RECENT CASES

Billy Joel obtains damages award of about $2 million in action against former manager; court orders further proceedings on fraud and punitive damages claims

A New York trial court has awarded Billy Joel damages of about $2 million in the performer's $90 million lawsuit (according to news reports) against his former business manager, and former brother-in-law, Francis X. Weber.

Joel sought payment on several promissory notes (plus interest) against various companies controlled by Weber; the notes were in the amounts of $650,000, $110,000, and $125,000.

The remaining causes of action included allegations of breach of contract; fraud; breach of fiduciary duty; conversion; negligent management; unjust enrichment; waste of corporate assets; and a claim under the Racketeer Influenced and Corrupt Organization statute.

Judge Edward H. Lehner first discussed Joel's claims concerning various interest-free loans purportedly taken by Weber from Joel's funds, allegedly without the performer's knowledge or consent. Weber stated that in June 1981, he obtained for Joel $4 million in interest-free loans from CBS Records in lieu of an advance under a new recording contract. As Joel's manager, Weber was entitled to collect commissions on royalty income, but not on loans obtained. Weber asserted that Joel agreed to the interest-free loans instead of the commissions Weber would have earned from the recording contract transaction, and that Joel further agreed that Weber did not have to repay his obligations to Joel until such time as Joel repaid CBS Records.

The court found that the parol evidence rule operated to exclude evidence of all prior negotiations between the parties offered to contradict or modify the terms of the writing, in this case, the dates upon which the various notes were due. Even if Joel's purported agreement to delay collection were a subsequent oral modification of the time for payment of the notes, such modification was unenforceable in the absence of consideration.

However, although granting Joel partial summary judgment on the cause of action seeking payment on the last note in the 1981 series of notes, Judge Lehner found that there was a triable issue of fact as to when payment on the first four notes in the series was made and the amount of interest, if any, due on those notes. The court also found that Joel was entitled to partial summary judgment on a cause of action seeking payment on a

1986 note due in October 1989, but not on the other notes in the 1986 series, which by their terms were not yet due.

Judge Lehner then determined that Joel's causes of action based on the notes were not inconsistent with the tort causes of action alleging the unauthorized taking of Joel's funds. In order to avoid a possible double recovery which might occur if an award of judgment on the notes duplicated the amount of compensatory damages sought by Joel on several of the tort claims, the court granted Weber's motion for partial summary judgment on various tort claims only to the extent required to avoid such an outcome.

The court concluded by granting Weber's application to amend his answer to assert a statute of limitations defense, and by finding that the issue of whether Joel ratified any allegedly wrongful conduct by twice re-executing the management agreement also remained a factual question.

Recently, according to news reports, a Virginia trial court judge dismissed a motion brought by Weber requesting the court to consider his $33 million counterclaim against Joel.

And a decision (see ELR 11:8:18) in a separate proceeding in which Frank Management sued Elizabeth Weber, Billy Joel's former wife and former manager, has been published. The published opinion focused on issues involving the applicable statute of limitations. Portions of the opinion were omitted for purposes of publication; apparently, one such portion included the court's decision to permit Weber to amend her $7 million counterclaim in order to state a claim for piercing the corporate veil of Frank Management, Inc.

Joel v. Weber, New York Law Journal, p. 22, col. 4 (N.Y.Cnty., Mar. 23, 1990); Frank Management, Inc. v. Weber, 549 N.Y.S.2d 317 (N.Y.Cnty. 1989) [ELR 11:12:3]

Federal Communications Commission's decision to reinstate syndicated exclusivity rules is upheld

The Federal Court of Appeals in the District of Columbia has refused to reconsider a 1988 Federal Communications Commission decision to restore the syndicated television program exclusivity rules (ELR 10:2:17). The rules bar cable television companies from duplicating programs presented by local broadcasters holding exclusive contract rights.

As described by Federal Court of Appeals Chief Judge Wald, a syndicated television program is "a program marketed from its supplier to local television stations by means other than a television network." In reviewing the "highlights" from the history of syndicated exclusivity regulation, Judge Wald noted that the Communications Act does not forbid cable retransmission of broadcast signals, but that the Commission, beginning in 1965, promulgated exclusivity rules to protect local broadcasters from the importation into their markets of distant signals that duplicated signals to which the broadcasters had purchased exclusive rights.

In the Copyright Revision Act of 1976, Congress provided a compulsory license scheme whereby cable companies paid a set fee for the carriage of distant signals. In 1981, the Commission deleted the syndicated exclusivity rules as artificial restrictions on competition and diversity in television programming. However, upon reinstating the syndicated exclusivity rules in 1988, the Commission found that broadcast stations were harmed in the absence of the rules, particularly given the growth in cable's audience and advertising revenues.

Judge Wald carefully examined the Commission's conclusion that the syndicated exclusivity rules would promote diversity in syndicated programming, and found that the conclusion was supported by substantial evidence. The Commission, stated the court, "did not act without reason in concluding that exclusivity must be a valuable commodity, and conversely that lack of exclusivity diminishes the value of a program."

The "weakest link" in the Commission's argument, in the court's view, was that reinstating the syndicated exclusivity protection would affect the supply of syndicated programming. But the Commission's conclusion was "sufficiently in accord with accepted economic theory that it can stand without empirical support." In all, the imposition of syndicated exclusivity rules was adequately supported by the record.

The court then found that the Commission provided a reasoned analysis of the decision to reimpose syndicated exclusivity, citing, in particular, "the unforeseen emergence of cable television as a full competitor to broadcast television." Judge Wald emphasized that the Commission possessed broad power over cable television pursuant to section 303(r) of the Communications Act; the syndicated exclusivity rules fell within the Act's general authority, and, again, were reasonably adopted in furtherance of a valid communications policy goal.

The cable parties argued that the syndicated exclusivity rules constituted an impermissible attempt by the Commission to impose copyright liability on cable television stations in violation of section Ill of the Copyright Act. But Judge Wald found that in 1976, Congress believed that the syndicated exclusivity rules were "a permissible accoutrement of a regime of compulsory licensing." The text and history of the Copyright Act, stated the court, showed that Congress intended that the Commission's communications policy decisions concerning the carriage of signals by cable television would affect the copyright liability of cable television companies. The compulsory licensing scheme was a means to carry out Congress' decision to impose copyright liability on cable companies, but was not intended to be a comprehensive solution to the communications policy problems presented by cable television, stated Judge Wald.

The cable parties' argument that the Cable Communications Policy Act of 1984 barred the syndicated exclusivity rules also was rejected, as was a First Amendment claim that the rules restrained the expression of protected speech which was paid for and authorized under the compulsory licensing scheme of section Ill of the Copyright Act. However, under section 111, cable companies may not obtain a compulsory license to transmit a program if that transmission would violate the syndicated exclusivity rules. Judge Wald recalled that Congress chose to withhold a compulsory license from those transmissions that the Commission decides to prohibit for reasons of communications policy. With respect to the argument that the rules would apply even to television signals that are not copyrighted, the court stated that the rules "simply do not apply to noncopyrighted programs."

United Video, Inc. v. Federal Communications Commission, 890 F.2d 1173 (D.C.Cir. 1989) [ELR 11:12:4]

Licensee of James Dean Trust may proceed in Federal District Court in Indiana with trademark infringement action against Academy of Motion Picture Arts and Sciences

The James Dean Trust, a trust established by the heirs of the late actor, hired the Curtis Management Group to act as its exclusive licensing agent with respect to authorizing the use of Dean's name and likeness in commercial ventures.

The Academy of Motion Picture Arts and Sciences, among its other activities, has engaged in the sale of fourteen different posters, including a poster containing an enlargement of a still photograph of Dean taken during the filming of "Giant." From 1985 to 1988, according to Curtis Management, the Academy received about $5,000 from the sale of more than 800 Dean posters to a graphics distributor based in New York.

In response to Curtis Management's trademark infringement action, the Academy questioned the jurisdiction of the court. Federal District Court Judge McKinney noted that there was no evidence indicating a "continuous and systematic presence" by the Academy in Indiana. The court then found that Curtis Management did not establish that the Academy had the minimum contacts with the state sufficient for personal jurisdiction; it did not appear that the Academy knew of the distribution system and could have foreseen the eventual sale of the posters in Indiana.

Assuming that jurisdiction were to exist, stated the court, there was no evidence to establish that the claim against the Academy arose in the Southern District of Indiana, and venue therefore was improper.

Judge McKinney then expressed concern with the Academy's representations to the court, which were "shown to be untrue or at least less than forthright on two instances," and found that the Academy was subject to sanction under Rule 11 for its filings in connection with the motion to dismiss. The "inescapable conclusion," based on the evidence, was that the Academy was fully aware of its "regular, continuous" sales to the distributor, and that certain of the Academy's affidavits, such as those acknowledging the sale of only 61 Dean posters during the three year period in issue, were "frivolous, or, alternatively, were filed for the improper purpose of concealing the full nature of its poster activities."

The court determined that, notwithstanding the lack of personal jurisdiction and venue, the appropriate sanction was striking the Academy's motion to dismiss, for "Had the Academy been forthright from the beginning, this motion to dismiss could have been easily disposed of last year. Instead, the motion required further briefing and evidence and has cost the Court [and Curtis Management] valuable time and money."

According to news reports, the Academy plans to seek reconsideration of the District Court's ruling. The Academy claimed that the New York distributor obtained the Dean posters from a company known as Photo &

Graphic Arts, and that the Academy did not receive any revenue from those sales.

Curtis Management Group, Inc. v. Academy of Motion Picture Arts and Sciences, 717 F.Supp. 1362 (S.D.Ind. 1989) [ELR 11:12:5]

Academy of Motion Picture Arts and Sciences loses copyright and trade dress infringement claims against company distributing statuette similar in appearance to "Oscar"

In 1976, Creative House, a Chicago manufacturer and distributor of advertising specialty items, developed a trophy sculpture for one of its clients. The sculpture, known as the Star Award, consisted of a streamlined, abstract rendering of a naked, muscular male, holding a star; the work was cast in solid metal, had a gold finish and stood on a circular gold cap mounted on a cylindrical base. Creative House decided to sell the award to additional corporate buyers under a program known as the Star Award incentive program.

In April 1983, the Academy of Motion Picture Arts and Sciences, claiming that the Star Award resembled the Academy's "Oscar" statuette, demanded that Creative House discontinue or significantly change the trophy. When the parties failed to reach an agreement, the Academy filed a lawsuit asserting claims for copyright infringement, false designation of origin under the Lanham Act, unfair competition, and trademark dilution.

Federal District Court Senior Judge Laughlin E. Waters first rejected the Academy's common law copyright claim. Judge Waters referred to Professor Nimmer's explanation of the rule that publication divests common law rights, and also found circumstances analogous to the instant proceeding in the case of Brown v. Tabb, 714 F.2d 1088 (11th Cir. 1983; ELR 6:1:12) which involved the use of customized jingles by automobile dealerships. Judge Waters noted that the Academy has allowed recipients to advertise the Oscar for their own commercial benefit; thus, as in Brown, the limited purpose test for maintaining a common law copyright was not met.

Furthermore, although the Oscar has not been sold, the Academy spends millions of dollars promoting the award in order to benefit the film industry. Stating that "the Academy, founded by film industry leaders, and the film industry share a unity of interest," Judge Waters determined that the Oscar entered the public domain prior to January 1, 1978.

Although stating that in view of the above determination, it was not necessary to consider whether the Academy had restricted the sale or distribution of the Oscar, Judge Waters observed that "no evidence was presented to suggest that the Academy should not have reasonably anticipated prior to 1941 that without express instructions a recipient would give or bequeath the Oscar to friends, family or others who might sell or in some other manner dispose of it."

With respect to the Academy's claim that Creative House violated section 1125(a) of the Lanham Act, the court, after finding that the design of the Oscar was nonfunctional, and that the Academy had acquired a secondary meaning in the Oscar, proceeded to review the factors relevant to establishing a likelihood of confusion. Judge Waters observed that the two statuettes were very similar in appearance, but that the distribution channels were entirely different; and that Creative House's advertisements indirectly referred to the Oscar, but that the company did not intend to confuse potential purchasers as to the source of the Star Award. The Academy apparently possessed a strong mark in the Oscar.

The court then found that the evidence indicated, on balance, that despite the similarity in appearance between the Star Award and the Oscar, there was not a likelihood of confusion among "an appreciable number" of purchasers of the Star Award, and that the Academy did not establish a claim for false designation of origin under section 1125(a) of the Lanham Act. The Academy's trade dress infringement claim under section 43(a) of the Lanham Act also was rejected, as were statutory and common laws causes of action for unfair competition.

The Academy's failure to prove that Creative House's use of the Star Award diluted the quality of the Oscar or "invaded" the good will the Academy developed in the Oscar resulted in the rejection of the Academy's claim under California's anti-dilution statute.

Judge Waters concluded by denying the parties' requests for attorneys' fees.

Academy of Motion Picture Arts and Sciences v. Creative House Promotions, Inc., 728 F.Supp. 1442 (C.D.Cal. 1989) [ELR 11:12:5]

Babe Ruth's heirs may not prevent publisher from using three photographs of the late ballplayer in a baseball calendar

After Babe Ruth's death, his daughters, Dorothy Ruth Pirone and Julia Ruth Stevens, registered the words "Babe Ruth" as a trademark for paper articles, such as playing cards, writing paper and envelopes. Pirone and Stevens also licensed the Babe Ruth League, Inc., an amateur baseball league, to use the trademark to promote the league and to sell products bearing the name

Babe Ruth, and authorized Curtis Management Group to license the mark to third parties.

In 1987, Macmillan Inc. published "The 1988 Macmillan Baseball Engagement Calendar." A photograph of Babe Ruth, but not the ballplayer's name, appeared on the cover of the calendar; two other photographs of Ruth, along with the photographs of many other baseball players, were included within the calendar. The Pirone parties did not claim an ownership interest in the photographs of Babe Ruth which were used by Macmillan.

Pirone (who, according to news reports, has since died) sued Macmillan, alleging federal and common law trademark infringement and unfair competition, infringement of the common law right of publicity, and the violation of the New York Civil Rights Law.

A Federal District Court granted Macmillan's motion for summary judgment on the trademark infringement and unfair competition claims, and also granted the publisher's motion to dismiss the remaining claims.

In upholding the District Court's decision, Federal Court of Appeals Chief Judge Irving R. Kaufman first declined to find that the photographs in issue were within the scope of Pirone's registered trademark. The court noted that "a photograph of a human being, unlike a portrait of a fanciful cartoon character, is not inherently distinctive in the trademark sense of tending to indicate origin." Under some circumstances, a photograph of a person may be a valid trademark, but Pirone sought to assert rights in every photograph of Ruth. Even if Pirone could establish a trademark in a particular photograph of Ruth, stated Judge Kaufman, such a trademark would not cover all of the photographs taken of the ballplayer during his career. Macmillan's use of Ruth's photograph did not indicate source or origin; thus, there was no trademark use.

Judge Kaufman next observed that personal names used as trademarks generally are treated as descriptive terms and are protected only if, through usage, they have acquired distinctiveness and secondary meaning - proof that the mark has become distinctive of a party's goods. However, when a proper noun is registered as a trademark, this does not "withdraw it from the language, nor reduce it to the exclusive possession of the registrant," and this rule, stated the court, would apply with "greater force" in the context of historical sports heroes.

Macmillan's use of Babe Ruth's name and image to identify a great baseball player, again, was not a trademark use and not an infringement under section 32(1) of the Lanham Act.

Pirone's claim under section 43(a) of the Lanham Act also was rejected. The photographs of Ruth did not indicate origin or represent sponsorship, noted Judge Kaufman. Furthermore, assuming that Pirone could demonstrate that the photographs indicated origin or represented sponsorship, there was no likelihood that consumers would be confused as to the source or sponsorship of the calendar. Given the many photographs featured in the calendar, "an ordinarily prudent purchaser would have no difficulty discerning that these photos are merely the subject matter of the calendar and do not in any way indicate sponsorship," commented the court.

Judge Kaufman concluded by denying Pirone's common law right of publicity claim. The court adverted to the decisions of New York courts which have indicated that the state's Civil Rights Law has preempted common law right of publicity claims, including claims brought by the heirs of a celebrity.

Pirone v. Macmillan Inc., New York Law Journal, p. 21, col. 3 (2d Cir., Jan. 29, 1990) [ELR 11:12:6]

Contract granting "broadcasting" rights in films included videocassette and videodisc viewing, rules New York trial court

In 1964, Tele-Pac, Inc. granted Video-Cinema Films, Inc. a license to distribute twenty-six black and white films "for broadcasting by television or any other similar device now known or hereafter to be made known. This shall include, but not limit said license to pay television, home television, theatrical television, etc. throughout the Territories."

In 1987, Tele-Pac entered an agreement with Raymond Rohauer whereby the company would " within the limits of the rights it actually owns, sell, assign, transfer and set over to Raymond Rohauer ... all its right, title and interest of every kind and character, including the copyrights and any renewals of copyrights" in various films, "but excepting therefrom the rights ... previously granted to Video-Cinema Films, Inc." under the 1964 contract.

Edmund C. Grainger, as administrator of the estate of Rohauer, claimed that pursuant to the 1987 agreement, the estate owned all the videocassette and videodisc rights in the films.

Video-Cinema and Tele-Pac sought a declaratory judgment determining that Tele-Pac was "the sole, exclusive, and rightful owner" of the copyrights and all renewals of such copyrights to various films, and that Grainger's registration of claims to the copyrights in the films for the renewal terms was void.

A New York trial court judge has found that the language of the 1964 agreement included transmitting the sound or images contained in a videocassette or videodisc via a VCR and a television set. The grant to Video-

Cinema must have included closed circuit cable transmissions of the films, stated Judge Saxe, and it did not matter whether that transmission travelled "many miles from a cable service company or only a few feet from a VCR to its reception on the viewer's television screen." Thus, the use of the word "broadcasting" in the 1964 agreement did not limit the broad grant of home television rights to over-the-air delivery of the audio and visual signals constituting the pictures to a television not in the recipient's home from a sending point geographically distant from the receiver.

Judge Saxe further noted that the 1964 agreement was executed by knowledgeable business people; that the public was aware of the future use of videotape recorders; and that the agreement did not contain any limiting language.

Grainger's reliance on Cohen v. Paramount Pictures, 845 F.2d 851 (ELR 9:12:3), was misplaced, declared

Judge Saxe because, "in direct contrast" to the 1964 contract, the Cohen case involved a license to use a musical composition in a film, where the language of the license explicitly specified the permitted uses and explicitly reserved all rights not granted.

Under the 1987 agreement, Rohauer obtained only those rights in the films actually owned by by Tele-Pac; since Tele-Pac had transferred its videocassette and videodisc rights to Video- Cinema in 1964, Tele-Pac could not transfer those rights to Rohauer in 1987, and the company's motion to dismiss Grainger's counterclaim was granted accordingly.

Tele-Pac, Inc. v. Grainger, New York Law Journal, p. 22, col. 1 (N.Y.Cnty., Mar. 23, 1990) [ELR 11:12:7]

Federal Court of Appeals finds that Warner Bros.' acquisition of one-half interest in theater chain will not unreasonably restrain competition in film distribution or exhibition

In late 1988, a Federal District Court in New York granted, with significant restrictions (ELR 11:3:10) Warner Bros.' request for an order modifying a 1951 antitrust consent judgment that barred Warner Bros. and other studios from owning or operating motion picture theaters.

A Federal Court of Appeals has found that Warner Bros.' ownership of a one-half interest in a motion picture exhibition company would not unreasonably restrain competition in the motion picture distribution or exhibition industries, and remanded the matter to the District Court for an order unconditionally granting Warner's motion.

Warner had agreed to buy a fifty percent interest in three theater chains from Paramount Pictures. The theaters were acquired by Cinamerica Theatres, a newly created limited partnership in which Warner and Gulf + Western, Paramount's parent, were coequal partners. Judge J. Edward Lombard noted that Cinamerica's screens constituted about two percent of the total number of screens in the country. In December 1987, the Department of Justice concluded that it would not oppose Warner's acquisition of Cinamerica.

Nevertheless, the late Judge Palmieri, in addition to imposing various restrictions on Warner's acquisition, ordered Warner and Cinamerica to submit their bidding and licensing practices for review by the court at the end of 1989.

Judge Lombard stated that there was "no question that Cinamerica, even with Warner behind it, will not be able to restrain competition among its competitors in the exhibition business," and that Warner's stake, through Cinamerica, in motion picture exhibition "is highly unlikely to result in foreclosure of the exhibition market." The court emphasized the continuing prohibition against licensing features to exhibitors in any manner other than on the merits, theater-by-theater, and reminded the parties that the consent judgment would not be affected in any other respect.

United States v. Loew's Inc., 882 F.2d 29 (2d Cir. 1989) [ELR 11:12:8]

Application of rule of reason analysis in motion picture exhibitor's antitrust action against distributors is upheld

When a Federal District Court jury in Tennessee rejected Balmoral Cinema's antitrust claims against several motion picture distributors, the court denied Balmoral's motion for a new trial. The court found that there was sufficient evidence on which the jury could base its conclusion that the distributors did not conspire with exhibitors to split product in Memphis, or enter into any agreement to deprive the Balmoral Theatre of access to first-run films (ELR 9:11:16).

On appeal, Balmoral challenged the trial court's instruction to the jury that the conduct of the distributors should be evaluated under the rule of reason rather than the per se standard.

A Federal Court of Appeals, finding that the District Court properly instructed the jury, has affirmed the judgment.

Balmoral had argued that the complained-of restraint of trade was a group boycott-refusal to deal and a market allocation. Judge Merritt, however, noted that the group conduct originated with the purchasers of the films - the exhibitors - and that sellers responded to the purchasers' conduct by consenting to sell films to " parties engaged in a "group buying program.

Balmoral claimed that the purpose of the alleged conspiracy was to establish and maintain artificially high prices, but it appeared to Judge Merritt that, based on the record, the claim may have been incorrect. The practice at issue, noted Judge Merritt, did not "facially appear always or almost always to restrict competition, decrease output and raise prices. Rather it may simply lower prices paid by exhibitors to distributors and hence indirectly to producers in a market where the distributors and the producers have historically wielded great market power over film products at the expense of exhibitors."

Judge Merritt declined to apply a per se standard to an alleged conspiracy which seemed to be of little or no benefit to those accused of conspiring, i.e., the distributors. In all, the conduct of the distributors in "tacitly consenting" to split agreements by purchasers of films was not per se anti-competitive or harmful to consumers, and due to this uncertainty about the economic effect of the split, the court rejected the use of a per se standard.

Balmoral Cinema, Inc. v. Allied Artists Pictures Corp., 885 F.2d 313 (6th Cir. 1989) [ELR 11:12:8]

European Community court finds that German owner of copyright in musical works by Cliff Richards may prevent unauthorized distribution in Germany of recordings imported from Denmark where copyright protection had expired

In a decision issued in January 1989, but only recently available to the Entertainment Law Reporter, the Court of Justice of the European Communities considered a dispute involving the re-exportation from Denmark to Germany of recordings by musician Cliff Richards.

Cliff Richards' musical works were in the public domain in Denmark, but still were protected by copyright in West Germany. Patricia Im-un Export, a German company, manufactured recordings by Richards in Germany on an order from a Danish company. The recordings were delivered to the Danish company, but then were re-exported to Germany, where they were marketed by the original manufacturer without the authorization of EMI Electrola, the copyright owner.

EMI Electrola claimed that its exclusive rights of distribution for recordings incorporating the works in question in German territory had been infringed, and brought an action seeking an injunction against Patricia and a company known as Lune-ton to restrain the companies from selling the imported recordings.

A German court would have granted EMI Electrola's application, but referred the matter to the Court of Justice.

Article 30 of the European Community Treaty prohibits measures having an equivalent effect to quantitative restrictions on imports between member states. However, pursuant to Article 36, Article 30 does not preclude prohibitions or restrictions on imports justified on grounds of the protection of industrial and commercial property. Such protection extends to literary and artistic property including copyright, if the property is exploited commercially. Therefore, measures extending protection to exclusive rights of reproduction and distribution of sound recordings would be upheld, if such rights are treated in the same way as copyright by the relevant national law.

According to the court, the object of Articles 30 and 36 "is to reconcile the requirements of the free movement of goods with upholding the lawful exercise of exclusive rights in literary and artistic property ... that reconciliation means that protection must be refused to any improper exercise of those rights which would be likely to maintain or create artificial partitioning in the Common Market."

The court's case law indicated that a copyright owner cannot rely on the exclusive exploitation right conferred by his copyright to prevent or restrict the importation of sound recordings which have been lawfully marketed in another member-State by the owner himself or with his consent.

However, in the instant case, the marketing of Richards' works in Denmark was not authorized by EMI Electrola or by the company's licensee.

To the extent that the disparity between national laws with respect to the duration of copyright protection might create restrictions on sound recordings in the Community, stated the court, such restrictions would be justified by Article 36 if the restrictions "arise from the difference in arrangements relating to the duration of protection and if the protection period is inseparably linked with the existence of the exclusive rights themselves."

The court's response to the German court therefore was that Articles 30 and 36 of the Treaty do not preclude "the application of legislation of a member-State which allows a producer of sound recordings in the member-

State to rely on the exclusive rights of reproduction and distribution of certain musical works of which he is the owner in order to prohibit the sale, in the territory of that member- State, of sound recordings of the same musical works when those recordings are imported from another member-State in which they had been lawfully marketed, without the consent of the aforesaid owner or his licensee, and in which the producer of those recordings had enjoyed protection which has in the meantime expired."

EMI Electrola GmbH v. Patricia Im-Und Export Verwaltungsgesellschaft mbH, Case 341/87 (Court of Justice of the European Communities, Jan. 24, 1989) [ELR 11:12:9]

Daughter of Hank Williams, Sr. may pursue claim for share of copyright renewal rights in late singer's works

When last reported upon (ELR 11:4:16), Cathy Yvonne Stone had obtained an Alabama Supreme Court ruling that she was entitled to share in the income earned since August 1985 from works composed by the late Hank Williams, Sr., but, in a separate proceeding, a Federal Court of Appeals in New York had affirmed a decision holding that Stone was barred by the doctrine of laches from claiming any interest in the copyright renewal rights to works composed by Williams, Sr.

In November 1989, the United States Supreme Court refused to review the Court of Appeals decision.

However, in December 1989, Federal Court of Appeals Judge Richard J. Cardamone granted Stone's petition for a rehearing, vacated the prior opinion and judgment of the court, and remanded the matter to the District Court for further proceedings.

Judge Cardamone, in reviewing the factual background of the case, cited the Alabama Supreme Court's determination that certain parties, possibly including Hank Williams, Jr. and various music publishers, may have "intentionally, willfully and fraudulently concealed [Stone's] identity, existence, claim and rights as a natural child of Hank Williams, Sr." The possibility of fraud, along with other errors of law, had presented sufficient grounds for the Alabama Supreme Court to set aside decrees issued in 1967 and 1968 that declared that Stone was not an heir to Williams' estate. The fraud, continued Judge Cardamone, would excuse Stone's delay in asserting her claim.

Although not bound by the decision of the Alabama Supreme Courts, which decision involved different parties and different law, Judge Cardamone stated that the finding of fraud required the Federal Court of Appeals to reappraise its decision. The equities were on Stone's side, stated the court, and allowing the Williams Jr. parties to bar Stone from claiming her rights when "the laches defense was obtained by them in such an unworthy manner" would grant the Williams Jr. parties a windfall to which they were not entitled and also might encourage a party to deliberately mislead a court.

In all, the evidence of fraud presented to the Alabama Supreme Court made inappropriate the affirmance of the decision dismissing Stone's claims on the ground of laches.

Stone v. Williams, 891 F.2d 401 (2d Cir. 1989) [ELR 11:12:10]

Marilyn Monroe's will granted her psychiatrist a testamentary power to bequeath property to England's Freud Centre

Marilyn Monroe's will provided, in part, that upon the termination of a certain trust, the trust's principal and accumulated income were to be paid to her psychiatrist, Dr. Marianne Kris "to be used by her for the furtherance of the work of such psychiatric institution or group as she shall elect." Monroe also stated that a portion of her residuary estate should pass to Dr. Kris.

During the eighteen year period after Monroe's death in 1962, until Kris' own death in 1980, Kris apparently did not receive any distributions from Monroe's estate. However, in her own will, Kris bequeathed all property which she was entitled to receive under Monroe's will, i.e., one-fourth of the royalties and other proceeds of the estate, to the Hampstead Child-Therapy Clinic in

London, the precursor of the Anna Freud Centre for the Psychoanalytic Study and Treatment of Children.

Anna Strasberg, the widow of Monroe's acting coach, Lee Strasberg, was appointed in July 1989 to administer Monroe's estate after the death of Aaron Frosch, the original executor. Strasberg argued that Monroe's will was ambiguous because the will did not give Kris an explicit power to appoint property, and further claimed that the bequests to Kris were limited in duration to the doctor's lifetime. Lee Strasberg's estate was entitled to seventy-five percent of the proceeds of Monroe's estate, but Anna Strasberg stated that any estate assets awarded to the Strasberg estate as a result of the instant proceeding would be donated to charities.

Manhattan Surrogate Marie M. Lambert has ruled that Monroe effectively granted Kris the power to appoint portions of her estate to a psychiatric institution or group. The will did not provide that Kris had to supervise or monitor the activities of any entity elected to receive funds from the estate, and there were no "substantial hints or indications" to justify creating such limitations by implication. Kris had a testamentary power of appointment, stated Surrogate Lambert, which, at the time of her death Kris validly exercised.

According to a news report, Monroe's estate grosses more than $1 million a year.

Estate of Marilyn Monroe, New York Law Journal, p. 25, col. 2 (Manhattan Surrogate's Court, Mar. 12, 1990) [ELR 11:12:10]

New York's "Son of Sam" law does not apply to $35,000 fee paid to Jean Harris for magazine article focusing on prison life

In April 1986, the Hearst Corporation paid $35,000 to Jean Harris for the exclusive North American serial rights to Harris' book "Stranger in Two Worlds." In 1981, Harris was convicted of second degree murder in connection with the death of Dr. Herman Tarnower. Good Housekeeping Magazine, a Hearst publication, planned to use about 5,000 words from the book; the excerpts primarily described Harris' life in prison.

In July 1989, the Crime Victims Board of the State of New York found that the contract was subject to New York Executive Law section 632- a, the "Son of Sam law," and ordered the proceeds of the contract paid to and held in escrow by the Board for five years. The Board previously had determined that section 632-a extended to Harris' contract with Macmillan,Inc., the publisher of "Stranger in Two Worlds."

In reversing the Board's ruling in the instant proceeding, New York trial court Judge Leonard N. Cohen agreed with Harris that the magazine article did not refer to the crime or to Harris' " thoughts, feelings, opinions and emotions" about the crime. Although Harris, in one paragraph of the article, expressed remorse for Dr. Tarnower's death, the "core" of the excerpt, stated Judge Cohen, focused on Harris' experiences in prison and her day-today relationships with and observations about her fellow prisoners. In all, the few sentences which referred to Harris' thoughts and feelings about the crime were merely incidental and de minimis; the Board's ruling was arbitrary and capricious and an abuse of discretion; and Harris' contract for the article was not subject to section 632-a.

The court did not find it necessary to address the First and Fourteenth Amendments issues raised by Harris.

Harris v. Abate, New York Law Journal, p. 25, col. 3 (N.Y. Cnty., April 2, 1990) [ELR 11:12:11]

Libel action against musician Daryl Hall is dismissed

A Federal District Court in Florida has dismissed a libel action against musician Daryl Hall on the ground that Hall was not subject to the court's personal jurisdiction, and because the action was barred by the applicable statute of limitations.

John Madera claimed that the alleged statement by Hall, which was published in a late 1986 issue of the magazine Music Connection, damaged Madera's reputation in the entertainment industry for professionalism and personal integrity.

Madera (a California resident) had sued Hall (a New York resident) in a Federal District Court in New York; the action was dismissed as time-barred under the state's one year statute of limitations.

Federal District Court Chief Judge James Lawrence King, in reviewing the relationships of the parties to the states of New York, California, and Florida, noted that the only connection to Florida alleged by Madera was the circulation in the state of eighteen issues of Music Connection. Hall owned some property in Florida, sold recordings in the state and appeared in Florida during several concerts. However, the latter two contacts were, according to the court, "entirely incidental and impersonal" and "sporadic and infrequent," and did not create a significant relationship between Hall and Florida. And although Hall was a resident of New York, the relationship between the alleged occurrence and New York was insignificant; apparently, the purportedly libelous statement was made in a private conversation which took place in New York.

Judge King concluded that the cause of action arose in California where Madera resided and where Music

Connection was published and had its greatest circulation. Under Florida's borrowing statute, the California one year statute of limitations applied to the action. Thus, the action, which was filed eighteen months after publication, was dismissed as time-barred.

Judge King proceeded to consider Madera's claim that the circulation of the allegedly libelous statement in Music Connection amounted to the commission of a tort within Florida, thereby subjecting Hall to the court's jurisdiction under the state's long-arm statute. The allegations of the complaint would allow the court to assert jurisdiction over Hall under the tortious conduct section of the long-arm statute, stated Judge King, but the assertion of that jurisdiction was not constitutionally permissible under the due process clause. Given the circumstances of the case, the court declined to find that the challenged statement was " purposefully directed at the residents of Florida," or that the alleged injury arose out of or was related to Hall's activities as a musician or as an owner of real property in the state.

Madera v. Hall, 717 F.Supp. 812 (S.D.Fla. 1989) [ELR 11:12:11]

Shana Alexander and Doubleday again prevail in libel action involving nonfiction work

The New York Court of Appeals has affirmed an appellate court decision (ELR 10:12:19) granting summary judgment to Shana Alexander and Doubleday & Company, Inc., the author and publisher of the 1985 book "Nutcracker: Money, Madness, Murder: A Family Album," in a libel action brought by Dr. Herman Weiner.

Judge Judith Kaye, after noting that Dr. Weiner was not a public figure and that Alexander's book was a nonfiction work, stated that the "pivotal issue" was whether the Doubleday parties' investigation of the allegedly defamatory statements was sufficient or whether they acted "in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties."

"Nutcracker" recounted the 1978 slaying of multimillionaire Franklin Bradshaw. Bradshaw's daughter and grandson, Frances and Marc Schreuder, were convicted of Bradshaw's murder.

Alexander, in two paragraphs of the book, referred to Dr. Weiner, a psychiatrist (described as a psychologist in prior court opinions) who had treated Frances Schreuder as a patient. The references reported unflattering descriptions by Ms. Schreuder's estranged relatives of Dr. Weiner's physical appearance, and their suspicions about the nature of Ms. Schreuder's relationships with her "shrinks."

On appeal, Dr. Weiner limited his defamation claim to the remarks which purportedly falsely accused him of having sexual relations with his patient.

Judge Kaye, in dismissing the complaint, based the dismissal solely on the ground that Dr. Weiner did not show that the Doubleday parties acted without due consideration for responsible standards of information gathering and dissemination. The court rejected Dr. Weiner's argument that simple negligence standard should be applied; found that Schreuder's relationship with Dr. Weiner was not so remote from the primary focus of the book as to constitute "a clear abuse of editorial discretion;" and determined that Dr. Weiner did not present sufficient evidence to raise a triable issue of fact as to whether the Doubleday parties satisfied the applicable duty of care. Doubleday relied not only on Alexander, whose "experience and reputation are unquestioned," but conducted its own review of the contents of the book, and, given the circumstances of the case, was not required to go further.

The court also observed that Alexander employed an experienced researcher, that the challenged paragraphs accurately summarized the statements made to Alexander and her researcher, and that "reasonable confirmation" of the statements was obtained, precluding a finding that there was a triable issue as to the Doubleday parties' gross irresponsibility.

Weiner v. Doubleday & Co., Inc., New York Law Journal, ps. 22, col. 3 (N.Y., Dec. 14, 1989) [ELR 11:12:12]

Author and publisher of biography of Sam Shepard obtain dismissal of libel and New York Civil Rights Law claims brought by friend of actor/playwright

A New York trial court has dismissed a lawsuit brought by Charles Mingus III against Don Shewey and Dell Publishing Company, the author and publisher of a biography entitled "Sam Shepard, The Life, The Loves Behind The Legend of a True American Original."

Mingus claimed that the book was libelous and used his name without authorization in violation of sections 50/51 of the New York Civil Rights Law. According to Mingus, Shewey's description of the friendship between Mingus and Shepard during the 1960s portrayed Mingus as a mentally deranged individual who habitually used illegal drugs; was incapable, under the influence of drugs, of distinguishing fantasy from reality; and was the individual who "introduced Shepard to the world of illicit drugs."

New York trial court Judge Lebedeff, after setting forth the allegedly offending passages of the biography, pointed out that Mingus, in his affidavit, did not directly deny experimentation with illegal drugs, and did not expressly deny the use of various illegal substances. The essence of the challenged writing, noted Judge Lebedeff, was that Mingus was an illegal drug user, and "the gist of the statement" was accurate so as not to raise an issue of fact.

The other statements challenged by Mingus primarily reflected Shewey's opinion, not fact, stated the court. Furthermore, even if the statements were not substantially true or were merely opinions, Shewey and Dell did not act in "a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." Shewey, a well-published author, conducted extensive interviews. And even Mingus's statements during his interview were corroborated by other research. It was noted that Dell was entitled to rely on Shewey's credentials and experience.

Judge Lebedeff concluded by finding that the biography was a matter of public concern and interest, and that Mingus therefore did not state a cause of action under sections 50 and 51 of the New York Civil Rights Law.

Mingus v. Dell Publishing Co., Inc., New York Law Journal, p. 24, col. 4 (N.Y.Cnty., Feb. 8, 1990) [ELR 11:12:12]

Florida court refuses to enjoin transfer of "Entertainment Tonight" from former NBC affiliate to another station

On January 1, 1989, WTVJ, the CBS affiliate in the South Florida television market, became an NBC affiliate. An independent station, WCIX, became a CBS affiliate, and the NBC affiliate, WSVN, became an independent station, thereby losing all of its network programming to WTVJ.

Sunbeam Television Corp., the owner of WSVN, sued NBC and Paramount Pictures, alleging that Sunbeam had reached an agreement with Paramount in 1988 for a two year renewal of the syndicated program "Entertainment Tonight," beginning in September 1989, but that Paramount then sold the program to WTVJ.

Federal District Court Judge Nesbitt first denied Paramount's motion to dismiss, rejecting the argument that the Florida statute of frauds would bar the enforcement of an oral two year contract. Judge Nesbitt pointed out that Sunbeam's complaint did not state whether the contract was oral or written. Thus, the question of the enforceability of an oral contract was beyond the scope of Paramount's motion to dismiss. Even if the statute of frauds issue had been presented properly (as an affirmative defense), other issues, such as whether California law was applicable to the case, remained to be decided.

In turning to Sunbeam's motion for a preliminary injunction which would bar WTVJ from broadcasting Entertainment Tonight and compel Paramount to leave the program on WSVN, Judge Nesbitt questioned whether Sunbeam would ultimately succeed on the merits of either its breach of contract claim against Paramount or its claim against NBC for interference with the business relationship between Paramount and Sunbeam.

The court next found that Sunbeam did not establish that it would suffer irreparable harm if an injunction were not issue d; noted that Sunbeam already obtained a replacement for Entertainment Tonight, and that the potential harm to NBC if the court were to issue an injunction outweighed the threatened injury to Sunbeam; and concluded, in denying the motion for a preliminary injunction, that the public interest was not implicated in the case.

Sunbeam Television Corp. v. National Broadcasting Co., Inc., 16 Med. L. Rptr. 2299 (S.D.Fla. 1989) [ELR 11:12:13]

License fees and talent release fees paid by producer of "Bloopers" show are not wages subject to unemployment tax

During the course of producing the television series "Bloopers," C & C Joint Venture assembled excerpts of motion pictures and television shows, obtained talent releases and paid license fees to the actors appearing in the excerpts, obtained permission and paid license fees to the owners of the material, and secured permission from the appropriate unions.

When an unidentified individual filed a claim for unemployment benefits, the California Employment Development Department assessed various unemployment taxes against C & C on the ground that an employer/employee relationship existed and that the compensation paid by the company to various actors constituted wages for unemployment purposes.

C & C argued that its payments to the actors appearing in the excerpts did not derive from the original employment contract, but rather amounted to a payment for the waiver of liability and for the right to show the excerpts. According to union agreements, stated C & C, such payments, although generally based upon union formulas, are not considered to be supplemental payments which original employer producers are required to pay for reruns of a particular film or program.

Administrative Law Judge Elbert Hensley noted that the agreements of the Screen Actors Guild and the American Federation of Television and Radio Artists recently began including clauses relating to the exhibition of bloopers or the use of excerpts. Section 36(g) of the Screen Actors Guild agreement provides that "the producer will not publicly exhibit nor license for public exhibition Blooper Reets without the appropriate consent of the recognizable performers involved, including individual voice- overs." Section 41 of the agreement discusses additional compensation for reruns - the section does not mention the use of bloopers or excerpts. Similar provisions appear in the AFTRA agreement. In particular, section 73(d) of the agreement states that excerpts are not deemed to be replays, and provides "for the separate negotiation for the use of excerpts ..."

In all, concluded Administrative Law Judge Hensley, "payments made for the use of excerpts and clips, in this matter called license fees and talent release fees, are not compensation for employment services and do not constitute wages which would be subject to unemployment taxes." The assessment was canceled accordingly.

C & C Joint Venture v. Employment Development Department, Case No. C-T-07808-0001 (California Unemployment Insurance Appeals Board, Aug. 23, 1989) [ELR 11:12:13]

ESPN obtains damages of about $612,000 in action against MDS system alleging unauthorized interception of programming

A Federal District Court in Wisconsin, in a proceeding brought by ESPN against Skyview, Inc., a multipoint distribution service, initially granted ESPN's motion for summary judgment seeking to dismiss Skyview's counterclaim alleging that ESPN violated Wisconsin's Fair Dealership Law.

The court found that ESPN and Skyview were not involved in the type of business relationship that the statute was designed to protect. The parties had a continuing financial interest in each others' business, but Skyview did not depend on ESPN for its continued existence and had not incurred a significant financial obligation because of its relationship with ESPN, stated Judge John C. Shabaz.

Judge Shabaz noted that the longest possible time period in which the parties had a relationship was about 13 months, although a long term contractual relationship was anticipated. Furthermore, assuming that a contract existed, the only term of any such contract seemed to be that ESPN would provide its signal to Skyview for a specific amount of money per subscriber. Skyview admitted that its rural market was not affected by whether ESPN was included in the company's programming package, and the company was free to contract with other programming services, had its own logo that did not include the ESPN trademarks, and did not hire additional personnel to handle the ESPN programming. In all, stated the court, while ESPN played "an important role" in the Skyview programming package, the relationship "did not exhibit conduct sufficient to constitute the community of interest necessary for [statutory] protection."

In a subsequent opinion granting damages to Skyview in the amount of about $612,000 plus costs, Judge Shabaz found that Skyview never had permission or authorization to receive or transmit ESPN programming at any time. The president of Skyview apparently used an HBO-authorized consumer descrambler in order to distribute and exhibit ESPN programming to Skyview subscribers.

Skyview violated the Federal Communications Act of 1934 for each of the 355 days the company commercially received ESPN programming without permission, and also violated the Copyright Act "on not less than 1,260 occasions."

The court ruled that ESPN was entitled to $612,000 in statutory damages for Skyview's violation of the Communications Act and the Copyright Act, and issued a permanent injunction barring Skyview, among other activities, from intercepting or using ESPN's transmissions, programs, or satellite television services without authorization. Skyview's counterclaims for breach of contract, violation of the Wisconsin Fair Dealership Act (as discussed above), and the Sherman Antitrust Act were dismissed.

ESPN, Inc. v. Skyview, Inc., Case No. 89-C-198- S (W.D.Wisc., Oct. 13, 1989; Oct. 31, 1989) [ELR 11:12:14]

Damage award of $4.3 million to greeting card designer in copyright and trade dress infringement action is upheld

The United States Supreme Court has let stand a Federal Court of Appeals decision upholding a judgment entered on a jury verdict of $4.3 million in favor of Georgia Lee Miller Roulo in a copyright and trade dress infringement action against Russ Berrie & Co., Inc.

In July 1977, Roulo introduced a greeting card line known as "Feeling Sensitive" cards. In October 1977, Roulo entered a two year contract with Berrie pursuant to which Berrie agreed to manufacture, distribute and sell the Feeling Sensitive cards and to pay ten percent of the receipts to Roulo; Roulo retained the ownership of her copyright and trade dress.

In late 1979, Roulo indicated that she did not plan to renew the contract with Berrie. When Berrie began developing a greeting card line to be known as "Touching You," Roulo sued the company alleging trade dress and copyright infringement. A Federal District Court jury awarded Roulo $4.3 million in damages based on Berrie's profits from the Touching You cards.

In affirming the judgment entered on the jury verdict, Federal Court of Appeals Judge Cummings first described the appearance and marketing of the competing cards. Judge Cummings then noted that there was adequate evidence to allow the jury to conclude that Roulo's cards were distinctive - although the cards "incorporated common, indistinct elements such as lines and handwriting," Roulo's combination of these elements was found sufficiently unique to warrant trade-dress protection. The similarity of the cards, both with respect to their design and display, was "striking," and the few dissimilarities cited by Berrie were "easily overlooked," declared the court, particularly since greeting cards usually are impulse purchases.

There also was sufficient evidence from which the jury could have found that Berrie intended to imitate Roulo's cards. The near identity in the appearance of the cards was strong evidence of copying, and there was testimony that Berrie expected its new card line to fit into the Feeling Sensitive display.

The court next found that the jury's special verdict that Roulo did not abandon her trade dress was not against the weight of the evidence. A prima facie case of abandonment was established by Roulo's failure to use the Feeling Sensitive trade dress for more than two years. However, Roulo testified that she intended to resume the use of the trade dress within the reasonably foreseeable future, stating that she would have marketed the Feeling Sensitive cards if Berrie had not developed the Touching You cards.

In turning to the issue of copyright infringement, Judge Cummings again referred to the similar appearance of the two card lines, and the evidence that Berrie patterned its cards after Roulo's cards. The jury may have considered certain elements of similarity unprotected by copyright laws, such as the size of the cards, the color of the paper, ink, and border designs, the general concept of stripes, the ellipses and the single-side format. But it was Roulo's unique combination of common elements which formed the copyrighted material; the jury was properly instructed as to which elements were subject to copyright protection, and there was "ample evidence" for the jury to find substantial similarity.

Judge Cummings next found that the District Court did not err in instructing the jury to render a single verdict on damages, or, given the evidence of intentional imitation and substantial similarity, in instructing the jury that an award of profits would be appropriate. Berrie claimed that the infringing elements of the Touching You cards contributed to, at most, about $65,000 in profits. The jury's verdict of $4.3 million, rather than the entire $5 million proposed by Roulo suggested to the court that the jury either apportioned the award or accepted some of Berrie's deductions. However, since Berrie appropriated the "total concept and feel" of Roulo's cards, the jury's decision not to accept the apportionment proposed by the company was not against the weight of the evidence.The court concluded by rejecting Berrie's claim of laches, and by affirming the denial of Roulo's claim for attorneys fees. The District Court's refusal to award fees due to Berrie's lack of willfulness and in view of the magnitude of the award of profits was not an abuse of discretion, stated Judge Cummings.

Roulo v. Russ Berrie & Co., Inc., 886 F.2d 931 (7th Cir. 1989) [ELR 11:12:14]

Investor prevails in claim for losses incurred under tax shelter program involving purchase of videotapes of television episodes

Allegations of fraud and unlawful securities transactions under the Arizona Racketeering Act were raised by Dale C. Davis in an action against Metro

Productions, Inc, and against Ralph Smith and Michael L. Miller, the sole stockholders of Metro.

In 1977 and 1978, Metro produced nearly 1,000 thirty-minute television episodes in several series; the series covered topics such as sewing, cooking, diet and health, religious singing and game shows and were intended for distribution to cable companies. Each half-hour show was sold as a tax shelter through a wholly owned subsidiary of Metro, or by outside commissioned salesmen, to investors throughout the United States. Metro edited each master videotape of the shows purchased by investors; the master videotape was placed in storage in the investor's name, and each investor paid an annual rental fee through the distributor chosen by the investor to manage his/her show or shows.

The shows were sold pursuant to a contract entitled "Production Service Agreement" for a purchase price of $90,000, with a $7,000 down payment, and a promissory note for $83,000. The agreement, in addition to other financial terms, provided that other than the minimum annual payment, the only other mandatory payments of principal and the accrued, but unpaid, interest, were to be made out of the revenues derived from marketing the individual television episodes by the investor.

Davis purchased one episode of the "Sam Diego Show." He entered into the Production Services Agreement and used a company known as Investor's Management Services as his management agent.

The Internal Revenue Service subsequently determined that the investment was an abusive tax shelter and disallowed the purported tax benefits.

In an action brought in an Arizona trial court, Davis alleged that the sale of the tax shelter constituted an investment contract and therefore a security. Since the alleged security was not registered and was sold by unlicensed salesmen, Davis claimed that the Metro parties had committed a securities violation, a predicate act under the Arizona Racketeering Act, as well as securities fraud, another predicate act.

The Metro parties removed the action to a Federal District Court on the basis of diversity of citizenship. The court denied Metro's motion to dismiss based on a lack of in personam jurisdiction, and eventually granted Davis' motion for summary judgment.

Smith and Miller argued that the court's exercise of jurisdiction over them as individuals violated due process, Federal Court of Appeals Chief Judge Goodwin noted that Davis' claim of monetary loss arising from Davis' investment in Metro's business met the requirements for jurisdiction over Smith and Miller under Arizona's long-arm statute.

Smith and Miller did not have "continuous and systematic" contacts with Arizona, noted the court, but Metro, an entity they controlled, had sold videotapes to Davis, and the company periodically contacted Davis, and other Arizona residents, to collect payments due on the videotape agreements. Furthermore, Davis' claim was directly based on his loss of money as a result of entering the agreement.

Judge Goodwin then found that Arizona's long- arm statute allowed the assertion of personal jurisdiction over officers of a corporation upon a finding that the officers had sufficient minimum contacts with Arizona. Smith and Miller "purposefully directed their activities toward Arizona when Metro solicited business from Arizona residents," and could have reasonably foreseen that they might have to appear in Arizona's courts if the investments by clients in Arizona resulted in litigation. Smith and Miller also had "fair warning," stated the court, that they could be held personally liable for securities violations. In all, the assertion of jurisdiction by the District Court met constitutional standards.

The court concluded by upholding the District Court's determination that the videotape agreements were investment contracts and that Metro, Smith, and Miller were liable for the sale of unregistered securities by unlicensed salesmen.

Davis v. Metro Productions, Inc., 885 F.2d 515 (9th Cir. 1989) [ELR 11:12:15]

Television commercial director's repudiation of contract ended production company's payment obligations

In August 1987, director Brian Mindel signed an exclusive one year contract with Image Point Productions, Inc., a company wholly owned by Cannell Productions. Image Point agreed to pay Mindel a minimum income guarantee of $200,000 a year, payable in 12 equal monthly installments, plus benefits and job-related expenses. Mindel also was to receive director's fees of $6,500 per shooting day, $3,250 per pre-light day, and a credit of twenty-five percent of the "budgeted mark-up," or production fee, of any commercial project on which he rendered director's services, which amounts would be credited to Mindel and then paid out when the credited amount exceeded the $200,000 guarantee.

Mindel directed six commercials for Image Point before the parties terminated their relationship in February 1988.

Mindel subsequently sued Image Point for breach of contract, but a Federal District Court in New York has rejected Mindel's claims. The court noted that the director received his monthly payments from the company promptly, and that when Mindel repudiated the contract, Image Point's duty to perform under the contract, including its obligation to make a payment in February 1988, was discharged. The fact that Mindel revoked his repudiation of the contract one day after his check otherwise would have been due did not put Image Point in default. In reliance on Mindel's confirmation that he would honor the contract terms, Image Point had agreed to reinstate the contract. Mindel, however, refused further performance under the contract, and refused to return the February payment. Once Image Point made the payment, stated the court, Mindel was required either to perform or to tender the payment back to Image Point.

The court concluded that Mindel owed damages to Image Point of about $16,600 for the payment he received on February 11, 1988, with interest from that date to the date when judgment was entered. Mindel's claim for incentive pay was rejected because his credits did not exceed $200,000.

Mindel v. Image Point Productions, Inc., 725 F.Supp. 189 (S.D.N.Y. 1989) [ELR 11:12:16]

Complaint involving production services for "Queenie" miniseries is reinstated by New York appellate court

Disclaimer: The following is not a bar exam question.

In 1986, Judith DePaul, an American citizen residing in London, and her corporation, Silver Chalice Production International Ltd., a Bermuda corporation, entered into a contract with Highgate Pictures, Inc., a New York corporation, whereby DePaul agreed to provide production services for a proposed five hour miniseries entitled

""Queenie." DePaul agreed to work in England and France in connection with financing the project, and in India or Sri Lanka, the proposed shooting locations. The contract was to be governed by California law. The negotiations leading to the contract took place in New York and in California where New World Television was located; New World had acquired Highgate.

Highgate claimed that it paid DePaul $118,500 in fees and advanced DePaul about $500,000 in trust, for use in the project. The money apparently was seized by an English bank in connection with unrelated debts incurred by DePaul (or one of her corporations) after DePaul failed to segregate the trust funds.

Eventually, DePaul moved back to New York and Highgate brought a lawsuit alleging breach of contract and breach of fiduciary duty, and seeking an accounting and the imposition of a constructive trust.

A New York trial court granted DePaul's motion to dismiss on the ground of forum non conveniens, finding that although the two parties were New York residents, the action had little connection with New York.

A New York appellate court has found that the trial court, "at the very least," abused its discretion in not conditioning the grant of the motion on a stipulation by DePaul to waive any statute of limitations defense and to submit to the personal jurisdiction of the California courts, or those of Great Britain.

Judge Asch noted that the contract was entered into in the name of a New York corporation, and that DePaul failed to show that any other forum was more convenient to the parties or witnesses. Stating that New York was the most equitable and convenient forum, given the circumstances presented to the court, Judge Asch ordered Highgate's complaint reinstated.

Highgate Pictures, Inc. v. DePaul, New York Law Journal, p. 21, col. 4 (N.Y.App., Jan. 1990) [ELR 11:12:17]

Federal District Court's ruling on diversity jurisdiction in dispute between Pete Rose and then-Commissioner of Baseball A. Bartlett Giamatti is published

The July 1989 decision by a Federal District Court in Ohio upholding the exercise of federal jurisdiction in Pete Rose's action against the since-deceased Commissioner of Baseball A. Bartlett Giamatti recently was published.

Rose originally sued Giamatti and other parties in a Cincinnati trial court. The action was removed to a Federal District Court for the Southern District of Ohio based upon diversity of citizenship, and subsequently was transferred to the Eastern Division of the Court.

Federal District Court Judge Holschuh first set forth the procedural history of the dispute. Briefly, in February 1989, Giamatti began an investigation regarding allegations that Pete Rose wagered on major league baseball games. A hearing concerning the allegations was scheduled for June 26, 1989. Rose sought a temporary restraining order and preliminary injunction against the pending disciplinary proceeding, claiming that he would be denied the right to a fair hearing by an unbiased decisionmaker.

The trial court issued a temporary restraining order barring the Giamatti parties from any involvement in deciding whether Rose should be disciplined or suspended from participation in baseball, and from terminating Rose's employment as Field Manager of the Cincinnati Reds, or interfering with his employment. The court set

July 6th as the hearing date for Rose's motion for a preliminary injunction.

After an Ohio appellate court held that the temporary restraining order was not an appealable order, the Giamatti parties filed a notice of removal. Rose then sought to remand the matter to the trial court, arguing that there was a lack of complete diversity.

As described by Judge Holschuh, Rose was an Ohio resident, Giamatti was a New York resident, Major League Baseball, an unincorporated association, consisting of the two principal professional baseball leagues and their twenty-six professional baseball clubs, was headquartered in New York, and the Cincinnati Reds baseball team was an Ohio limited partnership. Assuming the allegations of citizenship as true, the court found that although Rose and Giamatti differed in characterizing the status of the party identified as "Major League Baseball," the joinder of Major League baseball and the joinder of the Cincinnati Reds did not destroy the necessary diversity of citizenship.

First, with respect to the Cincinnati Reds, Rose claimed that the Commissioner's rules of procedure concerning fair disciplinary hearings were incorporated as a part of his employment contract with the team, and that any action by Giamatti in violation of the rules of procedure would constitute "anticipatory breach of his contract. The court pointed out, however, that the Major League Agreement, which "unquestionably" was incorporated as a part of Rose's contract with the Reds, granted "extraordinary" power to the Commissioner. The Commissioner, noted Judge Holschuh, has unlimited authority to investigate any act, transaction or practice that is even suspected to be "not in the best interests" of baseball, and has the authority to set his own procedural rules concerning the investigation of such matters. There was nothing in the Major League

Agreement, the Major League Rules, or in Rose's contract with the Reds which gave the Reds any right to prevent the Commissioner from holding a disciplinary hearing or to interfere with proceedings within the jurisdiction of the Commissioner.

Furthermore, Rose had alleged that there was no wrongdoing on the part of the Reds, and the team specifically stated that it would comply with the terms of its contract with Rose. Since there was no controversy between Rose and the Reds, the team, declared Judge Holschuh, for the purpose of determining diversity of citizenship, was fraudulently joined as a defendant and was, at best, a nominal party in the action. The citizenship of the team thus would be disregarded in determining whether there was complete diversity of citizenship among the parties.

Turning to Major League Baseball, the court first commented on the unique nature of the organization, set forth the background of the Major League Agreement, and pointed out that Rose did not challenge the Commissioner's authority under the Major League Agreement to establish procedural guidelines for investigating suspected violations of the Major League Rules, but rather, questioned Commissioner Giamatti's conduct of the investigation and disciplinary proceedings in Rose's case. Judge Holschuh found that Rose's controversy was not with Major League Baseball, but with the office of the Commissioner of Baseball for the Commissioner's alleged failure to follow his own procedural rules in conducting the investigation of Rose.

The court rejected Rose's argument that Commissioner Giamatti was acting as the agent for Major League Baseball, for, with regard to disciplinary matters, the major league clubs made the Commissioner totally independent of their control. The member clubs of Major League Baseball had no legal interest in the controversy, and at most would be considered to be nominal parties, stated Judge Holschuh, for purposes of determining diversity of citizenship.

Diversity of citizenship was present between Rose and Commissioner Giamatti, concluded Judge Holschuh, in denying Rose's petition to remand.

In August 1989, Rose filed a motion for an order preserving the status quo pending an appeal of the jurisdictional issue. Judge Holschuh stated that it was not unreasonable to request that Giamatti delay any disciplinary hearing until a Court of Appeals decision on the issue. Stating that an injunction pending appeal was necessary to protect "the orderly continuation of proceedings," the court ordered the Commissioner not to proceed with a disciplinary hearing until permitted to do so by an order of the District Court or by the Court of Appeals.

Rose v. Giamatti, 721 F.Supp. 906; 721 F.Supp. 924 (S.D.Ohio 1989) [ELR 11:12:17]

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Purchaser of Miro etchings may proceed with breach of contract, conversion, and unjust enrichment claims against art dealer, but court dismisses fraud and RICO claims

In 1984, Shirley Hutton purchased twelve Miro etchings from art gallery owner Mirek Klabal; the total cost for the works was $78,000. Klabal did not deliver the etchings, nor, as he purportedly promised, did he resell the art works for a profit.

A Federal District Court in New York has dismissed Hutton's fraud claim, finding that the complaint failed to set forth facts or events to support the claim that Klabal misrepresented his opinions or intent in the transaction.

A RICO claim also was rejected, given Hutton's failure to adequately plead fraud.

With respect to Hutton's conversion claim, the court, although observing that Hutton never had possession or control of the undelivered etchings and did not clearly establish that she ever actually acquired ownership of the works, nonetheless, may have presented a claim for conversion. Certain statements allegedly made by Klabal implied that he retained possession and control of etchings belonging to Hutton. However, the amended complaint did not allege conversion of the etchings (the claim was set forth in Hutton's reply brief); the court granted Klabal's motion to dismiss the conversion claim, but granted leave to replead.

Judge Vincent L. Broderick concluded by finding that Hutton stated a sufficient claim for unjust enrichment; by dismissing a cause of action for constructive trust; and by rejecting Hutton's claims for an injunction, and for punitive damages on the breach of contract and unjust enrichment claims; if Hutton pleads a " viable" conversion claim, the court stated that it would review the availability of punitive damages.

Hutton v. Klabal, 726 F.Supp. 67 (S.D.N.Y. 1989) [ELR 11:12:18]

Golfer who scored hole-in-one is awarded car offered as prize in signs posted at tee, although dealer intended to offer prize only at previously-held charity tournament

Golfer Amos Cobaugh was entitled to win a new Chevrolet Beretta for shooting a hole-in-one on the ninth tee of the Fairview Golf Course, a Pennsylvania court has ruled. Signs at the ninth tee stated "Hole-in-one wins this 1988 Chevrolet Beretta GT Courtesy of Klick-Lewis Buick Chevy Pontiac..." The dealer refused to deliver the car, claiming that the prize was offered at a charity golf tournament which was held two days before the tournament in which Cobaugh played, and that Klick-Lewis merely had neglected to remove the car and signs. The trial court granted Cobaugh's motion for summary judgment.

In affirming the trial court's decision, Judge Wieand noted that under Pennsylvania law, "an offer to award a prize in a contest will result in an enforceable contract if the offer is properly accepted by the rendition of the requested performance prior to revocation." The dealer had agreed to award a car to a golfer who shot a hole-in-one; this was adequate consideration to support the contract, stated the court.

Judge Wieand also pointed out that it was not shown that Cobaugh was aware that the car was intended as a prize only for an earlier tournament. Thus, there was no mutual mistake - the mistake was unilateral and was due to the negligence of the dealer. Klick-Lewis' manifested intent, as it appeared from the posted signs, was that a hole-in-one would win the car.

A dissenting judge would have found the contract unenforceable as violating Pennsylvania's policy against gambling. In Judge Popovich's view, the possibility of scoring a hole-in-one would be "sufficiently remote to qualify as the necessary gambling requirement of an element of chance." The other elements of gambling - the payment of an entry fee to the golf tournament (consideration) and the prize (reward) also were present, stated Judge Popovich, who noted that although "it may be difficult to re-assert a public policy which everyday is violated by common experience, especially such as here, where there probably was no thought of gambling or 'breaking the law'...[the contract] was unenforceable no matter how much condoned or indulged."

Cobaugh v. Klick-Lewis, Inc., 561 A.2d 1248 (Pa.Supr.Ct. 1989) [ELR 11:12:19]

NEW LEGISLATION AND REGULATIONS

Texas adopts Talent Agency Act

The State of Texas has adopted a Talent Agency Act requiring talent agents to register with the state's Department of Licensing and Regulation. Each application for registration must be accompanied by a $100 licensing fee and a $10,000 surety bond (the bond must be maintained for two years after the agency stops doing business in Texas). The Act prohibits talent agencies from charging up-front fees as a condition to registering an applicant or representing an artist; prohibits talent agencies from requiring applicants or artists to use specific suppliers of services, such as acting or modeling workshops or video or audio tape production services, or to subscribe to specific publications or advertising material; and prohibits agencies from splitting or sharing fees with persons not registered under the Act.

The Act further provides that a talent agency, before a contract is signed, must deliver a fully completed copy of the written contract to an artist who purchases services from the agency. An artist may cancel the contract and obtain a full refund from the agency within four business days after the execution of the contract. Any contract that does not comply with the Act or that was entered into in reliance on a fraudulent or misleading representation is void and unenforceable as contrary to public policy.

Other provisions set forth disclosure requirements and state that the Department may prescribe record-keeping practices and procedures for the disbursement of funds received by agencies on behalf of clients.

The Act broadly defines "talent agency" as "...a person that engages in the business of obtaining or attempting to obtain employment for artists. The term includes an entity that counsels or directs an artist in the development of the artist's professional career."

The Department of Licensing and Regulation has adopted rules specifically exempting all agencies other than those working with actors and models. The Department gave additional exemptions to attorneys licensed to practice in Texas who represent artists; to unions or other associations that casually attempt to obtain employment for their members; to persons who book themselves; to persons who, without charging a fee, book talent on behalf of their own business; and to parties engaged in certain other activities.

Talent Agency Act, Tex.Civ.Stat.Ann. art. 522la-9 (Vernon 1989) [ELR 11:12:20]

IN THE NEWS

Federal Communications Commission will consider changes in financial interest and syndication rules

The Federal Communications Commission will consider changing the rules which prohibit television networks from having a financial interest in the programs they broadcast or from being able to sell the programs in the syndication market. In order to encourage the major studios and other program suppliers to reach an agreement with the television networks concerning new rules, the Commission barred interested parties from filing comments in the proceeding until June 13, 1990. [May 1990] [ELR 11:12:21]

French court awards $333,000 in damages to Margaret Mitchell's heirs in plagiarism action

A court in Paris has found that author Regine Deforges plagiarized Margaret Mitchell's "Gone With the Wind" in writing the novel "The Blue Bicycle." The court ordered Deforges and her publisher, Editions Ramsay, to pay Mitchell's heirs damages of $333,000.

According to news reports, the publisher and Ms. Deforges plan to appeal the decision. [May 1990] [ELR 11:12:21]

Painting over mural does not warrant damages under California Art Preservation Act

In 1988, Shell Oil Corp. and the owners of a Boyle Heights gasoline station painted over a mural entitled "Filling Up on Ancient Energies." In 1980, Shell Oil had paid $3500 to a muralist group known as Streetscapers to prepare the 100 foot long work on a wall adjoining the service station.

Streetscapers brought an action under the California Art Preservation Act, seeking about $200,000 in damages.

Los Angeles Superior Court Judge Harvey A. Schneiderman, in an oral decision, ruled that the Act did not apply to the demolition or painting over of murals. Judge Schneiderman observed that the statute did not specifically identify murals as artworks entitled to protection, and suggested that the artists appeal the ruling in order to resolve the issue. [May 1990] [ELR 11:12:21]

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[ELR 11:12:23]