RECENT CASES

In "Coming to America" case, trial court rules that Paramount Pictures' "net profits" agreement with Art Buchwald and producer Alain Bernheim is a "contract of adhesion" and that several of its provisions are "unconscionable"

In January 1990, a Los Angeles trial court ruled that Paramount Pictures' film "Coming to America" was based upon a screen treatment written by Art Buchwald (ELR 11:9:9).

In the second phase of the proceeding, Judge Harvey A. Schneider has ruled on damages-related issues raised by Paramount's 23-page standard net profit participation agreement, and the "turnaround" provisions of the Deal

Memo entered into between Alma Productions, Inc. (Alain Bernheim's loan-out company) and Paramount.

In 1983, Paramount agreed that if the studio acquired Buchwald's story idea, Bernheim, a friend of the author, would be entitled to produce the film based on the story and to receive certain payments from the studio.

Judge Schneider first found that except for the compensation provisions of Bernheim's Deal Memo, the agreement's other provisions were not negotiated by the parties but were presented to Bernheim on a "take it or leave it" basis. The evidence indicated to the court that Paramount negotiated its net profit formula only with a small number of individuals with "clout," and that "even these negotiations result[ed] in changes that [were] cosmetic, rather than substantive."

The court also concluded that the entire contract was drafted by Paramount; that the turnaround and net profit participation provisions were standard form provisions;

and that the evidence would support the conclusion that "essentially the same negotiations are conducted at all studios and that when one studio revises a provision of its net profit formula, that revision is adopted by the other studios."

On the basis of the above factors, Judge Schneider found that the Bernheim-Paramount contract was a contract of adhesion.

With respect to the issue of unconscionability, the court noted that although Paramount had argued that the studio's net profit definition was justified by the nature of the film industry, the company, in November 1990, abandoned this argument. Paramount's contention that the court was not authorized to strike down certain provisions of the net profit formula while enforcing the remainder of the contract with Bernheim was rejected.

Judge Schneider then determined that several provisions of the net profit formula were unconscionable. The

15% overhead on Eddie Murphy Productions' operations allowance was ruled unconscionable because an additional 15% charge was made for overhead "on top of" this item, in effect charging overhead on overhead, in the court's view.

The 10% advertising overhead, which according to the judge bore no relation to actual costs, "add[ed] significantly to the amount that must be recouped by Paramount before the picture [would] realize net profits," and the court found no justification for the charge.

A flat charge of 15% for overhead yielded "huge profits," declared the court, even though in the judge's view the overhead charges did not "even remotely correspond to the actual costs incurred by Paramount."

Charging interest on the negative cost balance without credit for distribution fees also was found "one sided," because Paramount's practice of accounting for income on a cash basis, while accounting for costs on an accrual

basis, slowed down the recoupment of negative costs and inflated the amount of interest charged. Also found one sided and overly harsh was the provision charging interest on overhead. Judge Schneider noted that Paramount, although receiving revenue from distribution fees and overhead charges, did not take that revenue into account in determining whether costs were recouped. The "interest" thus was "an additional source of unjustified profit."

Charging interest on profit participation payments also was unconscionable, stated the court. The studio charges the payments made to gross participants to negative costs. However, the payments are not paid until a film has some receipts; the studio thus did not "in any real sense" advance the money upon which interest was charged, the judge concluded.

Finally, charging an interest rate not in proportion to the actual costs of funds, an interest rate which the court

concluded might be as much as 20% to 30%, even when no funds were provided by the studio, was found to be one-sided and unconscionable.

Judge Schneider declined to award Bernheim the compensation provided for in the deal memo, after all of the unconscionable provisions were stricken, and after permitting Paramount to recoup its actual costs plus a reasonable rate of return on its investment. The result of this approach would be an "inequitable windfall to Bernheim," the court ruled. Stating that it did not have sufficient facts to set the amount due Bernheim, the court deferred to the third phase of the trial the amount of damages and the manner in which the damages should be calculated.

The court also deferred ruling on the amount to which Buchwald would be entitled until after the amount due Bernheim was determined. Under the contracts as written, noted Judge Schneider, Buchwald was to receive

only a fraction of the net profits to which Bernheim would have been entitled.

Judge Schneider next found that Paramount was required to employ Bernheim as the producer of "Coming To America," and that the studio breached its contract by failing to do so. Contrary to Paramount's argument, the court ruled that the turnaround provision was never intended to apply in the situation presented in this case.

The court concluded by rejecting Bernheim's claim that he and Paramount were co-venturers and that Paramount owed him a fiduciary duty. Instead, the court ruled that the only fiduciary obligation to Bernheim on the part of the studio was to render an accounting. Moreover, by virtue of the court's application of the doctrine of unconscionability, Judge Schneider found it unnecessary to determine whether there has been a breach of the implied covenant of good faith and fair dealing, as Buchwald and Bernheim had argued.

Buchwald v. Paramount Pictures Corporation, Case No.C706083 (L.A.Cnty., Dec. 21, 1990) (published in the December 26, 1990 issue of the Los Angeles Daily Journal in its Daily Appellate Report, 90 Daily Journal D.A.R. 14482) [ELR 12:8:3]

Publisher of "Baby Talk" Magazine may not prevent producers from using "Baby Talk" as a title for ABC television program

A Federal District Court in New York refused to grant Parenting Unlimited's motion for a preliminary injunction seeking to bar Columbia Pictures Television, Capital Cities/ABC Inc. and The Weinberger Company from using the title "Baby Talk" as the title of a television program.

Parenting Unlimited, the distributor of the magazine Baby Talk and the holder of a trademark in the title, claimed that ABC's then upcoming presentation of the television program would, among other claims, violate sections 32(1) and 43(a) of the Lanham Act.

Judge Mary Johnson Lowe, after finding that Parenting Unlimited did not establish that the ABC parties' use of the title would cause an irreparable loss of magazine advertising revenues, proceeded to review the factors relevant to a claim of trademark infringement. The court stated that although the term Baby Talk did not describe a magazine, "it most certainly conveys an immediate idea of the contents of that magazine..." and therefore might be deemed a "descriptive" term. However, even if Baby Talk were considered to be a suggestive term, it might be entitled only to limited trademark protection given that Parenting Unlimited presented little proof of secondary meaning.

The court emphasized that Baby Talk's readership, in comparison to the readership of most other magazines, was relatively small, and consisted of "a very specific and limited segment of the population - expectant couples and parents of infant children..." It also was noted that the magazine was distributed in an "unconventional manner," i.e., via diaper services, medical offices, and baby goods stores, rather than being displayed at newsstands or bookstores where the general public might have come to associate the term Baby Talk with the publication.

The strength of the mark also was diluted by extensive third party usage, stated Judge Lowe.

With respect to the similarity between the marks, the court observed that there were several visual differences in the logo design and typeface used by the parties; the differences served to weaken Parenting Unlimited's claim of absolute similarity. And there were

"monumental" differences in the content, style and target market of the parties' products.

The parties were engaged in completely different fields, continued the court, and Parenting Unlimited did not indicate that it planned to produce a program directly competitive with ABC's fictional work.

Judge Lowe then commented that the most relevant consumer group in a trademark case involving a magazine and a television program would be the advertisers, and that in the instant case, those advertisers were "extremely sophisticated" and capable of distinguishing between the magazine and the television program. The court found that the ABC parties were not aware of Publishing Unlimited's trademark when initially selecting the name of the television program, and concluded that the publisher did not prove a sufficient likelihood of confusion to warrant injunctive relief under the Lanham Act.

Furthermore, the term Baby Talk was not sufficiently distinctive to warrant injunctive relief under New York's anti-dilution statute.

Parenting Unlimited Inc. v. Columbia Pictures Television Inc., 743 F.Supp. 221 (S.D.N.Y. 1990) [ELR 12:8:4]

Arbitrator's decision awarding compensation to actor discharged from television series is upheld, and court grants attorneys fees to Screen Actors Guild

A. Shane Company produced a pilot for a television series entitled "High Mountain Rangers." Although actor Todd Allen appeared in the pilot and entered into a Series Option Agreement with the production company, Shane decided not to employ Allen in the series.

The Screen Actors Guild filed a claim on behalf of Allen. An arbitrator found that the actor's option was exercised when Allen participated in two wardrobe fittings. The allegedly objectionable behavior cited by Shane in discharging Allen was not within the meaning of default under the employment agreement, ruled the arbitrator, in ordering the production company to pay Allen his salary for one contract year in the amount of $48,000 and to contribute about $5,000 in pension and health benefits.

A trial court confirmed the arbitrator's award and a California appellate court has affirmed the court's decision.

Judge Goertzen found that the arbitrator's interpretation of the various contract terms was plausible; agreed that it was not necessary for Shane to exercise the employment option in writing; and upheld the arbitrator's finding that although Allen's conduct was "objectionable in

the extreme," it was not within the definition of "default."

The court awarded attorneys fees to the guild on the basis that Shane did not raise "substantial issues involving complex or significant questions of law," but rather "merely has questioned, albeit vehemently ... the arbitrator's decision and award..."

Screen Actors Guild v. A. Shane Co., Case No. B0044563 (Ca.Ct.App., Aug. 20, 1990) [ELR 12:8:4]

Decision cancelling trademarks and service marks of Five Platters, Inc. in the group name is upheld, as is award of over $3.5 million in damages to former group member Paul Robi

After a series of proceedings (see ELR 9:10:8), a Federal District Court in California ruled that Paul Robi, a former member of the musical group "The Platters," was entitled to use the name of the group; the court also cancelled the registered "Platters" trademarks and service marks held by Five Platters, Inc., and ordered the company to pay Robi about $1.5 million in compensatory damages and $2 million in punitive damages.

In affirming the District Court's decision, Federal Court of Appeals Judge Pregerson found that Robi had established a claim of intentional interference with contractual relations. It was noted that "ample evidence" supported the finding that Five Platters, Inc. damaged Robi's business and professional reputation, and that the court had made a reasonable approximation of the amount of Robi's damages.

With respect to the trademark cancellation, Judge Pregerson pointed out that the District Court had found that

Five Platters, Inc. filed a false incontestability affidavit, submitted a false and misleading trademark application exemplar, and had attempted to mislead the public. Again, there was ample support for the cancellation of the company's "Platters" trademarks on the basis of fraud.

Paul Robi died prior to the Federal Court of Appeals decision, and his wife Martha was substituted as the assignee of his rights in the name and goodwill of The Platters.

Robi v. Five Platters, Inc., Case No. 89-55433 (9th Cir., Nov. 14, 1990) [ELR 12:8:5]

Showtime/The Movie Channel's blanket license fee of $0.15 per subscriber for 1984-1988 for use of ASCAP repertory is upheld

In October 1989, Federal District Court Magistrate Michael H. Dolinger ruled that Showtime/The Movie Channel was obligated to pay ASCAP a fee of fifteen cents per subscriber for a blanket license covering the term April 4, 1984 through December 31, 1988; ASCAP had requested a fee of twenty-five cents per subscriber (ELR 11:11:16).

A Federal Court of Appeals has affirmed the opinion. Judge Jon O. Newman stated that the evidence supported the finding that the market for licensing music rights was less competitive than it would be if direct or source licensing were regularly used or if music rights "were scattered among numerous performing rights societies with users free to secure only those licenses needed to distribute particular films." The magistrate also was entitled to find that ASCAP's dominant position in the music licensing field gave the organization

considerable market power; that the perception of such market power was relevant in reducing the weight of ASCAP's licenses to Home Box Office and Disney as comparable sales; and that the price of twenty-five cents per subscriber was not reasonable.

The finding that Showtime/The Movie Channel's license from BMI was a comparable license was upheld as was the magistrate's adjustment of the BMI price in accordance with a 55-45 ration ASCAP had negotiated with BMI for the allocation of cable retransmission royalties awarded by the Copyright Tribunal.

The court included the magistrate's decision as an appendix to its opinion.

American Society of Composers, Authors and Publishers v. Showtime/The Movie Channel, Inc., 912 F.2d 563 (2d Cir. 1990) [ELR 12:8:5]

Singer Barbara Cook loses New York Civil Rights Law claim against record producer in connection with compact disc of concert

Phonograph records and cassettes of singer Barbara Cook's performance at a September 1980 Carnegie Hall concert were released by a record company in return for an advance to producer Arthur Cantor against royalty payments of $1 per unit. Cook had delivered tapes to Cantor for the purpose of releasing commercial recordings, but the parties did not have a written agreement. In 1986, Cantor arranged to issue the concert recording in compact disc form, in return for an additional advance against an increased royalty payment of $1.10 per unit.

A New York trial court dismissed Cook's claims against Cantor for breach of oral contract, and dismissed that part of Cook's claim under New York Civil Rights Law sections 50/51 alleging the use of the singer's name

and picture in connection with the initial release of the records and cassettes.

After a trial on the quantum meruit cause of action, a jury awarded Cook compensatory damages of about $6,600; the trial court dismissed the balance of Cook's Civil Rights Law cause of action pertaining to the use of the singer's name and picture in connection with the issuance of the compact disc.

In upholding the trial court's ruling, the appellate court noted that Cantor was licensed, "under an informal arrangement," to pursue the issuance of commercial recordings of Cook's live concert, and that there was no basis to conclude that the license did not include recordings in the compact disc format or was restricted to the ten songs contained in the initial release of Cook's concert material.

Cook v. Cantor, New York Law Journal, p. 25, col. 3 (N.Y.App., Nov. 23, 1990) [ELR 12:8:6]

Federal District Court in Wisconsin dismisses securities fraud claims brought by purchasers of limited partnership interests in film production venture involving New World Entertainment

In an action brought by the holders of limited partnership interests in Balcor Film Investors, a Federal District Court in Wisconsin first dismissed the investors' claim that the Balcor parties violated section 17(a) of the Securities Act of 1933, noting that there is no private right of action under section 17(a). The court also found that the investors failed to state a claim under section 12(2) of the Act; the section renders a person liable for selling a security by using a materially misleading prospectus or

other form of communication. However, it was not alleged that the time limitations of section 12(2) claims were fulfilled, stated the court.

Senior District Judge Reynolds refused to dismiss the investors' cause of action alleging fraud. Judge Reynolds found that the investors set forth, with sufficient particularity, the misstatements allegedly made by the Balcor parties.

The court then stayed the claims of certain investors against Shearson Lehman Hutton pending arbitration, finding, in part, that the scope of the arbitration clauses in the agreements between those investors and Shearson, the underwriter of the public offering of the Balcor partnership interests, extended to the investors' claims.

The court granted the Balcor parties' motion to strike the investors' request for punitive damages for claims arising under the federal securities laws, but denied the motion with respect to the pendent state law tort claims.

In a related proceeding involving a different group of investors, Judge Reynolds granted the Balcor parties' motion to dismiss the investors' claim under section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission. The court found that the investors did not allege, with particularity, that they relied on any specific misrepresentations or omissions when they purchased their five partnership interests. "To presume reliance on omissions which allegedly occurred in statements and documents which [the investors] do not claim to have listened to, read, or relied on is illogical and would eliminate the reliance requirement," stated the court.

Federal courts have used the "fraud-on-the-market theory" to permit an investor's reliance on the integrity of the market to substitute for the investor's reliance on a party's misstatements or omissions. In this case, neither the investors' reliance on the integrity of the market in

which the Balcor partnership interests were sold, nor their reliance on the regulatory process satisfied the reliance requirement of a Rule 10b-5 claim, concluded the court.

Majeski v. Balcor Entertainment Company, Ltd., 740 F.Supp. 563; Eckstein v. Balcor Film Investors, 740 F.Supp. 572 (E.D.Wis. 1990) [ELR 12:8:6]

Photograph of noted art collectors was protected under Copyright Act as part of copyrighted work, but court finds issues of material fact as to similarity between photo and allegedly infringing opera backdrop

The book "Pop Art," created by Kenneth Heyman and John Rublowsky, was published in 1965; the book

contained a photograph, taken by Heyman, of the art-collecting Scull family.

In 1982, artist David Salle designed a backdrop for an opera. Salle indicated that he used "the imagery conveyed by the Scull Photo" in preparing the backdrop. Photographs of the scenery appeared in a book about Salle and in the catalog for an exhibition of the artist's works.

When Heyman eventually sued Salle, a Federal District Court in New York first found that the Scull Photo, which Heyman had not copyrighted, nonetheless was protected under the Copyright Act because it was an original work contributed by Heyman to the copyrighted Pop Art book.

Judge Robert P. Patterson, Jr. then found that there were substantial differences between the Scull Photo and the photograph of the backdrop which raised genuine issues of material fact with respect to the question of

substantial similarity. The court noted that there was no exact copying; that the backdrop was "huge" in comparison to the Scull Photo; and that the backdrop was not presented alone, but appeared as the background "in the overall context of an opera scene (and only for approximately five minutes)." It also was observed that the backdrop consisted of a different medium, which created "somewhat of a different image and appearance," and that Salle colored the backdrop predominantly orange, compared to the black and white Scull Photo.

The court denied the parties' motions for summary judgment with respect to Heyman's copyright infringement claim, but granted Salle's motion for summary judgment on Heyman's trademark infringement claim under section 43(a) of the Lanham Act. There was no evidence that Heyman had obtained a trademark of any

kind in connection with the Scull Photo, declared Judge Patterson.

Heyman v. Salle, 743 F.Supp. 190 (S.D.N.Y. 1990) [ELR 12:8:6]

Composers may proceed with copyright infringement claim against McDonald's Corporation

The song "Life is a Rock (But the Radio Rolled Me)," written in the early 1970s by Paul DiFranco and Norman Dolph, was recorded by a group called Reunion and released by RCA in 1974.

In 1989, several commercials for McDonald's Corporation featured the "Menu Song;" the patter section of the song included lyrics which recited the company's food and beverage items. DiFranco and Dolph sued

McDonald's for copyright infringement, claiming that the Menu Song was similar to Life is a Rock.

McDonald's argued that the pitch and rhythm of the patter section of Life is a Rock was so simple as to be unprotectible, and that the harmony and underlying melody of the Menu song was the same as another song, known as "Good Time/Great Taste" which was written for McDonald's.

Federal District Court Judge Robert P. Patterson, Jr. found that an issue of fact was present as to whether the harmony underlying the Menu song was substantially similar to the harmony underlying Life is a Rock. Even if the only similarity of copyrightable expression between the songs occurred with respect to the patter section, it was not clear that the section was so lacking in creativity that it was non-copyrightable.

The court then stated that even assuming that the McDonald's parties were correct that there was no

substantial similarity between the harmonic progressions in the Menu song and in Life is a Rock, the court did not agree with the conclusion that there was no issue of fact as to the presence of other similarities between the songs. The songwriters' use of various noncopyrightable elements was itself copyrightable if such elements were arranged in a unique and recognizable way. Thus there remained an issue for the jury as to the similarity between the songs.

Judge Patterson also pointed out that the fact that Life is a Rock might be considered as a part of a musical genre did not preclude copyright protection so long as the songwriters did not copy previously existing songs. The McDonald's parties did not show that the similarities between the songs followed unavoidably from the use of the patter song concept. A jury could find the nine measure composition of the verse section of Life is a Rock sufficiently creative to warrant copyright

protection - repetitiveness "does not make a work unoriginal," stated the court, nor would the use of a minimal number of notes in a work containing other substantial musical elements prevent a composition from being copyrightable. In all, the various disputed issues of material fact resulted in the denial of McDonald's motion for summary judgment.

Levine v. McDonald's Corporation, 735 F.Supp. 92 (S.D.N.Y. 1990) [ELR 12:8:7]

Ruling limiting number of stories in Chicago publisher's compilation of John Cheever works is upheld, but publisher, not Cheever's widow, has right to control distribution

As described at ELR 10:8:6, Academy Chicago Publishers entered a contract with John Cheever's widow, Mary Cheever, to publish a work tentatively titled "The Uncollected Stories of John Cheever." Academy Chicago prepared galleys of a manuscript containing about 68 stories, most of which were written prior to World War II. Mary Cheever had anticipated a more modest work, and notified Academy Chicago that the author's estate planned to claim that the publishing contract was obtained through fraudulent representations and that the company was incapable of performing its obligations.

Academy Chicago brought an action for declaratory relief, and after a preliminary ruling by a Federal District Court in New York, the Chicago trial court ruled that the contract was valid and enforceable. The court also declared that Cheever was entitled to select the stories of the late author to be included in the manuscript; that Cheever would comply with her obligations of good

faith and fair dealing if she delivered a manuscript of at least 10 to 15 stories totalling at least 140 pages; and that Academy would control the design and format of the work but must exercise that control in cooperation with Cheever.

The publisher claimed that the trial court should have limited its decisions to confirming the validity of the contract and requiring Cheever to deliver a manuscript.

Federal Court of Appeals Judge Freeman first pointed out that in the absence of a contractual provision, the trial court properly determined the number of stories, between none and 68, which Cheever was required to submit for publication. Academy Chicago had presented evidence with respect to the company's claim that it was entitled to publish 68 stories, and thus litigated, "albeit implicitly," the minimum number of stories which Cheever could submit were the trial court to disagree with the publisher's claim. Judge Freeman then found

that the trial court did not err in declining to apply certain minimum performance obligations raised by Academy. The testimony did not require a finding that the use of the number of words in a manuscript was a sine qua non in defining its length.

Academy further argued that if Cheever selected stories in the public domain, this would destroy or injure the publisher's right to receive the benefits of the contract. Judge Freeman stated the the "mere possibility" that the publisher's contract rights might be injured by the selection of nine stories in the public domain, out of the l5 to be included in the manuscript, was insufficient to establish that the trial court abused its discretion in failing to consider the number of public domain stories which Cheever could include in the manuscript.

It also was observed that the trial court did not err in considering the fact that the contract did not define the size of the work; that an Academy executive was not

aware, at the time of executing the contract, of the number of previously uncollected stories which might be found; that Academy was a relatively small publishing house; and that except for the Pulitzer Prize winning collection of Cheever stories published by Knopf in 1978, all other collections of Cheever stories contained about 10 to 15 stories and ran about 140 to 260 pages.

The trial court had declared that Academy was required to consult with Cheever on all matters regarding the publication of the manuscript. However, the parties' contract provided that Academy had exclusive control of the advertising, promotion and sale of the work and the number of books to be printed and sold. Cheever did not have the right to condition the delivery of the manuscript on the publisher's acquiescence to Cheever's approval of such advertising and promotion, and the trial court erred as a matter of law in considering extrinsic evidence to reach a determination which altered and contradicted the

clear and unambiguous language of the contract. The ruling with respect to this issue was reversed accordingly.

Academy Chicago Publishers v. Cheever, 558 N.E.2d 349 (Ill. App. 1990) [ELR 12:8:7]

Temporary restraining order barring "Inside Edition" from airing report on physician is reversed as unconstitutional prior restraint even though use of surreptitious videotape may violate federal law

When the television program "Inside Edition" investigated the medical practice of Dr. Stuart M. Berger, a nationally known diet expert, the show sent one of its producers to Dr. Berger's office. The producer, pretending to be a patient, surreptitiously videotaped Dr.

Berger; the tape purportedly revealed the doctor engaging in medical malpractice and unethical behavior.

Dr. Berger brought an action against the program and its owner, King World Productions, alleging the violation of 18 U.S.C. section 2511 which prohibits tortious or criminal interception and disclosure of wire communications or oral communications; Dr. Berger also alleged invasion of privacy, fraud and trespass.

A Federal District Court in Michigan issued a temporary restraining order enjoining the Inside Edition parties from broadcasting the videotape taken in Dr. Berger's office.

A Federal Court of Appeals found that the temporary restraining order constituted a prior restraint of the use of the videotape, and that "no matter how inappropriate the acquisition, or its correctness, the right to disseminate that information is what the Constitution intended to protect." Dr. Berger did not show the type of

irreparable harm or injury that would justify a prior restraint of Inside Edition's First Amendment freedoms to broadcast the videotape, stated Judge Boyce F. Martin, Jr., in granting the program's request for a writ of mandamus and directing the District Court to vacate the temporary restraining order. However, stated Judge Martin, granting the writ was not intended "to constitute an approval of the surreptitious means used to gather this information about Dr. Berger," and would not affect Dr. Berger's ability to seek redress under New York tort law and section 2511.

In a subsequent ruling, the District Court observed that although Dr.Berger's diet product was manufactured in Michigan, all parties in the case resided in New York and the claim arose there. Thus, venue was proper only in New York and the matter was transferred accordingly.

In re King World Productions, Inc., 898 F.2d 56 (6th Cir. 1990); Berger v. King World Productions, Inc., 732 F.Supp. 766 (E.D. Mich. 1990) [ELR 12:8:8]

Capital Cities/ABC, Inc. obtains hearing on application for access to sealed documents concerning witness at criminal trial

In October 1989, Capital Cities/ABC, Inc. applied to a Federal District Court in Pennsylvania for access to thirteen sealed docket entries in the consolidated criminal trials of two officials of a Pennsylvania education agency who were charged with several counts of criminal conduct, including conspiracy, extortion, and bribery. The jury returned a verdict acquitting Kenneth R. Reeher of all charges and convicting Harry P. Casoni on eight of twelve counts.

The District Court unsealed ten of the thirteen documents. Capital Cities continued to seek access to the three documents which contained transcripts and notes of two chambers and sidebar conferences. Apparently, the court, in the sealed conferences, ruled that Reeher and Casoni would not be allowed to impeach a prosecution witness by cross-examining him about the fact that he was targeted by a grand jury investigating drug use among high-ranking Pennsylvania government officials; the investigation was not related to the Reeher-Casoni matter.

A Federal Court of Appeals has ruled that the District Court did not comply with its obligation to hold an open hearing concerning whether to grant access to the sealed documents. The court also found that Capital Cities improperly tried to present certain extra-record press reports that the District Court should first consider. Judge Hutchinson therefore remanded the matter in order to

allow the District Court to hold the required hearing and to give Capital Cities an opportunity to present relevant evidence on the question of the witness's remaining privacy interests in the subject matter of the sealed documents.

In re Capital Cities/ABC, Inc.'s Application for Access to Sealed Transcripts, 913 F.2d 89 (3rd Cir. 1990) [ELR 12:8:9]

California and New York courts consider media access to preliminary hearing and to photographs of assault victim

Several media representatives obtained court permission to conduct film and electronic media coverage of the preliminary hearing of Elizabeth Ann Broderick in

connection with the killing of Broderick's former husband and his wife. However, the court qualified the order by prohibiting the witnesses' statements from being broadcast without further court authorization.

A California appellate court granted a petition brought by three television stations seeking extraordinary relief, and directed the trial court to vacate that part of its order imposing the broadcast limitation.

Judge Wiener noted that although the public and press have both a statutory and constitutional right to attend preliminary hearings, such right has not yet been extended to include the right of the press to electronically record and broadcast the hearing. Nevertheless, the trial court exceeded the scope of Rule 980 of the California Rules of Court by imposing a blanket condition preventing the dissemination of any recording without court approval - the rule "does not authorize a judge to become the editor of a television station's news broadcasts of a

previously recorded judicial proceeding," stated Judge Wiener.

In a separate proceeding, a New York trial court granted a request by three television stations and the New York Post for permission to inspect certain still pictures that were introduced into evidence at a criminal trial, but refused to allow the media to reproduce the photographs of John Loughlin. Loughlin was the victim of an assault in Central Park on April 19, 1989.

Judge Thomas B. Galligan noted that the graphic photographs in issue did not depict those charged with the assault, did not portray the actions of public officials, and in all, that "concern for the dignity of a crime victim, and indeed, principles of common decency" outweighed the interests advanced by the media parties.

KFMB-TV Channel 8 v. Municipal Court, 271 Cal.Rptr. 109 (Cal.App. 1990); People v. McCray, 559 N.Y.S.2d 619 (N.Y.Cnty. 1990) [ELR 12:8:9]

United States Supreme Court lets stand temporary order barring CNN from broadcasting taped prison conversations of Manuel Noriega; District Court subsequently lifts broadcast ban

In late November 1990, Federal District Court Judge William Hoeveler agreed to allow Cable News Network to broadcast tapes of government-recorded telephone conversations between Manuel Noriega and Noriega's lawyers. The court, according to news reports, reviewed seven tapes turned over by CNN and determined that the only attorney-client conversation on the tapes already had been broadcast by CNN; CNN had aired

some of the tapes before the court imposed a ban barring further broadcasts.

Noriega, while awaiting trial on charges of drug-dealing and money-laundering, is being held in a federal prison near Miami. It has been reported that federal prison authorities monitor and tape record all inmates' telephone conversations, except those between inmates and their attorneys, and that inmates are made aware of this practice.

Judge Hoeveler's initial order temporarily barred the broadcast of the tapes until the court could review the material; CNN appealed the order to the United States Supreme Court.

The Supreme Court, by a 7-2 vote, denied CNN's application to stay the District Court's restraining order, and denied the broadcaster's petition for a writ of certiorari.

Justices Sandra Day O'Connor and Thurgood Marshall dissented from the vote. Justice Marshall noted that the District Court entered its order without any finding that suppression of the broadcast was necessary to protect Noriega's right to a fair trial; the court apparently concluded that such a finding need not be made "unless and until CNN surrendered the tapes for the court's inspection."

Justice Marshall, stating that the case was "of extraordinary consequence for freedom of the press," would have granted the stay application and the petition for certiorari.

In early December 1990, several media organizations sought access to the court transcripts of the tapes. Judge Hoeveler rejected CNN's attempt to limit access to the tapes. However, although agreeing that the transcripts should be made public, the court delayed such release in order to allow CNN time to appeal.

Cable News Network v. Manuel Antonio Noriega, Case No. 90-767 (A-870), (United States Supreme Court, Nov. 18, 1990) [ELR 12:8:9]

United States Supreme Court will review decision holding that Indiana's public indecency statute is unconstitutional as applied to non-obscene nude dancing

After lengthy litigation, a Federal Court of Appeals in Indiana ruled that non-obscene barroom variety nude dancing performed as entertainment was expression entitled to limited protection under the First Amendment. The court held that Indiana's public indecency statute, which provides for a total ban on nudity in public places, was unconstitutional as applied to such dancing.

Judge Flaum set forth the relevant case law, discussed the nature of dance as entertainment, declined to distinguish between expressive and nonexpressive dance, and stated that "nude barroom dancing, though lacking in artistic value, and expressing ideas and emotions different from those of more mainstream dances, communicates them, to some degree, nonetheless."

The state may control the presentation of nude dancing, but the attempt to impose a total ban on such dancing was "a forbidden interference and restraint...," declared Judge Flaum in enjoining the state from enforcing its public indecency statute to prohibit non-obscene nude dancing as entertainment.

In a concurring opinion, Judge Cudahy suggested that invoking the First Amendment in the instant case was "a bit trivializing and, perhaps unworthy," commenting that "the message of the striptease is not a subject that the

Founding Fathers had in mind in drafting the First Amendment."

Judge Posner's extended concurrence in the opinion and judgment of the court also noted the significance of dance in Western culture; rejected a formula whereby "entertainment" as a category of activities, distinct from "art," would be subject to government regulation; viewed the "line" between conduct and speech as a blur; and stated that if the state was seriously concerned with the social consequences of nude barroom dancing, and did not trust its municipalities to deal adequately with the problem, the state would amend the public indecency statute to prohibit nude dancing in establishments that serve liquor - such an amendment would be valid under the Twenty-First Amendment.

Judge Coffey, in dissent, would have found that the statute's application to nude dancing implemented the state's interest in public morality, a "legitimate and

praiseworthy goal unrelated to speech," and was a valid regulation of the manner of any speech that allegedly inhered in the dancing. Judge Coffey noted the state's concern with the link between nude dancing, prostitution and other sexual crimes, with the degradation of women involved in nude dancing, and with the psychological and physical harm that can result from public nudity, including nude dancing.

Judge Easterbrook's dissent emphasized that Indiana regulated nudity, not dancing; that the state's reasons for prohibiting public nudity were not related to the suppression of free expression; and that "parading in a state of undress is conduct, not speech."

Judge Manion agreed with the District Court's finding that the nude dancing in issue contained no expressive activity, and that even if a striptease contained an expressive element, the content-neutral statute was valid because the state's interest in preventing public

indecency and immorality substantially outweighed whatever limited First Amendment rights were implicated by a simple striptease performed for money in bars.

The United States Supreme Court has agreed to review the case.

Miller v. Civil City of South Bend, 904 F.2d 1081 (7th Cir. 1990) [ELR 12:8:10]

United States Supreme Court lets stand ruling enjoining prosecution of cable operators under Puerto Rico's obscenity laws

In March 1987, Puerto Rico's Department of Justice notified cable operators that criminal obscenity charges would be filed against them for transmitting the Playboy

Channel over their systems. By July, all cable operators except Teleponce, Inc. had stopped transmitting the Playboy Channel.

Playboy Enterprises and the Puerto Rico Cable Television Association brought an action under 42 U.S.C. section 1983 alleging that the commonwealth's obscenity statute violated the First Amendment, and that any prosecution of the cable operators for obscenity was precluded by the Cable Communications Policy Act of 1984.

A Federal District Court declared that the prosecution of Teleponce for transmitting the Playboy Channel, on a leased access channel obtained by Playboy Enterprises under section 532 of the Cable Act, was precluded by section 558 of the Cable Act. Other cable operators designating channel capacity under section 532 also would be free from criminal and civil liability, ruled the court

in enjoining the prosecution of any cable operator based upon programming carried on the Playboy Channel.

A Federal Court of Appeals has affirmed the District Court's decision, finding that section 1983 provided the cable parties with a right of action against the commonwealth officials, and that the cable association had standing to sue on behalf of its members.

Senior Judge Fairchild then noted that although section 558, narrowly viewed, protects only cable operators from liability, rather than programmers such as Playboy Enterprises, the cable operator's immunity benefits the leased access programmer by helping guarantee its statutory right to access part of the operator's channel capacity. Because the threat to the cable operator's immunity presented by local prosecution also threatened Playboy's' right of access and because the programmer alleged a reluctance on the part of operators to defend their rights based on statutory immunity, Playboy

possessed standing to raise the cable operator's immunity, stated Judge Fairchild.

The court modified the injunction against the initiation of prosecutions so that as to video programming carried on or after June 3, 1987, the injunction would be limited to transmissions on any channel obtained under section 532 or under similar arrangements.

The United States Supreme Court has let stand the Federal Court of Appeals decision.

Playboy Enterprises, Inc. v. Public Service Commission of Puerto Rico, 906 F.2d 25 (1st Cir. 1990) [ELR 12:8:11]

United States Supreme Court lets stand decision rejecting claims brought by estate of Len Bias against agent for failing to obtain life insurance policy and to sign footwear endorsement contract

In April 1986, basketball player Leonard Bias signed a representation contract with Advantage International; Lee Fentress was the Advantage agent who worked with Bias. On June 17th the Boston Celtics picked Bias in the first round of the National Basketball Association draft. On the morning of June 19th, Bias tragically died of cocaine intoxication.

James Bias, as the representative of Len Bias's estate, sued Advantage and Fentress. The estate alleged that prior to the athlete's death, Bias and his parents directed Fentress to obtain a $1 million insurance policy on Bias's life, and that Fentress told the Bias family that he had obtained a policy. However, although the agency

had secured increased disability coverage for Bias, in a $1 million disability insurance policy with an accidental death rider, the agency did not obtain any life insurance coverage for Bias prior to his death.

The complaint also noted that on June 18th, Bias entered negotiations with Reebok International concerning a potential endorsement contract. According to the estate, Advantage sought to extend the endorsement contract to other athletes represented by the agency, and, in so doing, breached a duty to Bias by failing to complete the negotiations on June 18th. The estate argued that the contract with Reebok would have provided Bias with an unconditional "up front" payment.

A Federal District Court granted summary judgment to the Advantage parties, holding that the estate did not suffer any damage from the alleged failure to obtain life insurance for Bias. The court apparently considered the fact that even if the agency had tried to obtain the

insurance policy, it would not have been able to do so - there was no genuine issue concerning Bias's cocaine use and no insurer in 1986 would have issued a $1 million life insurance policy to a cocaine user.

The agency could not be held liable for failing to close the endorsement contract, in the District Court's view, because there was no "independent reason" to expedite the signing of the contract, and because the agency could not have obtained a signed contract before Bias's death even if it had tried to do so.

A Federal Court of Appeals in Washington, D.C. agreed with the District Court's finding, based on the eyewitness testimony of two of Bias's former teammates, that there was no genuine issue of fact concerning Bias's status as a cocaine user. Also upheld was the finding concerning the lack of availability of an insurance policy.

With respect to the Reebok contract, the court pointed out that the estate did not present evidence to rebut the agency's showing that the contract could not possibly have been signed prior to Bias's death - at the very least, Reebok would have had to review the contract before signing. There was no basis for the claim that a jury could reasonably conclude that a contract could have been drafted and signed on June 18th.

The United States Supreme Court has let stand the Federal Court of Appeals' decision.

Bias v. Advantage International, Inc., 905 F.2d 1558 (D.C.Cir. 1990) [ELR 12:8:11]

United States Supreme Court declines to review decision finding that WPIX-TV violated National Labor Relations Act by improperly declaring impasse in negotiations with union

The Newspaper Guild of New York, Local 3, AFL-CIO, represented certain WPIX employees who wrote and edited news programs produced by the station. The collective bargaining agreement between the union and the station provided, in part, that WPIX would grant employees periodic step increases in pay after specified periods of service.

In April 1986, the union informed WPIX that it wished to negotiate changes in the agreement, including a substantial wage increase. The parties held a series of meetings and discussed a wide range of issues, but in April 1987, WPIX announced that the company believed that the negotiations were at an impasse.

An Administrative Law Judge subsequently found that the company had prematurely declared an impasse and improperly ceased paying contractually required step increases.

The National Labor Relations Board agreed with the ruling, finding that WPIX had violated sections 8(a)(1) and (5) of the National Labor Relations Act by unilaterally implementing changes in the terms and conditions of employment without first reaching a true impasse in negotiations.

A Federal Court of Appeals in New York has found that substantial evidence supported the Board's conclusion that no impasse existed and the finding that WPIX violated the Act by failing to pay the contractually required step increases. In all, the court stated that it was presented "with a deliberate violation of the Act that affected a central aspect of the collective bargaining

process and denied certain employees part of the wages they were due."

According to news reports, the United States Supreme Court has declined to review the decision.

National Labor Relations Board v. WPIX, Inc., 906 F.2d 898 (2d Cir. 1990) [ELR 12:8:12]

Former professional hockey player who received workers compensation for knee injury may not bring personal injury action against Buffalo Sabres and team doctor

Richard Martin, a former professional hockey player with the Buffalo Sabres, sustained a knee injury during a game played in November 1980. The Sabres team physician, Peter Casagrande diagnosed the injury as a

sprained knee. Dr. Casagrande performed arthroscopic surgery on Martin's knee in January 1981 and found no ligament or meniscal damage; Martin subsequently played in eight games in January.

In February 1981, another doctor performed arthroscopic surgery on Martin and found significant damage. Martin, who was traded to the Los Angeles Kings in March 1981, played "sparingly" and retired the following season.

When Martin sued the Sabres, general manager Scotty Bowman, and Dr. Casagrande alleging various causes of action, a New York trial court granted summary judgment to the Sabres parties on the ground that Martin was an employee of the team and did not establish intentional tortious conduct so as to avoid the exclusivity of workers' compensation; the court also found no evidence that Dr. Casagrande intentionally concealed the risks and true condition of Martin's right knee.

A New York appellate court has affirmed, on different grounds, the trial court's decision. Judge Green noted that the Workers' Compensation Board had determined that Martin's injury was accidental and occurred during the course of his employment. Martin, who did not challenge that determination, and accepted workers' compensation benefits, therefore was prohibited by res judicata from bringing an intentional tort claim.

The court also pointed out that there was no evidence that the Sabres parties intended to harm Martin - Dr. Casagrande did not order or even suggest that Martin return to the ice in late December 1980. Martin acknowledged that he knew he risked permanent damage to his right knee if he played at that time, and that the Sabres did not specifically order him to play against his wishes.

Judge Green concluded by commenting that "Martin may have a valid medical malpractice claim against Dr. Casagrande," but that the player's intentional tort claim

lacked merit as a matter of law. The court distinguished the case of Krueger v. San Francisco Forty Niners, 234 Cal.Rptr. 579 (1987; ELR 9:1:13) in that the initial x-rays and arthrograms did not indicate the damage to Martin's right knee that was subsequently discovered.

Martin v. Casagrande, 559 N.Y.S.2d 68 (N.Y.App. 1990) [ELR 12:8:12]

Former college basketball player loses action alleging educational malpractice, negligent infliction of emotional distress and breach of contract

Former college basketball player Kevin Ross, who scored nine points out of a possible thirty-six on the American College Test, was recruited to attend Creighton University. In 1978, the year in which Ross

matriculated, the average student attending Creighton scored 23.2 points on the ACT. After four years, when his basketball eligibility expired, Ross had earned only 96 of the 128 credits required to graduate, maintaining a "D" average. As described by Federal District Court Judge Nordberg, Ross's reading skills were those of a seventh-grader; his overall language skills were those of a fourth-grader.

Ross, pursuant to arrangements made by Creighton, attended a preparatory school in Chicago in 1982 and 1983. Ross also attended Roosevelt University, but dropped out in 1985.

The athlete eventually sued Creighton alleging that the school was negligent in recruiting and enrolling him without providing necessary support. Ross also set forth causes of action for breach of contract, claiming that Creighton had an obligation to provide him sufficient educational and financial support so that he "would have

a reasonable opportunity to obtain a meaningful education."

The court first found that although Creighton was not doing business in Illinois, the court possessed jurisdiction under the Illinois long-arm statute.

Judge Nordberg then determined that Illinois would not recognize a cause of action for educational malpractice. Also rejected was Ross's claim for negligent infliction of emotional distress. The court declined to recognize a special tort for the benefit of student athletes.

The quality of Creighton's instruction of Ross was not subject to attack on contractual grounds, stated Judge Nordberg, noting, among other factors, that Creighton could not make Ross accept tutoring. And there was no contractual provision guaranteeing that Ross would complete college and earn a degree. In the absence of such a provision, the court refused to assume any regulatory role over college athletics.

Ross v. Creighton University, 740 F.Supp. 1319 (N.D.Ill. 1990) [ELR 12:8:13]

Former limited partner in St. Louis Spirits basketball club loses action seeking share of payments due from NBA under settlement agreement with ABA

Harry Weltman claimed that an amendment to a partnership agreement was an invalid attempt to nullify his partnership interest in the profits generated by the St. Louis Spirits Basketball Club of the American Basketball Association. Although the ABA no longer exists, a portion of the National Basketball Association's national television revenue is payable in perpetuity to the Spirits under a settlement arranged by the owners of former ABA teams. The other partners, including Ozzie and

Daniel Silna, argued that the amendment terminated Weltman's partnership interest.

A Federal District Court in Missouri initially found that under the Delaware Limited Partnership Act, as amended in 1986, Weltman withdrew from the partnership; the court entered judgment in favor of the Silna parties.

A Federal Court of Appeals reversed the District Court's decision, holding that the law applicable to the cause of action was the Delaware Limited Partnership Act as it existed prior to the 1986 amendment.

On remand, Judge Harper found that the limited partnership amendment was valid and operative since it conformed to the original certificate of partnership and Delaware law. Weltman signed the amendment as president of a corporate general partner. Judge Harper stated that Weltman's signature in his capacity as a withdrawn limited partner was not required to render the

amendment effective, and expressed the view that Weltman withdrew from the limited partnership prior to the amendment. The court then observed that all existing limited partners and new limited partners signed the amendment as required by the statute; that there was insufficient evidence to establish that Weltman assigned his interest to one or more of the new or existing limited partners; and that since Weltman was not included as a limited partner in the amended limited partnership certificate, the Silna parties were entitled to judgment.

Weltman v. Silna, 739 F.Supp. 477 (E.D.Mo. 1990) [ELR 12:8:13]

Soap opera magazine's refusal to publish advertisements of soap opera newsletter does not violate antitrust laws because publishers are not "competitors"

Soap Opera Now, a six-page black and white weekly newsletter, sued Soap Opera Digest, a 150 page biweekly color magazine, alleging an illegal attempt to monopolize trade in violation of section 2 of the Sherman Antitrust Act. The action arose when Soap Opera Digest cancelled Soap Opera Now's advertising. A Federal District Court granted Soap Opera Now's request for a preliminary injunction directing Soap Opera Digest to permit the newsletter to advertise in the magazine during the pendency of the action.

Upon the completion of discovery, Judge Robert J. Ward granted Soap Opera Digest's motion for summary judgment, and vacated the preliminary injunction. Judge Ward carefully reviewed the law regarding refusals to

deal, and noted that the relevant geographic market in the instant case was a national market. However, Soap Opera Now did not present any evidence demonstrating that the newsletter competed with Soap Opera Digest in any relevant antitrust market, stated the court. Although the newsletter and the magazine were both aimed "at some segment of the soap opera viewer population," the publications were not reasonably interchangeable and thus were not competitors in the same relevant market. The court declined to find that Soap Opera Now could reasonably be considered a potential or future competitor of Soap Opera Digest.

Even assuming (with "serious reservations") that Soap Opera Digest was a monopolist in the market consisting of soap opera magazines and products reasonably interchangeable with soap opera magazines, the magazine did not engage in monopoly leveraging, declared Judge Ward. Soap Opera Now apparently claimed that Soap

Opera Digest, by refusing to deal with the newsletter, was attempting to use its alleged monopoly power in one market to gain a competitive advantage in a second market. Soap Opera Now referred to the possibility that the magazine would publish a competing newsletter. But the court pointed out that the magazine had not started such a newsletter, and that a claim of monopoly leveraging, even if it had been properly pleaded, was "far too speculative" to survive a motion for summary judgment.

Again assuming Soap Opera Digest's monopoly power in its product market, the court rejected any monopolization and attempted monopolization claims premised on an essential facilities theory. It again was noted that the parties did not compete in any market; thus, there was no factual issue as to whether Soap Opera Digest had denied its services "to a competitor." Even if Soap Opera Now had raised an issue as to whether it competed in the same market at the magazine, the court

stated that it still would have found that the advertising pages of Soap Opera Digest were not an essential facility in the market for soap opera publications. There were a variety of advertising methods which the newsletter could have used to reach subscribers, and smaller publications in the market existed without advertising in Soap Opera Digest.

The court dismissed Soap Opera Now's pendent state claim alleging that Soap Opera Digest, by refusing to run the newsletter's advertising, breached a purported contract between the parties.

Soap Opera Now, Inc. v. Network Publishing Corporation, 737 F.Supp. 1338 (S.D.N.Y. 1990) [ELR 12:8:14]

Chronicle Publishing prevails in action alleging unfair competition against Chronicle Publications

In a decision issued in August 1989, a Federal District Court in California has ruled that Chronicle Publications, Inc. engaged in unfair competition in violation of the Lanham Act with respect to the company's use of the name "Chronicle."

Chronicle Publishing Company, the publisher of the San Francisco Chronicle newspaper, has used the trade name "Chronicle Books" for its book publishing division. Chronicle sued Chronicle Publications alleging various causes of action.

Chronicle Publications has published "Chronicle of the 20th Century" and "Chronicle of the Year 1987;" the books, containing summaries and photographs outlining the major events of the time periods covered by each book, displayed the word "Chronicle" on each cover and "Chronicle Publications, Inc." on each title page.

Federal District Court Judge Jensen found that the trade name and marks "Chronicle," "Chronicle Books," and "Chronicle Publishing" were not generic terms for the products produced by Chronicle Publishing or for its activities as a book publisher. Rather, the marks were suggestive, ruled Judge Jensen. Chronicle Publishing therefore did not have to prove that its marks had acquired a secondary meaning.

The court then applied the eight part test for determining whether there was a "likelihood of confusion" under the Lanham Act; found that there was sufficient evidence to support a finding of "likelihood of confusion" regarding the origin of Chronicle Publications' works; and granted summary judgment to Chronicle Publishing accordingly on the company's claim of unfair competition under section 43(a) of the Lanham Act.

However, Judge Jensen granted Chronicle Publications' motion for summary judgment as to Chronicle

Publishing's infringement claims with respect to its federal and state registered newspaper trademarks.

The court proceeded to grant Chronicle Publishing's motion for summary judgment on causes of action for the violation of section 14400 and 14402 of the California Business and Professions Code, and for unfair competition in violation of sections 17200 and 17203 of the California Business and Professions Code.

There remained issues of material fact regarding Chronicle Publishing's claims alleging statutory and common law false advertising, stated Judge Jensen, in denying Chronicle Publications' motion for summary judgment on the claims.

In conclusion, the court granted Chronicle Publishing's motion for summary judgment on causes of action alleging common law trademark and trade name infringement, and common law unfair competition.

Chronicle Publishing Company v. Chronicle Publications, Inc., 733 F.Supp. 1371 (N.D.Ca. 1989) [ELR 12:8:14]

Television station may proceed with liquidated damages claim against A.C. Nielsen ratings service for alleged failure to provide data of the "highest quality practicable"

WXON-TV, Inc., the operator of a Michigan television station, sued A.C. Nielsen for breach of contract, alleging that over a thirteen month period, the ratings data service substantially underestimated the station's market share, resulting in a significant loss of advertising revenue.

A Federal District Court dismissed WXON's claim for consequential damages, but allowed the station to

proceed with a claim for a refund of fees based on the finding that there was a genuine issue of material fact as to whether Nielsen used reasonable efforts to provide WXON with data of the "highest quality practicable."

In a Memorandum on Reconsideration issued one month after the initial ruling, Judge Cohn noted that the contract between the parties contained an "elaborate" limitation of damages clause. WXON had argued that the clause would apply only if Nielsen failed to furnish data to the client, and that the clause therefore was unconscionable because it completely excused Nielsen from any liability if the ratings service provided some data, albeit inaccurate, to the station.

The court stated that the relevant contractual terms could be read as a guarantee that Nielsen would use its best efforts to provide data of the highest quality practicable to WXON, although Nielsen would not necessarily guarantee any specific result. In the court's view,

WXON was entitled to seek a liquidated damages remedy for the alleged breach of the best efforts obligation, and a trial was ordered on the question of whether Nielsen breached that obligation.

The court rejected WXON's claim of procedural unconscionability and concluded that although the station had not presented a claim for liquidated damages, such a claim could be "fairly inferred from the four corners of the case."

WXON-TV, Inc. v. A.C. Nielsen Company, 740 F.Supp. 1261; 742 F.Supp. 418 (E.D.Mich. 1990) [ELR 12:8:15]

Accounting firm's use of Madison Square Garden skybox is not a commercial activity subject to New York City's rent tax

The accounting firm of Peat Marwick Main & Co. was not liable for an assessment totalling over $158,000 in commercial rent and occupancy taxes in connection with the firm's use of a luxury skybox at Madison Square Garden, the New York Court of Appeals has ruled.

Peat Marwick used the skybox from 1974 through 1985. In 1987, the New York Department of Finance ruled that the sums paid by the firm were subject to the commercial rent and occupancy tax.

The trial court annulled the determination of the Department of Finance, characterizing Peat Marwick's payments as the purchase of "admission to an unknown number of events." The court also concluded that the use of the skybox was not commercial activity subject to the tax.

An appellate court reversed the trial court's decision, holding that the agreement for the use of the box was a lease, and that the box was used for commercial activity.

Chief Judge Sol Wachtler, in reversing the appellate court's decision, noted that although the firm's use of the skybox "concededly had a business purpose," such use was not within the scope of the tax. The skybox was used only during the sports and entertainment events held in Madison Square Garden, and admission to those events was the essence of the agreements between Peat Marwick and the Garden. The fact that the firm "may have chosen its guests for business advantage" did not render the skybox subject to the commercial rent tax.

It appeared to the court that the ordinary meaning of the statutory language suggested that the tax was intended to apply to a premises "where an integral part of a commercial enterprise is carried out." The conduct in issue constituted nontaxable social activity with business

benefits, rather than taxable commercial activity, concluded the court.

In the Matter of Peat Marwick Main & Co. v. New York City Department of Finance, New York Law Journal, p. 21, col. 3 (N.Y., Oct. 18, 1990) [ELR 12:8:15]

Publication of photograph of child involved in paternity action against Johnny Carson's son does not support invasion of privacy claim against Playboy Magazine

In 1987, Tanena Love brought a paternity action against Christopher Carson, the son of talk show host Johnny Carson, on behalf of Cristal Love Carson. A Florida trial court ruled in favor of Love and ordered

Christopher Carson to pay $175 per month in child support for Cristal.

A March 1988 story in Playboy Magazine about the paternity action included a photograph, taken in front of the county courthouse, of Love and Cristal.

Sally Heath, as guardian ad litem for Cristal, sued Playboy for invasion of privacy based on the publication of private facts. A Federal District Court in Florida first found that the photograph in issue was taken in a public place and was not a private fact as a matter of law.

Furthermore, the paternity and child support award were disclosed in public judicial records, and facts taken from public records or proceedings are not private. There also had been extensive media coverage of the action prior to the publication of the Playboy report. Judge Scott noted that the republication of facts already

publicized elsewhere cannot provide a basis for an invasion of privacy claim.

The fact that Playboy did not obtain the consent of the child was "irrelevant to the privileged publication of public facts," concluded Judge Scott, who again pointed out that no Florida statute prohibits the publication of a photograph taken in a public place or of facts taken from public records.

And although Florida has codified a "narrow range" of state interests in the area of child exploitation, Cristal's claim was not among those interests. The court therefore granted Playboy's motion for summary judgment.

Heath v. Playboy Enterprises, Inc., 732 F.Supp. 1145 (S.D.Fla. 1990) [ELR 12:8:16]

Court dismisses libel and invasion of privacy claims against ABC arising from "20/20" interview conducted by Geraldo Rivera

In April 1980, the ABC television program "20/20" broadcast an interview with William Brooks. The interview, conducted by Geraldo Rivera, focused on Brooks' connection with James Barbuto, a local judge who had been indicted for alleged misconduct. Brooks' $40 million libel claim challenged Rivera's comments about allegations that Brooks was an "enforcer" or "hit man" for Judge Barbuto.

When Brooks sought to amend his complaint by adding a claim for the commercial exploitation of his identity, a Federal District Court in Ohio granted summary judgment to ABC. Judge Joiner, sitting by designation, noted that Brooks' name and likeness was used in the context of general news reporting. Rivera's questions to Brooks

involved matters of newsworthy or legitimate concern to the public, and the interview was only a minor segment in a larger news story, observed the court,

Judge Joiner also rejected Brooks' motion to add a claim under Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Under Title III, it is unlawful to intercept, disclose, or use any wire or oral communication. After careful review, the court found that Brooks did not establish that the recorded communication was for the purpose of committing a criminal or tortious act. Thus, the one-party consent provision of the statute applied to preclude ABC's liability.

Upon rejecting Brooks' proposed civil rights claims, the court granted ABC's motion for summary judgment with respect to the false light invasion of privacy claim raised in the original complaint since Ohio does not recognize such a cause of action.

In dismissing Brooks' libel claim, Judge Joiner noted that although there remained issues of material fact with respect to whether the challenged statements were true, Brooks was libel-proof. The court described Brooks' "long criminal history in Akron;" stated that Brooks' reputation in Akron at the time of the 20/20 broadcast was "severely tarnished;" and found that any harm to Brooks' reputation from the broadcast was minimal. The court pointed out that a local newspaper, prior to the 20/20 broadcast, had reported extensively on Brooks' criminal history.

Brooks v. American Broadcasting Companies, Inc., 737 F.Supp. 431 (N.D.Ohio 1990) [ELR 12:8:16]

Briefly Noted:

Copyright Infringement/Judy Garland Records.

Sidney Luft, a former husband of Judy Garland and the owner of certain copyrighted television shows featuring the late performer, brought an infringement action against Crown Publishers, Inc., Audiofidelity Enterprises, Inc. and Daniel Pugliese, president of Audiofidelity from 1980 to 1988, alleging that the Crown parties were distributing records and tapes without authorization. The Crown parties claimed that they had acquired the rights to the recordings in 1983 from George Tucker. Tucker stated that he had obtained the rights at a 1969 sheriff's sale.

A Federal Court of Appeals first noted that the parties conceded that the sheriff's sale was ineffective to convey the copyrights to Tucker, and that Tucker's

conveyance to Audiofidelity therefore also was ineffective.

Luft eventually settled with Crown, Audiofidelity entered bankruptcy, and the District Court entered judgment against Pugliese awarding Luft damages in the amount of $78,000, plus attorneys fees and costs.

Judge Kearse found that the record did not support the District Court's order striking Pugliese's answer, and remanded the matter for further proceedings. Although the District Court stated that Pugliese refused to comply with the court's orders concerning document production, the Crown parties had produced a copy of the agreement with Tucker. The court did not make sufficient findings, stated Judge Kearse, as to the failure to produce documents sought by Luft in connection with the manufacture, sale, marketing, and distribution of the allegedly infringing recordings.

Luft v. Crown Publishers, Inc., 906 F.2d 862 (2d Cir. 1990) [ELR 12:8:17]

Copyright Infringement/Animal Masks.

Masks resembling the noses of a pig, elephant, and a parrot were not "useful articles" and therefore were copyrightable, a Federal Court of Appeals has ruled. Judge Stapleton, in reversing the decision of a Federal District Court, noted that "the only utilitarian function of the nose masks is in their portrayal of animal noses;" that the masks were not useful for any reason unrelated to their appearance; and that the fact that "nose masks are meant to be worn by humans to evoke laughter does not distinguish them from clearly copyrightable works of art like paintings." The matter was remanded for further proceedings on the issue of infringement.

Masquerade Novelty, Inc. v. Unique Industries, Inc., 912 F.2d 663 (3d Cir. 1990) [ELR 12:8:17]

New York Civil Rights Law.

A pamphlet published in 1985 by the United Jewish Appeal-Federation of Jewish Philanthropies of New York contained a photograph bearing the caption "Jonathan, 5, of Forest Hills." The photograph accompanied a story about Jonathan's difficult life and the child's improvement at a day care center funded by the Federation. The photograph, which was published without authorization, actually was that of Jonathan's brother, Robert Samuel; the Samuel family, according to New York trial court Judge Shirley Fingerhood, was intact and was "capable of bearing its expenses without assistance from a charity."

Judge Fingerhood dismissed as time barred the causes of action raised by Michael and Natalie Samuel. However, the statute did not apply to bar the claims of Robert and Jonathan, as infants.

The Federation argued that a solicitation for funds by a nonprofit organization was not within the scope of sections 50/51 of the New York Civil Rights Law. But the court observed that the purpose of the picture and the story was not to report matters of public information or of legitimate public interest, but to advertise the Federation's services and to solicit funds for the organization. The Samuel children therefore were allowed to proceed with their claims under sections 50/51.

Samuel v. The Jewish Week, Inc., New York Law Journal, p. 24, col. 4 (N.Y. Cnty., Oct. 4, 1990) [ELR 12:8:17]

New York Civil Rights Law.

A Federal District Court in New York has awarded Sabrina Gallon $30,000 in damages for Hustler Magazine's unauthorized publication of a nude photograph of Gallon. The court noted that the magazine's research department did not follow its own procedures in attempting to verify the validity of the release form purportedly submitted by Gallon. Hustler acted with reckless disregard for whether the information in the release was true and whether Gallon actually consented to the publication of her picture, and published the picture with reckless disregard for the offensiveness of the material. The magazine's violation of section 51 of the New York Civil Rights Law caused Gallon emotional harm, declared the court, but did not rise to the level of intentional or wanton misconduct required for an award of punitive damages.

Gallon v. Hustler Magazine, 732 F.Supp. 322 (N.D.N.Y. 1990) [ELR 12:8:17]

Tax/Television Program Syndication.

Field Enterprises, on behalf of its Detroit station, WKBD-TV, entered various syndication license agreements with television program producers. A typical license would allow the station to exhibit videotapes of certain television programs for a specified number of times during the license period; Field agreed to make monthly payments of the license fee. The Michigan Treasury Department, characterizing the license payments as royalties, imposed a tax on the payments. Field prevailed in a trial court action seeking a tax refund. An appellate court noted that the state's Single Business Tax Act imposes a value-added tax, and that a party who

pays royalties rather than the one who receives them is liable for the payment of taxes under the statute. Field argued that the payments to program producers constituted rent because the producers retained ownership of the tapes, and that the obligation to make payments was not based on actual use, but on the right to use the tapes. The court reversed the trial court's decision, finding that the payments in issue were royalties since, among other factors, the program producers granted Field an exclusive license to publicly perform their copyrighted works.

Field Enterprises v. Department of Treasury, 457 N.W.2d 113 (Mich.App. 1990) [ELR 12:8:17]

Media Sales Tax.

The Supreme Court of Oklahoma has affirmed a trial court decision declaring unconstitutional certain provisions of the state Sales Tax Code. The provisions granted tax exemptions which favored print media over broadcasting media. The court ruled that the taxes in issue and the challenged exemptions violated the First and Fourteenth Amendments because the state failed to justify the differential tax burden on the media parties. Radio broadcasters and newspapers enter into comparable licensing agreements, noted the court; the only difference between the agreements would be the manner in which the licensed material is presented.

Oklahoma Broadcasters Association v. Oklahoma Tax Commission, 789 P.2d 1312 (Okla. 1990) [ELR 12:8:18]

Cable Television Tax.

The Supreme Court of Arkansas has reversed a lower court decision and has held that a sales tax imposed on cable television service was unconstitutional during the time period when the tax was not applied to mass communications media delivering substantially the same service, such as satellite television progamming. The state subsequently extended the scope of the tax to all similarly situated businesses. The court stated that the fact that cable television companies use public property and must obtain a franchise to do so did not warrant applying a tax which had "no relationship to the acquisition of the privilege of using public property." The United States Supreme Court has agreed to review the case.

Medlock v. Pledger, 785 S.W.2d 202 (Ark. 1990) [ELR 12:8:18]

Theater Admissions Tax.

When National Amusements, Inc. challenged a city sales tax on theater admissions, an appellate court upheld a trial court decision in the city's favor. Subsequently, the United States Supreme Court issued a decision in Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983). On the basis of that decision, National Amusement filed another action seeking to have the theater tax declared unconstitutional. During the pendency of the action, the city imposed a tax on admissions to places of entertainment other than motion picture theaters.

The trial court held that the cinema tax was discimina-torially applied to National Amusements' theater for the period between the effective date of the cinema tax and the effective date of the entertainment tax. An appellate court held that the original decision in the matter rendered the instant case res judicata and reversed the judgment of the trial court. The Ohio Supreme Court has affirmed the judgment of the appellate court, finding that the claim in the instant case was the same as the claim in the original case.

National Amusements, Inc. v. City of Springdale, 558 N.E.2d 1178 (Ohio 1990) [ELR 12:8:18]

Contracts/Race Horse Syndication.

In 1975, Robert Fishman and Harold Burgher purchased a thoroughbred race horse named "Lothario;" the purchase price was $60,000. In 1979, Gallagher's Farm, Inc. purchased a one-half interest in the stallion. The owners then entered a syndication agreement pursuant to which the ownership of Lothario was divided into forty equal shares; Gallagher's was the designated syndicate manager.

When Gallagher's sought to collect about $26,000 from Fishman as his pro rata share of the syndicate's expenses, a New York jury awarded the syndicate manager about $8,500. The jury awarded Fishman about $3,500 on one of his counterclaims.

A New York appellate court has found that the trial court did not err in denying Gallagher's motion for judgment notwithstanding the verdict. However, the court improperly denied Gallagher's motion to dismiss

Fishman's counterclaim, concluded Presiding Judge Mahoney.

Gallagher's Stud, Inc. v. Fishman, 553 N.Y.S.2d 561 (N.Y.App. 1990) [ELR 12:8:18]

Horse Racing Broadcasts.

A New York appellate court, ruling in three consolidated actions involving the simulcast broadcasting of horse races by the New York Racing Association to Yonkers Raceway, granted Yonkers Racing Corporation's motion for a preliminary injunction barring the Catskill Regional Off-Track Betting Corporation from withdrawing its consent to such simulcast broadcasting. The court found, in part, that the language of a contract between the Association and Catskill was sufficiently

ambiguous to require that extrinsic evidence be considered in order to determine the intent of the parties. Under the circumstances of the case, the court found it appropriate to grant the injunction sought by the Association and Yonkers in order to maintain the status quo.

Yonkers Racing Corporation v. Catskill Regional Off-Track Betting Corporation, 552 N.Y.S.2d 670 (N.Y.App. 1990) [ELR 12:8:18]

Workers Compensation/Jockey Injury.

The Supreme Court of Texas has upheld lower court rulings holding that jockey Tommy Thompson was not an employee of Manor Downs race track at the time when Thompson was injured immediately after a horse race, prior to dismount. Thompson claimed that he was

an employee of the race track because on the day of his injury, he participated in a daily pool of jockeys available for selection by horse owners who had not already hired a jockey for a particular race.

The court pointed out that the owners or trainers of the horses ridden by the "pool jockeys", not the race track, controlled the "progress, details and methods" of the jockeys' work, paid the mount fees, and gave instructions to the jockeys on strategy and tactics. The evidence indicated that Manor Downs did not prevent jockeys from racing at other tracks on any given day, did not require jockeys to remain at the track for the entire day, and did not require jockeys to ride any particular horse. And the race track did not withhold taxes or social security from any jockey's pay. The court therefore found that the evidence did not establish, as a matter of law, that Thompson was an employee of Manor Downs.

Thompson v. Travelers Indemnity Co. of Rhode Island, 789 S.W.2d 277 (Tex. 1990) [ELR 12:8:18]

Harness Racing.

A New York trial court has upheld the decision of the New York State Racing and Wagering Board to suspend the license of a harness race trainer. The summary suspension, prior to an evidentiary hearing, occurred when the trainer's horse, after a race, tested positive for cocaine. The court noted that the suspension was based on proof that the horse tested positive for cocaine and relied on the rebuttable presumption of trainer responsibility for such results. And the Board scheduled a prompt hearing date. The trainer's petition was dismissed accordingly.

Ehrhart v. Corbisiero, New York Law Journal, p. 25, col. 6 (N.Y.Cnty., Nov. 1, 1990) [ELR 12:8:19]

Horse Racing.

Testing conducted on two horses after races held on June 27, 1987 revealed that each horse had a prohibited substance in its system. After a hearing, racetrack officials fined each trainer $300 and placed each on probation for one year. The stewards also disqualified both horses from the June 27th races, and ordered that the owners of the horses not share in the purse of a race held on July 4, 1987 in which the horses had run.

The Supreme Court of Idaho has upheld a trial court decision finding that the racetrack officials and the Idaho Horse Racing Commission did not have the

authority to redistribute the purses. The court then found that the Commission properly imposed penalties on the trainers, interpreting the rule pursuant to which the officials disciplined the trainers so as to provide sufficient certainty to avoid a claim that the rule was unconstitutionally vague. The matter was remanded to the trial court in order to set an award of attorneys fees to the owners. A dissenting judge questioned the award of attorneys fees.

Moosman v. Idaho Horse Racing Commission, 793 P.2d 181 (Ida. 1990) [ELR 12:8:19]

Horse Racing.

A New Jersey appellate court has upheld the convictions of horse trainers Ronald and Lise Turcotte of

possession of prescription legend drugs without a prescription and possession of hypodermic needles and syringes without a prescription. The court found that the warrantless administrative search of an off-track stable housing licensed harness racing horses did not violate the Fourth Amendment.

Judge Havey noted, in part, that a police officer had testified that the horse "Trottin' Happy," the second-place finisher in a race at the Freehold Raceway on October 15, 1986, tested positively for a drug. Lise Turcotte was the owner of the horse, and Ronald Turcotte was a part owner.

It was found that the racing industry in New Jersey was subject to "pervasive and long-standing government regulation," that a horseman licensed under Racing Commission regulations would have a reduced expectation of privacy, and that New Jersey had a substantial interest in regulating owners, horsemen and licensed

premises "in order to preserve the integrity of horse racing and parimutuel wagering."

State v. Turcotte, 571 A.2d 305 (N.J.App. 1990) [ELR 12:8:19]

Previously Reported:

The following cases, which were reported in previous issues of the Entertainment Law Reporter, have been published: Ralph Andrews Productions, Inc. v. Paramount Pictures Corporation, 271 Cal.Rptr. 797 (12:5:11); Hill v. National Collegiate Athletic Association, 273 Cal.Rptr. 402 (12:7:6); New York Times Company v. The Superior Court of Santa Barbara County, 273 Cal.Rptr. 98, 796 P.2d 811 (12:6:16); Presley v. County of Nassau, 560 N.Y.S.2d 173

(12:6:8); Sands v. News America Publishing Inc., 560 N.Y.S.2d 416 (12:6:6); Unelko Corp. v. Rooney, 912 F.2d 1049 (12:6:3).

The United States Supreme Court has let stand the decisions in Jim Bouton Corporation v. Wrigley Company (12:6:4), Getz v. Getz (10:12:11); and New Era Publications v. Carol Publishing Group (12:6:5).

IN THE NEWS

George Lucas prevails in Canadian action involving "Ewoks" characters

Canadian Federal Judge W. Andrew MacKay has rejected writer Dean Preston's claim that the Ewok characters in Lucasfilm's "Return of the Jedi" were taken from Preston's script, "Space Pets."

It has been reported that Judge MacKay, in ruling that there was no substantial similarity between the works, noted Lucasfilm's policy of refusing to review unsolicited manuscript submissions; Preston had stated that the script was submitted to Twentieth Century Fox in 1978. [Jan. 1991] [ELR 12:8:20]

Rap group "PG-13" will change name to settle Motion Picture Association of America trademark action

Quality Records has announced that the rap group PG-13 will change its name to Positive Generation. The Motion Picture Association has agreed not to pursue a trademark infringement action against the group.

The MPAA will allow Pump Records, a Quality affiliate, to distribute existing product by the group as long as

such product displays a sticker indicating the name change; future albums will be released under the Positive Generation name. According to news reports, the group had used the name PG-13 for three years and had released two albums under the name. [Jan. 1991] [ELR 12:8:20]

Florida court fines record store owner $1,000 for selling 2 Live Crew album "As Nasty As They Wanna Be"

In early October 1990, a Florida jury found record store owner Charles Freeman guilty on a misdemeanor charge of obscenity for selling the 2 Live Crew album "As Nasty As They Wanna Be" (ELR 12:6:20).

Judge Paul L. Backman has fined Freeman $1,000; the court recommended that the fine be paid to a local

school for the performing arts. [Jan. 1991] [ELR 12:8:20]

New York satellite television company pleads guilty to obscenity charges in Alabama

A now-defunct New York satellite television company, Home Dish Only Satellite Network Inc., has pleaded guilty in an Alabama state court to obscenity charges. It has been reported that the company, which was indicted for using satellite broadcast technology "to invade the territorial boundaries of a state with hard-core obscenity," agreed to pay a total of $150,000 to two children's homes. [Jan. 1991] [ELR 12:8:20]

Congress passes bill authorizing copyright infringement actions against state entities

Congress has passed a bill subjecting state entities and state employees acting in their official capacity to federal copyright infringement actions. The bill reverses the ruling in BV Engineering v. University of California, Los Angeles, 858 F.2d 1394 (9th Cir. 1988; ELR 10:11:16 ; 10:8:9), a case which held that a computer program distributor was barred by the Eleventh Amendment from seeking damages from the university for the allegedly unauthorized use of copyrighted material. [Jan. 1991] [ELR 12:8:20]

Federal Trade Commission prevails in early phase of antitrust proceeding against Capital Cities/ABC and College Football Association

The Federal Trade Commission may proceed with an antitrust claim challenging a $175 million broadcasting agreement between Capital Cities/ABC and the College Football Association, an administrative law judge has ruled.

The Commission argued that ABC and the College Football Association were engaged in an illegal restraint of competition in the marketing of college football games. The administrative law judge rejected the contention that the Commission lacked jurisdiction in the matter because the College Football Association is a nonprofit organization; however, it has been reported that this contention may be reviewed upon the submission of additional evidence. [Jan. 1991] [ELR 12:8:20]

Major league baseball team owners will pay $280 million to settle collusion grievances

The major league baseball team owners have agreed to a $280 million payment to resolve claims alleging that the owners acted in collusion to restrict free agent player movement and salaries from 1987-1990. Previous arbitration decisions awarded the players about $110 million in damages for lost salaries (see ELR 12:5:20).

According to news reports, the agreement also provided that fifteen players, including Gary Gaetti and Brett Butler, would become "new look" free agents. [Jan. 1991] [ELR 12:8:21]

University of Nevada Las Vegas will participate in 1990-1991 postseason competition under revised NCAA penalty

The National Collegiate Athletic Association has altered the penalty imposed in July 1990 on the University of Nevada Las Vegas (ELR 12:3:19).

The NCAA had banned the school from 1990-1991 postseason play as the final penalty for alleged rules violations.

Under the recent ruling, the school will participate in postseason competition at the end of the current season, but will not make live television appearances during the 1991-1992 season and will not compete in postseason play in 1992. The school declined an alternative penalty proposed by the NCAA which would have banned the University of Nevada Las Vegas from postseason competition in 1992 and would have suspended Coach Jerry

Tarkanian during postseason competition in 1991. [Jan. 1991] [ELR 12:8:21]

National Football League imposes fines totalling $72,500 against New England Patriots and players for sexual harassment incident

The National Football League has fined the New England Patriots $50,000 and has fined three players a total of $22,500 for an incident of sexual harassment involving reporter Lisa Olson.

NFL Commissioner Paul Tagliabue fined players Zeke Mowatt, Michael Timpson, and Robert Perryman, $12,500, $5,000 and $5,000, respectively. Victor K. Kiam II, the club owner, was fined $25,000, and the club was assessed $25,000 to provide material on dealing with the media.

It was found that the players' actions and statements to Olson, who was conducting a locker room interview, were improper, and that the club "appeared to condone the misconduct." [Jan. 1991] [ELR 12:8:21]

Broadway directors and choreographers ratify contract with producers

The League of American Theaters and Producers, as part of a six year contract ratified in November 1990 by the Society of Stage Directors and Choreographers, has agreed to establish minimum guidelines for royalty pools.

Under royalty pool arrangements, a percentage of a production's weekly profits are put into an account and then divided among royalty participants.

The contract, although setting minimum guidelines, does not require producers to establish such pools. According to news reports, the contract does require that for a play, the producer will contribute at least 27.5 percent of profits into the pool, with the percentage increased after 125 percent of the initial investment has been recouped. For a musical, the portion of profits going to pool participants would start at 32.5 percent.

Producers still must pay a mimimum weekly guarantee of $200 for each point owned by royalty participants, or $500 per point for musicals.

Over the six years of the contract, the fees and advances for directors will increase from $20,000 to $40,000. Choreographers will receive an increase from $16,000 to $33,250.

The contract also contains a property rights provision to prevent the unauthorized re-creation of original direction or choreography. "Third-party" producers restaging

a production with original direction or choreography must hire the director or choreographer or pay for using the original work. [Jan. 1991] [ELR 12:8:21]

Los Angeles court approves $35 million settlement of stockholders' claims arising from sale of MGM/UA

In 1986, Kirk Kerkorian sold MGM/UA Entertainment Co. to Ted Turner Broadcasting System for $1.5 billion. MGM/UA stockholders received $29 per share.

Subsequently, a $200 million class action lawsuit, brought on behalf of about 20,000 stockholders, alleged that the directors of MGM/UA did not obtain the highest possible price for the stock. Kerkorian purportedly undervalued United Artists in the sale, and later bought back the company for $9 per share.

According to news reports, a Los Angeles trial court has approved a $35 million settlement for the stockholders. [Jan. 1991] [ELR 12:8:21]