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Back to the Future Again: An Oblique Look at the Sports Broadcasting Act of 1961

by Dean A. Rosen

It has been exactly thirty years since Congress passed the Sports Broadcasting Act of 1961, one of the most important pieces of legislation affecting broadcasting generally and the most important affecting sports broadcasting. Over the past thirty years, the Act - which exempts from antitrust scrutiny the pooled sale of "sponsored telecasting" rights by the professional football, baseball, basketball and hockey leagues - has allowed the leagues to negotiate such lucrative television contracts as Baseball's Game of the Week and Sunday afternoon NFL football without fear of antitrust prosecution.

But, during its thirty year history, the Act has also served as a flash point for controversies of every size involving sports telecasting. During the past few months alone, for example, the Act has grabbed headlines across the country as (a) the Chicago Bulls attacked the league-wide National Basketball Association restriction on the number of telecasts that could be shown on superstations carried by cable television systems, (b) National Football League Commissioner Paul Tagliabue caused a stir by suggesting that the NFL might soon put certain games on pay-per-view cable, (c) Hometown fans of the National Hockey League's Minnesota North Stars could follow their team's 1991 Stanley Cup playoff games only on pay-per-view, (d) Major League Baseball's Philadelphia Phillies considered putting Opening Day on pay-per-view, (e) the NBA's Philadelphia 76ers announced that they might move all their games to cable, and (f) three bills were introduced in the 102d Congress aimed either at limiting the scope of the Sports Broadcasting Act's exemption or preventing the "siphoning" of sports programming from free television to cable and pay cable television.

These recent actions have reminded observers, most strikingly, that telecasting arrangements borne by the progress and demands of the evolving sports telecasting marketplace may not always ease comfortably into the confines of the Act's thirty year old definitions. When Congress in 1961 chose the term "sponsored telecasting" to describe the critical aspects of pooled arrangements exempted from antitrust scrutiny, it could not, and did not, foresee the radical changes that would occur over the next three decades in both communications technology and the sports marketplace. A plethora of new communications entities - cable, pay cable, pay-per-view, and Direct Broadcast Satellite - now compete with over-the-air television for the right to exhibit professional football, baseball, basketball, and hockey games. Leagues and team owners, driven by skyrocketing overhead costs, are looking increasingly toward alternative ways to deliver their product to the public.

But until these recent events are placed in the context of the Act's thirty year history, we cannot even begin to discuss them intelligently. This article therefore looks historically at a critical issue in the Act and its 1973 "amendment."

As the article demonstrates, there is nothing new or unusual about these most recent conflicts, court decisions and Congressional rumblings. They are merely the latest episode in a thirty-year saga. In fact, to many observers, their recurring nature brings to mind the alleged words of baseball great Yogi Berra, that it seems like "deja vu all over again."

Justification for the Sports Broadcasting Act: NFL Survival

At the beginning of the 1960's, the NFL found itself facing increased competition from the new American Football League, which had recently negotiated a league-wide television contract with ABC. As the networks scrambled to satisfy viewers' voracious programming appetites, the NFL also came to recognize that stadium ticket sales and revenue from regionalized television contracts represented only the tip of a very lucrative iceberg.

The NFL responded to this brave new television world by selling a pooled package of its teams' 1961 season broadcast rights to CBS. However, there was one minor obstacle. A United States District Court in Pennsylvania found that the NFL-CBS arrangement violated the antitrust laws. United States v. National Football League, 196 F.Supp. 445 (E.D.Pa. 1961). The court determined that the NFL's exclusive contract with CBS violated a 1953 final judgment, by the same court and same judge, that prohibited the league and its individual clubs from restricting the area of game telecasts.

Having nowhere to turn for help, the NFL turned to Congress. Just seventy-two days after the district court decision was handed down, Congress passed the Sports Broadcasting Act, authorizing the pooled sale of "sponsored telecasting" rights by all the professional sports leagues. Congress agreed with the NFL that the league's structure would become "imperiled" if teams from smaller, more remote areas were forced to rely solely upon revenues from individual broadcasting arrangements. Note that although the Act was passed at the behest of the NFL, and primarily for the NFL's benefit, it applies equally to the professional football, baseball, basketball and hockey leagues.

Definition Difficulty

The recent controversies that were outlined earlier in this article have arisen primarily because it is difficult to apply the term "sponsored telecasting" to the modern sports telecasting marketplace. The Act itself does not define "sponsored telecasting," and the legislative history offers little additional guidance. When the bill was reported out in 1961, the House Judiciary Committee Report said only that:

"The [sports antitrust] exemption . . . applies to the sale or transfer of rights in the sponsored telecasting of games. The bill does not apply to closed circuit or subscription television."

The problem is that many current communications entities delivering sports programming cannot be characterized accurately as "sponsored telecasting," "closed circuit" or "subscription television." For example, ESPN and USA Network, cable networks which offer a significant amount of sports programming, are both advertiser-supported and commonly offered by cable systems as part of a low-cost basic package. On the other hand, Home Box Office, which supplements its premium movie offerings with occasional sports programming, is usually offered to cable subscribers on a separate-fee basis, much more like "subscription television." In addition, some sports programming is now offered strictly on pay-per-view cable, and many more non-traditional methods of sports telecasting will almost certainly develop in the future.

Administration Confusion

Even the two federal agencies charged with antitrust jurisdiction, the Federal Trade Commission and the Department of Justice, appear confused by the efforts of

Congress in 1961. In October 1987, the FTC wrote a letter to Senator Howard Metzenbaum in response to the Senator's inquiry about whether the first NFL-ESPN contract raised antitrust considerations. "... [I]t is arguable," the FTC responded, "that Congress did not intend to provide an antitrust exemption for the type of service offered by ESPN." But the FTC was not necessarily willing to adopt a strict interpretation. As the letter said:

"[T]oo narrow a reading of the language of the exemption may result in unexpected consequences. Without further study, for example, it is unclear whether a strict limitation on the exemption could have the unanticipated effect of reducing the willingness of the NFL to deal with alternative transmitters of football games and whether this in turn might have the effect of reducing competition among alternative suppliers of sports to fans."

Five months later, the Department of Justice's Antitrust Division, in a letter to Senator Arlen Specter, seemed to conclude just the opposite: that the NFL-ESPN deal was not exempted from antitrust liability by the 1961 Act. Justice recognized that ESPN's payment arrangement, some payments from advertising and some from subscriptions, was "something of a hybrid" which did not fit neatly into the definition of sponsored telecasting adopted by Congress in 1961. But, relying mainly on the traditional rule that exemptions to the antitrust laws are to be narrowly construed, Justice concluded that ESPN's contract with the NFL did not come within the Act's exemption.

Many Unanswered Issues Highlighted by the FTC and DOJ Letters

The Administration's confusion raises a number of issues, which can only briefly be touched upon here.

For example, as Justice's letter recognized, the Act provides "no definitive answer" to the question of how much advertising support is required for an entity to come within the exemption. Is twenty percent enough? Fifty percent? One-hundred percent?

In addition, by choosing the term "sponsored telecasting," did Congress mean to actually require sponsorship? Did it, for example, intend to preclude Public Broadcasting, which is prevented from carrying advertising in the same fashion as conventional broadcasting, from negotiating for the right to televise a professional sports package?

Further, is it possible that Congress deliberately ignored a more definite statement about cable television in its legislative consideration of the Act? At the time, cable television as an industry was thriving, serving hundreds of thousands of subscribers. It had also been using sports as a subscriber inducement for nearly a decade. Moreover, in 1961, the Federal Communications Commission was using the term "subscription television" to describe over-the-air pay television stations, not any form of cable. Could Congress have intended to adopt the FCC definition by using a phrase which the Commission had been using as a defined term of art?

Of all the critical issues highlighted by the two letters, the most significant may simply be that applying the Act to the modern marketplace does not afford any clear answers. As Justice accurately and succinctly stated, each of the lingering queries set forth above really go to the overriding consideration of "how best to apply a statutory antitrust exemption in the context of an evolving industry."

Congress Complicates the Matter Further by "Amending" the Act's Home Game Blackout Provision

The Administration need not feel twinges of conscience as a result of not working from the same page. Indeed, Congress had also refused to confront directly some of the problems inherent in the Sports Broadcasting Act some sixteen years earlier, when it amended the Act's home game blackout provision.

The home game blackout provision of the Sports Broadcasting Act allows the professional leagues to prevent games from being broadcast into the home territory of a member team when that team is playing at home.

The provision was designed originally to shield teams from a decline in home game attendance. But, a decade later, the exemption seemed more difficult to justify in the face of the NFL's robust growth, increased number of sellouts, and overall financial success. Fans sued to force the NFL to broadcast sold-out games locally, and bills to amend the home game blackout provision were introduced in both Houses of Congress.

Even faced with increased judicial and legislative pressure, the NFL exhibited a seemingly guileless rigidity when asked to voluntarily lift the ban on sold-out local games. With the Washington Redskins in the playoffs and the prospect of the National Conference Championship Game in Washington D.C. in late 1972, the NFL's obstinance seemingly reached its nadir when it refused a direct appeal from President Nixon to lift the blackout on all remaining sold-out playoff games.

Nonetheless, the issue, in all likelihood, would have ended right there. Matters of greater importance - namely, the Watergate scandal and the Vietnam War - had begun to compete increasingly for the Administration's attention. But less than one year later, the blackout issue surfaced again when the NFL's Director of

Broadcasting, Bob Cochran, made some terribly impolitic comments to The Washington Post about the power of the NFL alone to control what games the "spoiled" American public would see. Seventy-one days later, Congress passed anti-blackout legislation.

Like the Sports Broadcasting Act, the 1973 amendment was, on its surface, extremely straightforward. It required the leagues to lift the local blackout of any pooled telecast if all the tickets available for purchase five days before the game were sold seventy-two hours or more in advance.

The legislation clearly served Congress's short-term objective. But it also affected sports on cable and pay cable, possibly into the next century, in ways that Congress could not have foreseen back in 1973.

There are four important points to bear in mind when looking back on the 1973 anti-blackout amendment. The first is that the "amendment" was not really an amendment to the Sports Broadcasting Act at all. Unlike earlier attempts to modify the blackout provision, the 1973 legislation was fashioned as an amendment to the Communications Act, instead of the antitrust laws. This maneuver enabled the proponents of the legislation to keep it away from the House and Senate Judiciary Committees, where it had been obstructed in previous years by members who were largely disinclined to revise the Act.

Second, the House bill that was eventually signed into law was much narrower in scope than the bill the Senate had passed by a 76-6 margin only days earlier. The Senate bill would have lifted the blackout on any sold-out game played during the year; the House version applied only to those games which were part of a network package, and not to those broadcast pursuant to agreements entered into by individual teams. This detail made little difference to the NFL, which broadcast all of its games as part of a network package. But it has been worth tens of millions of dollars to the pro basketball and hockey leagues, which then relied almost exclusively on individual contracts. (Because pro baseball has traditionally sold out far fewer games than hockey or basketball, it has benefitted to a lesser extent by adoption of the House version.) Third, one unspoken intention of the legislation was to make more games available for broadcast on "free" television by triggering the FCC's anti-siphoning regulations. Those regulations, which were later declared unconstitutional, limited the number of games that could be sold to cable and pay-television once they were shown on traditional broadcast tv.

Finally, while the anti-blackout legislation expired, by its terms, in 1975, the bill has had lasting and potent impact. The sports leagues, wary about angering legions of sports fans who have become accustomed to watching sold-out home games on television, have, in effect, made the law permanent by voluntarily adhering to its terms for the past sixteen years. Few people, in fact, realize that the legislation expired at the end of the 1975 football season.

Is This Really The "Conclusion"?

So, as the Sports Broadcasting Act enters its fourth decade of existence, and Congress and the courts once again struggle to limit the Act's antitrust exemption, fit new telecasting arrangements into the Act's definitions and preserve the "free" broadcast of sports programming, as intelligent people we should ask exactly where all of this leaves us? Well, as Yogi might have explained, it certainly seems like, "deja vu all over again."

Mr. Rosen is an associate attorney with the law firm of Dow, Lohnes & Albertson in Washington, D.C., and an avid sports fan.
[ELR 13:5:3]

Federal Communications Commission waives prime-time access rule for Sacramento television station

In September 1991, the Federal Communications Commission granted a waiver of the primetime access rule to Kelly Broadcasting. The primetime hours for the company's Sacramento television station, KCRA-TV, will be shifted from 7-11 P.M. to 6-10 P.M. for about an eight month experimental period.

The primetime access rule requires network affiliates in the top fifty markets to allocate an hour of primetime for non-network programming. [ELR 13:5:6]

RECENT CASES

Verdict awarding damages of $1.47 million to producer in fraud claim against Warner Bros. is upheld in unpublished decision, but court reverses damages award on breach of contract claim

In 1968, John Mantley, a writer and television producer, purchased an option to acquire the motion picture rights to Isaac Asimov's science fiction short story collections, "I, Robot," and "The Best of the Robots." Mantley continued to renew the option and invested, according to California Court of Appeal Judge Grignon, over $67,000 in attempting to produce a film based on the Robot stories.

In 1977, Mantley entered an agreement with film producer Edward Lewis to develop the Robot stories. Lewis brought the project to Warner Bros., and the company agreed to produce a film. Mantley again exercised his option to purchase the film rights, assigned the rights to Warner Bros., and obtained reimbursement from the company for the $37,000 option price.

Although the parties did not sign a written agreement until April 1983, Mantley believed that in exchange for assigning his option to the film rights to Warner Bros., he would be the producer of the film, and would be consulted, during pre-production, on major business and creative matters. The written agreement, among other provisions, stated that "[a]ll major business and creative decisions in connection with the production of the Picture shall be arrived at by mutual agreement between the parties, and the parties thereto will advise and consult with each other from time to time with respect thereto."

The agreement also provided that if the parties could not reach agreement on business and creative decisions, Warner Bros. would have the power to make a binding decision. Mantley was named the producer of the project, and obtained "turn around" rights which would allow him to take the project to another studio under certain circumstances.

From 1977 through 1984, Warner Bros. did not consult Mantley, although the company hired various writers and directors to work on the project.

In 1982, Warner Bros. paid $200,000 to Isaac Asimov to reacquire the film rights to the Robot stories. In 1985, the company abandoned the project.

In 1984, Mantley sued Warner Bros., alleging breach of contract and fraud, with a punitive damages claim. The trial court granted Warner Bros.' motion to strike Mantley's claim for punitive damages and also found (as quoted by Judge Grignon) that the company did not breach its agreement "by failing to use [Mantley's] services as producer or by abandoning the project because [Warner Bros.] was not obligated to actually use [Mantley's] services as a producer and could abandon the project at any time, with or without cause."

In its jury instructions, the court stated that notwithstanding the above-noted ruling, the jury might find, if warranted by the evidence, that Warner Bros. breached its agreement with Mantley by failing to use Mantley's services during the development phase of the project, or by failing to "advise and consent" with Mantley as to major business and creative decisions.

The trial court jury awarded Mantley damages in the amount of about $1.47 million for fraud and $127,500 for breach of contract (the award included seven percent interest from the date of loss on all fraud damages).

The appellate court, in a decision marked "Not to be Published," first upheld the order granting Warner Bros.' motion to strike the claim for punitive damages.

The court then found that sufficient evidence was presented to support the jury's verdict that Warner Bros. committed fraud by negligently or intentionally making misrepresentations to Mantley in order to "induce" him to transfer the film rights to the Robot stories. It was noted that despite repeated assurances to Mantley, Warner Bros. did not consult with the writer-producer. Thus, an inference, based on the company's conduct, could be drawn that Warner Bros. "never intended to involve Mantley in the project."

In upholding the damage award for fraud, Judge Grignon cited expert testimony estimating that in 1977, the most likely value of the film rights transferred from Mantley to Warner Bros. was $500,000, but that the value could have been as high as $1 million. The expert based his opinion on the popularity and value of the Robot stories, the popularity and notoriety of the author, the general increase in the value of all literary properties at the time, and the particular increase in the value of science fiction literary properties after "Star Wars."

It appeared to the court that if the jury awarded Mantley $800,000 for his loss as of September 1977, that amount, together with interest to the date of the verdict in August 1989, would total $1.46 million, which was about the amount of the award. The $800,000 figure, although high, was within the range estimated by the expert, was supported by substantial evidence, and was within the sound discretion of the jury, declared Judge Grignon.

The court concluded by agreeing with Warner Bros. that the evidence did not support the damages awarded on the breach of contract claim since "the fact and amount of any such damage was conjectural and speculative." Judge Grignon stated that Mantley was entitled to nominal damages for breach of contract, and fixed the amount at $1.

Mantley Productions, Inc. v. Warner Bros., Inc., Case No.B044674 (Cal.Ct.App., June 25, 1991) [ELR 13:5:7]

Copyright infringement claim against Pathe Communications by co-owner of James Bond films is dismissed for lack of jurisdiction

Under a 1962 contract, Danjaq, S.A. produced sixteen James Bond films and MGM/UA Communications Co. financed the films and distributed them in the United States. In late 1990, when Pathe Communications Co. acquired MGM, Danjaq, alleging breach of contract, breach of fiduciary duty, conspiracy claims and copyright infringement, unsuccessfully sought a restraining order against the merger. A Federal District Court recently determined that Danjaq did not state a valid copyright claim and that, in view of the lack of diversity of citizenship, the court did not possess jurisdiction to hear the company's state law claims.

Judge Stephen V. Wilson, after finding that section 1332(c) of the Judicial Code applied to alien corporations, attempted to locate the company's worldwide principal place of business. Danjaq was incorporated in Switzerland with its principal office in Lausanne. Danjaq's principals, Albert Broccoli and his wife Dana, resided in Los Angeles.

Danjaq argued that its principal place of business, if not Switzerland, was Great Britain because Eon Productions, Ltd., a wholly-owned subsidiary of Danjaq, was based in the Pinewood studios outside of London; Eon, as described by the court, was "charged with putting ideas on the screen." Upon completing a film, Eon would formally sell the work to Danjaq.

Notwithstanding the above, Judge Wilson found that while the corporate separation between Danjaq and Eon "may perhaps be merely formal, it [was] nonetheless real," and that Danjaq's principal place of business would be determined without regard to Eon's activities. It was further found that although Danjaq did not conduct a majority of its corporate activities in one place, the company's "chief decisionmaker," Albert Broccoli, lived within the forum. In all, stated the court Danjaq did not show that the company required the protection from local prejudice provided by diversity jurisdiction.

Turning to the copyright claims, Judge Wilson pointed out that Danjaq and MGM were the co-owners of the copyrights in the James Bond films, and that Danjaq's copyright infringement claim was asserted only against Pathe. Danjaq alleged that Pathe, prior to the merger with MGM, offered several European television stations an opportunity to license the exhibition of the Bond films at "cut-rate" prices, thereby reducing the value of Danjaq's copyrights on the world market; the licensing offers purportedly were made contingent upon a successful merger with MGM. Apparently only one offer resulted in a final licensing agreement.

The court framed the "novel question" presented as whether copyright liability may be imposed upon an "authorization" to use copyrighted material that did not in fact culminate in a primary act of infringement. The Copyright Act of 1976 reserved to copyright owners the exclusive right "to do and to authorize any of the following:" the reproduction of the copyrighted work, the preparation of derivative works, the distribution or sale of the copyrighted work, and its display and performance in public. Judge Wilson reviewed the legislative history pertinent to the addition of the word "authorize" to the Copyright Act in 1976, and cited Professor Nimmer's analysis suggesting that "instances of unconsummated authorization do not merit the invocation of federal court jurisdiction under the Copyright Act."

The court concluded that although an act of authorization might, in some instance, injure the copyright owner, such injury more than likely would be remediable under state law. It was noted that Danjaq presented several state claims arising from Pathe's acts of authorization, allegedly made with MGM's permission. Thus, Danjaq would be left with some remedy if the value of the Bond copyrights was wrongfully diminished through Pathe's purported negotiations in Europe. Judge Wilson accordingly would confine the scope of liability based on an unwarranted authorization to the scope of contributory infringement liability. Thus, authorization liability would be imposed only where direct infringement had in fact occurred, and state law would be available in the "rare instances where an unconsummated act of authorization redounds to the copyright owner's loss."

The court declined to consider the broad question of whether an unconsummated authorization is ever actionable under the Copyright Act. Rather, Judge Wilson granted the MGM parties' motion to dismiss on the ground that Pathe's alleged authorization of the performance of the Bond films on European television was not actionable under the Copyright Act since United States copyright laws do not operate extraterritorially. And the authorization of a noninfringing activity would not be actionable even if such authorization were made in the United States.

Judge Wilson distinguished the case of Peter Starr Prod. Co. v. Twin Continental Films, Inc., 783 F.2d 1440 (9th Cir. 1986; ELR 8:2:20), pointing out that in Peter Starr, the court addressed the question of subject matter jurisdiction, but was not presented with, nor addressed the question of whether the complaint stated a claim for relief with respect to an authorization in the United States of an overseas exhibition of a copyrighted film. In Judge Wilson's view, Danjaq's complaint, as in Peter Starr and Danjaq's complaint, while arising under the Copyright Act, failed to state a claim for relief. Pathe's alleged authorization of noninfringing overseas performances, again, was not actionable under the Copyright Act and the copyright claim was dismissed accordingly.

Danjaq v. MGM/UA Communications Co., Case No. CV 90-5498 (C.D.Ca., June 26, 1991) [ELR 13:5:8]

Federal Trade Commission lacks jurisdiction to review College Football Association's sale of television rights to Capital Cities/ABC

A Federal Trade Commission Administrative Law Judge has dismissed a claim challenging the College Football Association's sale to Capital Cities/ABC, Inc. of television rights to association member schools' football games.

Administrative Law Judge James P. Timony noted that under section 5(a)(2) of the Federal Trade Commission Act, the Commission may "prevent persons, partnerships, or corporations from using unfair methods of competition in or affecting commerce." The Commission has jurisdiction over an association if the association was organized "for its own profit or that of its members."

It was argued that jurisdiction was present because association members were "persons" receiving monetary benefits from the association. But it was not alleged that the institutions, all organized under nonprofit laws or as state or federal instrumentalities, distributed any part of the television revenues to individuals or firms who sought monetary gain. The association's activities in promoting college football and television exposure of college football furthered nonprofit purposes, and the association, again, was not organized and did not carry on business for the profit of its members. In all, there were no disputed issues of fact that could support a finding of jurisdiction over the association, concluded Judge Timony.

Judge Timony also dismissed the complaint against Capital Cities/ABC, Inc. Although a nonbinding statement filed in the proceeding referred to Capital Cities' aggregation of exclusive college football telecast "packages," purportedly to gain an anticompetitive advantage over competing telecasters, the complaint lacked allegations of monopoly power or purpose, or a basis of liability separate from the arrangement with the association.

In the Matter of College Football Association and Capital Cities/ABC, Inc., Docket No. 9242 (Federal Trade Commission, July 29, 1991) [ELR 13:5:9]

Internal Revenue Service disagrees with court ruling exempting NCAA from paying tax on advertising revenue derived from "Final Four" tournament program

In September 1990, a Federal Court of Appeals ruled that the revenue received by the National Collegiate Athletic Association from advertisements placed in the program for the semifinal and final games of the Men's Division I Basketball Championship was nontaxable royalty income.

Judge Seymour noted that the NCAA, an exempt organization under section 50l(c)(3) of the Internal Revenue Code, received over $18.6 million in revenue from the 1982 championship tournament; the organization did not report any of the revenue as taxable unrelated business income. The Internal Revenue Service determined that the NCAA was liable for about $10,400 in taxes on about $56,000 in income derived from program advertising revenue.

In reversing the United States Tax Court's determination that the program advertising revenue was subject to taxation, Judge Seymour noted that the NCAA had conceded that the advertising was a "trade or business," and was not "substantially related" to the organization's exempt purpose. However, contrary to the tax court's conclusion, Judge Seymour stated that the three week span of the tournament constituted the relevant time frame of the business activity in issue. Thus, the NCAA's involvement in the sale of advertising space "was not sufficiently long-lasting to make it a regularly-carried-on business solely by reason of its duration."

With respect to the Commissioner's claim that the program advertisements resembled material suitable for commercial periodicals, the court pointed out that a substantial number of the advertisements, particularly those placed by local companies not engaged in the tourist industry, appeared to be "complimentary contributions." In any event, stated Judge Seymour, the program advertising met the regulatory standard of being an intermittent activity. The programs were distributed over less than three weeks at an event that occurred only once a year - this was sufficiently infrequent to preclude a determination that the NCAA's advertising activities amounted to a regularly carried on trade or business.

Judge Seymour concluded by observing that the NCAA program, published only once a year, was not an unfair competitor for other publishers of advertising, and that applying the unrelated business tax therefore would not further the statutory purpose of preventing unfair competition between companies whose earnings would be taxed and those whose earnings would not be taxed.

In the fall of 1991, the Chief Counsel's Office of the Internal Revenue Service announced its disagreement with the above-noted decision, but declined to seek Supreme Court review of the issue. The Internal Revenue Service apparently equates the NCAA's advertising activity to commercial businesses placing advertising on a seasonal basis, such as race tracks and professional sports teams, and, as distinguished from the court, refers to a time span which includes the time spent in soliciting advertisements and preparing them for publication.

National Collegiate Athletic Association v. Commissioner of Internal Revenue, 914 F.2d 1417 (10th Cir.

1990); Internal Revenue Service AOD-1991-015 [ELR 13:5:9]

Court affirms decision granting summary judgment to movie studios on antitrust counterclaims brought by hotel in action involving in-room viewing of rented videodiscs

In 1989, a Federal Court of Appeals in California (ELR 10:9:13) upheld a District Court decision finding that the owners of a hotel in Palm Springs did not violate the Copyright Act by renting videodiscs to the hotel's guests for viewing on videodisc players placed in the guests' rooms.

The hotel had filed counterclaims charging that Columbia Pictures Industries and seven other studios violated the Sherman Act and state antitrust and unfair competition laws. It was alleged that the copyright infringement action was a sham brought with the intent to monopolize and restrain trade. The hotel owner also claimed that the studios' concerted refusal to grant licenses to the hotel to rent the videos, as well as other unspecified activities, constituted a pattern of anticompetitive conduct.

A Federal District Court granted the studios' motion for summary judgment with respect to the antitrust counterclaims, stating that the hotel did not demonstrate that the alleged conduct caused antitrust injury. The hotel did not plead or present evidence that the videodisc rental service was interrupted, that the hotel lost a single guest, or that the studios' conduct prevented the marketing of the video viewing system to other hotels.

Judge William C. Canby, Jr. then found that filing of the infringement action did not violate the antitrust laws. Under the Noerr-Pennington doctrine, the filing of a lawsuit is immune from the antitrust laws unless the suit is a "sham." But the hotel did not allege that the studios' lawsuit involved misrepresentations, and the hotel did not challenge the District Court's finding that the lawsuit was brought with probable cause and presented issues that were difficult to resolve.

The District Court did not abuse its discretion in denying the hotel's request for further discovery or in dismissing the hotel's state law counterclaims, concluded Judge Canby.

Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc., Case Nos. 90-55583/90-55668 (9th Cir., Sep. 24, 1991) [ELR 13:5:10]

Football player's claims that NFL's free agent restraints violate California antitrust law are precluded by federal commerce clause

In February 1989, the National Football League and its member teams agreed that each team had the right to protect thirty-seven out of forty-five players on its active player roster. The protected players would be subject to a first refusal/compensation system whereby a team could prohibit a veteran free agent from moving to another NFL team by exercising a right of first refusal and matching a competing team's offer to such player. If the player's former team chose not to match the offer, it would receive substantial compensation from the new team, i.e., one or more college draft choices. Under the 1989 "Plan B," which was not part of a collective bargaining agreement and was not approved by the players, many players would remain bound to their former teams.

Bobby Hebert played for the New Orleans Saints from 1985 to 1990. When Hebert's contract expired on February 1, 1990, the Saints designated Hebert a protected player. Hebert had a two-month period during which he could attempt to negotiate with another NFL team. Hebert did not receive any offers from any NFL team during the two month period; he therefore was barred from conducting contract negotiations with any team, and remained the exclusive property of the Saints for the 1990-1991 season.

Hebert discussed playing for the Los Angeles Raiders, but the team stated that Plan B would prohibit entering a contract.

Hebert, claiming that Plan B restrained him from engaging in his profession in violation of article I, section 1 of the California Constitution and section 16600 of the Business and Professions Code, sought declaratory and injunctive relief.

The NFL parties demurred to the complaint on the ground that the commerce clause of the United States Constitution would preclude applying California law to the League. The trial court sustained the demurrer and entered judgment dismissing the complaint.

In affirming the trial court's judgment, California Court of Appeal Presiding Judge Lillie agreed that the decision in Partee v. San Diego Chargers Football Co., 34 Cal.3d 378 (1983; ELR 5:12:14) was controlling and required the dismissal of Hebert's complaint for failure to state a cause of action. In Partee, the California Supreme Court held that the commerce clause precluded the application of California's antitrust law to professional football.

Judge Lillie stated that although Hebert relied on a provision of the California Constitution, the basis of the player's claim - the alleged deprivation of his right to work as a professional football player - "was included in the rights alleged in Partee to constitute a violate of the

Cartwright Act, which Partee held may not be enforced because of its impermissible burden on interstate commerce."

Hebert v. Los Angeles Raiders, Ltd., Case No. B057462 (Ca.Ct.App., Sep. 17, 1991) [ELR 13:5:10]

Nevada Supreme Court declines jurisdiction in dispute between MGM and Walt Disney Company concerning use of MGM name, logo and trademarks for movie theme park

MGM granted Walt Disney Company "the worldwide exclusive right," to use the "MGM" name, logos, trademarks, and films in connection with studio theme parks. In 1989, MGM Grand sought a declaratory judgment in a Nevada trial court permitting the company to use the

MGM insignia for a proposed Las Vegas movie theme park. The court granted Disney's motion to quash service of process due to a lack of jurisdiction.

The Nevada Supreme Court, agreeing that it was "neither reasonable nor constitutionally permissible to require [Disney] to litigate this contract dispute in Nevada," has denied MGM's petition for a writ of mandamus compelling the trial court to vacate its order. It was observed that substantially similar litigation was taking place in California; that California law would apply to MGM's claims; and that both parties' primary place of business was in California. Disney's contacts with the state of Nevada consisted of advertising and promoting the company's California theme parks; such contacts were neither continuous nor systematic. And Disney's subsidiaries' contacts were not relevant for jurisdictional purposes because Disney exercised "no more control over its subsidiaries than [was] appropriate for the sole shareholder of a corporation."

Specific jurisdiction was not present because Disney did not direct any sort of action toward Nevada. Contrary to the dissent's view, the court stated that the contractual grant of rights did not establish a "worldwide contact" which would subject Disney to jurisdiction anywhere in the world.

The dissent noted that the parties' contract did not contain a "choice of forum" clause, suggesting, to Chief Justice Mowbray, that Disney "anticipated being haled into court in other jurisdictions where a controversy might arise." Chief Justice Mowbray would have found that MGM made a prima facie showing of personal jurisdiction by alleging that Disney had challenged the use of the MGM name for the Las Vegas theme park - Disney's conduct and actions, stated the dissent, would substantially interfere with the proposed park. Furthermore, Disney was a large corporation which could afford to litigate anywhere, Nevada had a strong interest in encouraging a major construction project, and efficiency concerns supported resolving the dispute prior to such construction, concluded Chief Justice Mowbray.

MGM Grand, Inc. v. Eighth Judicial District Court, 807 P.2d 201 (Nev. 1991) [ELR 13:5:11]

Model/actress "Go Beverly" refused preliminary injunction for defamation and unauthorized use of name and picture in film "Strictly Business"

The Supreme Court of New York, New York County, has denied preliminary injunctive relief to a model/actress who claimed that the soon to be released film "Strictly Business" defamed her and used her name, portrait or picture in violation of New York Civil Rights Law section 51.

Armed with an old and subsequently discarded draft of the screenplay, plaintiff Go Beverly a/k/a Beverly Bond claimed that her name was used without permission as the name of a character in the film and as its title, which plaintiff believed to be "Go Beverly." She also contended that the film depicted her through its portrayal of a character alllegedly named "Beverly" (actually named "Natalie" in the film) because of the certain similarities between them.

Plaintiff became known as Go Beverly when her manner of dancing at clubs and parties drew onlookers who chanted "go Beverly." In the film, the character Natalie is seen dancing in a nightclub encircled by patrons who chant "go Natalie."

Natalie appears for the first time in a scene shot at a restaurant at which plaintiff was once employed. Finally, plaintiff was allegedly a promoter at the New York nightclub "Kilimanjaro" as was Natalie in the film

While claiming that the foregoing similarities constituted her "picture" for the purposes of N.Y. Civil Rights Law section 51, plaintiff also asserted that her characterization was so inaccurate and disparaging as to constitute defamation.

Defendants' opposition to the motion pointed out that plaintiff had been misinformed about the film's title, which was no longer "Go Beverly," and about the name of the character alleged to represent her, which had been changed from Beverly to Natalie. Defendants claimed that without the use of plaintiff's name to anchor her section 51 and defamation claims, she would have difficulty showing how the foregoing similarities between herself and the character could constitute her "name, portrait or picture" or otherwise serve to identify her to the public at large. Defendants also argued that the film's fictional nature makes it almost impossible for it to be construed as a defamatory statement about the plaintiff and that as a form of entertainment, the film is entitled to substantial protection under the First Amendment.

After hearing oral argument from both sides, the court questioned whether plaintiff had made a sufficient showing of irreparable injury and, without an opinion, denied her request for preliminary relief. The case is still pending and no trial date has been set.

Go Beverly a/k/a Beverly Bond v. Island Pictures, et. al., No. 18291/91 (Sup. Ct., N.Y. Cty. September 6, 1991) [ELR 13:5:11]

BOZO'S restaurant met "use in commerce" requirement of Lanham Act, rules court in upholding dismissal of Larry Harmon Pictures' opposition to registration of service mark

Larry Harmon Pictures Corporation opposed the application for registration by the Williams Restaurant Corporation of the service mark BOZO'S for restaurant services. A Federal Court of Appeals has upheld the United States Patent and Trademark Office Trademark Trial and Appeal Board decision dismissing the opposition.

Judge Archer noted that Williams operated BOZO'S pit barbecue restaurant in Mason, Tennessee (about a one hour drive from Memphis) since 1932, and that the restaurant served some interstate travelers. The Board concluded that Williams' use of its service mark satisfied the use in commerce requirement of Section 3 of the

Lanham Act. Judge Archer rejected Harmon's argument that an "increased threshold level" of interstate activity would be required before registration of a mark used by a single-location restaurant could be granted.

Judge Pauline Newman, in dissent, stated that the Board incorrectly adopted Williams' version of the disputed facts, and improperly shifted the burden of proof on summary judgment. Judge Newman noted the factual dispute over the extent of services provided to customers from other states, and declared that the Board erred in accepting, on summary judgment, Williams' version of the facts.

The Board also erred, in Judge Newman's view, in holding that "some" contact with interstate commerce was sufficient for single location restaurant service to be "rendered in commerce" within the meaning of the Lanham Act. According to Judge Newman, the legislative history of the Lanham Act indicated that Congress intended to deny federal registration to marks for "local matters that affect or hamper interstate commerce." BOZO'S Restaurant was not located on an interstate highway or near a state line, was not listed in any travel or restaurant guides, was not advertised in any out-of-state media, had no liquor license, accepted no credit cards, and took no reservations, observed Judge Newman, in concluding that even if the rules governing summary judgment were correctly ignored by the Board, the cited facts did not meet the threshold criterion of services "rendered in commerce."

Larry Harmon Pictures Corporation v. Williams Restaurant Corporation, 929 F.2d 662 (Fed.Cir. 1991) [ELR 13:5:12]

Court issues rulings in libel case against Glamour magazine and author of article about Foretich/Morgan custody dispute

As reported at ELR 12:9:10, the November 1988 issue of Glamour magazine included an article concerning the highly-publicized custody dispute between Eric Foretich and his former wife, Dr. Elizabeth Morgan, over their daughter Hilary.

Foretich sued the magazine, alleging various causes of action. The court ruled that Foretich's claims for defamation and emotional distress based on the original publication of the article were barred by the applicable one year statute of limitations, but ordered discovery concerning the alleged republication of the article.

Glamour and the author of the article, Bob Trebilcock, had agreed that the publication rights in the article would revert to the author once the November 1988 issue of Glamour was removed from sale. Trebilcock granted an organization known as Friends of Elizabeth Morgan permission to make 400 copies of the Glamour article and granted permission to the National Organization for Women to reprint 1600 copies of the piece (the NOW distribution apparently was not at issue). Trebilcock specified that no distribution of the reprints should occur before November 15th and required the organizations to include certain disclaimers.

A Federal District Court in the District of Columbia has found the republication of the Glamour article in the form of the Friends of Elizabeth Morgan reprints was reasonably foreseeable to Trebilcock. However, Judge Gesell determined that Foretich's claims against Trebilcock were time-barred, noting, in part, that Trebilcock's role in the republication was a separate occurrence from the original publication and that relation back was not appropriate. The court therefore dismissed all claims against the Glamour parties for defamation and intentional infliction of emotional distress concerning the November 1988 publication of the article in issue and any republication of the article.

In a subsequent memorandum addressing certain remaining claims, Judge Gesell noted that Foretich had challenged statements in a "Letters from Readers" page in the January 1989 Glamour referring to the November 1988 article, and statements in a December 1989 issue of Glamour in which the magazine designated Dr. Elizabeth Morgan as one of twelve "Women of the Year." The court, citing Milkovich v. Lorain Journal Co., 110 S.Ct. 2695 (1990; ELR 12:2:8), dismissed the claims based on four of the statements. It was noted that the issues in the highly publicized controversy were "of mounting public concern. Glamour took sides and appeared to support Morgan, but its position alone cannot transform opinions or otherwise innocuous statements into defamation in the manner [the Foretich parties] imply." Judge Gesell also pointed out that there was "serious doubt" that the challenged statement were "of and concerning" any of the Foretich parties, or were capable of a defamatory meaning.

The court declined to find that a statement concerning a deceased infant sister of Eric Foretich was not capable of a defamatory meaning, and allowed Foretich, subject to further development of the relevant facts, to proceed with an emotional distress claim with respect to this aspect of the case.

In June 1991, the court, in a lengthy opinion, granted summary judgment to the magazine parties on the defamation and emotional distress claims of Eric Foretich and of his father, Vincent Foretich. The court also found that although Eric Foretich's mother, Doris, was a limited purpose public figure, Doris Foretich was entitled to proceed to trial on her defamation and emotional distress claims. However, the court granted Trebilcock's motion for summary judgment as to both claims. The claims of the Foretich parties were based on a letter to the editor and an accompanying editor's note published in the January 1989 edition of Glamour.

Briefly, the court determined that the challenged statements were not "of and concerning" Vincent Foretich, and that it was not shown that the magazine parties intended, knew, or should have known that the challenged statements would inflict severe distress either on Vincent or Eric Foretich.

Judge Gesell then pointed out that Eric Foretich had not presented any new facts to support the claim that the challenged statements defamed him.

With respect to Doris Foretich's claim, Judge Gesell concluded that, based on the record before the court, a reasonable factfinder might find by clear and convincing evidence that the magazine parties acted with actual malice. At trial Doris Foretich will be subject to the evidentiary burdens of New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

Foretich v. Glamour, 753 F.Supp. 955 (D.D.C. 1990); 765 F.Supp. 1099 (D.D.C. 1991) [ELR 13:5:13]

Nebraska Supreme Court upholds damage award for cable systems' failure to deliver promised number of subscribers to purchaser, but remands matter for recalculation of interest

In June 1985, Harmon & Company, Inc., the predecessor in interest of Harmon Cable Communications, agreed to purchase a cable television system from Scope Cable Television, Inc. and a cable system from Scope Cable Television of Nebraska Co. The corporate seller warranted that, as of the date of closing, it would deliver at least 1,200 "basic subscribers" and 1,160 "pay subscribers." The partnership seller warranted that it would deliver at least 2,125 basic subscribers and 2,060 pay subscribers. The parties subsequently acknowledged that the sellers would be unable to deliver the warranted number of subscribers, but completed the sale upon Harmon's payment of a total of about $2.5 million to the sellers. Harmon also executed a promissory note in the amount of $5,000 to the corporate seller and a note in the amount of $20,000 to the partnership seller.

When Harmon sued the cable parties, a Nebraska trial court jury awarded damages to Harmon in the amount of about $106,000 against the corporate seller. The jury also awarded Harmon damages of about $9,000 against the partnership seller, but the trial court found that the seller was entitled to $20,000 on the promissory note;

after various adjustments were made, the partnership seller was awarded about $9,100 against Harmon.

After lengthy review, the Nebraska Supreme Court essentially upheld the determination of the trial court, but vacated the judgments of the court and remanded the matter with the direction that judgment be entered in accordance with the Supreme Court's opinion, apparently to correct the calculation of interest accruing to the sellers on the promissory notes after Harmon's damages were set off in each case.

Harmon Cable Communications of Nebraska v. Scope Cable Television, 468 N.W.2d 350 (Neb. 1991) [ELR 13:5:13]

Video distributor obtains damage award in copyright infringement action against retail stores

International Audio-Visual Corporation, the exclusive distributor in the United States and Canada of Mandarin language television programs produced by three Taiwanese companies, licensed a company known as New York Chinese to distribute videotapes of the programs in New York and New Jersey.

In 1989, in response to a lawsuit brought by New York Chinese, a Federal District Court found several retail stores liable for copyright infringement and entered an order enjoining any further infringement.

In June 1991, United States Magistrate Judge Kathleen A. Roberts, in calculating damages, noted, among other factors, that one of the purported infringers, U.E. Enterprises, copied and distributed over 50,000 infringing tapes in the period between January 1987 and April 1988; that costs totalling $6.35 were incurred for each infringing tape; and that there was an average profit of

$6.40 on the tapes sold to certain stores, and a profit of about $3.15 per tape on sales to U.E. Enterprises' retail stores. Magistrate Roberts stated that the evidence presented during both the liability and damages phases of the action established by a preponderance of the evidence that the video stores distributed unauthorized copies of registered works commencing on the date of importation of the infringing copies.

Magistrate Roberts, after careful review, determined that New York Chinese's lost profits totalled about $90,000 and that the company also was entitled to recover the infringing stores' profits in the amount of about $101,000.

It also was found that the video stores' conduct was a "blatant and cavalier violation" of New York Chinese's copyrights. The stores, stated Magistrate Roberts, engaged in "a massive counterfeiting scheme whereby they imported, distributed and rented over 61,000 exact copies of the Programs." U.E. Enterprises and the other retail parties had read the advertisements placed by International Audio-Video and New York Chinese concerning the ownership of the United States copyrights in the programs; had sought, unsuccessfully, to obtain a license from International Audio-Video to market the programs; and were aware of the need to pay a license fee to distribute videotapes.

If New York Chinese were to elect statutory damages, concluded Magistrate Roberts, the award against U.E. Enterprises would total $680,000 - approximately the amount the infringers would have been required to pay to New York Chinese or to International Audio-Video as licensing fees in order to distribute the infringing tapes lawfully. The retail stores not affiliated with U.E.Enterprises were found liable for statutory damages, as specified by the magistrate, in amounts ranging from $7,500 to $35,000.

The president and one-third owner of U.E. Enterprises was held individually liable, jointly and severally, for copyright infringement because "he had control over and a financial interest in the infringing activity, and because he personally participated in it."

New York Chinese was entitled to recover actual damages totalling about $718,000, or statutory damages totalling $762,500, as well as costs and attorney's fees in an amount to be determined.

New York Chinese TV Programs, Inc. v. U.E. Enterprises, Inc., 1991 U.S.Dist. LEXIS 8075 (S.D.N.Y. 1991) [ELR 13:5:14]

Court awards $10,000 and $116,000 in legal fees to cookbook author in infringement claim involving Pepperidge Farm advertising campaign

Susan Branch, the author and illustrator of a cookbook entitled "Heart of the Home," claimed that a Pepperidge Farm advertisement infringed her copyrighted work. The cookbook, handwritten in script, contained pictures, poems, quotations and notes to the reader as well as recipes.

When Ogilvy & Mather was preparing an advertising campaign for Pepperidge Farm, the agency asked Branch to illustrate the campaign. However, the agency changed Branch's preliminary drawings, in part, by cutting and pasting onto the "comps" several of the illustrations from Branch's book.

The agency and Branch did not reach an agreement concerning Branch's services. The agency then instructed another illustrator to base the handwriting in the advertisements on the cookbook. As described by Federal District Court Judge Charles H. Tenney, "the layout space for the ads had already been calculated according to the dimensions of Branch's handwriting."

In ruling on various motions by the agency, Judge Tenney granted a motion to exclude from evidence certain letters, advertisements and reviews. Branch offered the material to prove the value of her work, but the court stated that there was no relationship between the value of the cookbook and its similarity to the advertisements; the evidence thus was irrelevant on the issue of copying.

Judge Tenney next found that a jury would be allowed to consider the individual elements of the cookbook in deciding whether the agency copied the "total concept or feel" of the work; agreed with a prior determination that the "total concept or feel" of the cookbook was protected by copyright law; and stated that Branch was entitled to introduce expert testimony that copying occurred with respect to similarities between individual elements of her cookbook and the challenged advertisements. Once Branch established copying, a jury, using the ordinary lay observer test, would determine whether the copying constituted unlawful appropriation; expert testimony would be improper on this question.

In December 1990, according to news reports, a jury awarded $1 in damages to Branch. In August 1991, Judge Tenney denied a motion for judgment notwithstanding the verdict, refusing to award Branch the $307,500 earned by the agency in gross revenues for the advertising campaign. The agency had claimed expenses of about $417,000, and the jury's award of nominal damages could have been based on this evidence. However, the court awarded Branch $10,000 in statutory damages and about $116,000 in legal fees. The court did not exceed the maximum statutory amount because the copyright infringement was not willful - the agency's decision to continue to publish the infringing advertisements was based on advice from its lawyers.

Branch v. Ogilvy & Mather, Inc., 765 F.Supp. 819 (S.D.N.Y. 1990) [ELR 13:5:13]

Metropolitan Museum of Art obtains summary judgment in dispute between art collector and art historian

An ongoing dispute between art collector Sean McNally and art historian James Yarnall concerning the stained glass work of artist John La Farge eventually resulted in a lawsuit in which McNally claimed that Yarnall's statements about McNally's restoration work were defamatory and diminished his professional reputation, and that statements in Yarnall's letters to various parties diminished the value of the collector's La Farge pieces.

A Federal District Court in New York first noted that the subject of Yarnall's statements - the works of La Farge - was a matter of public concern; the statements on "the authenticity and value of works attributed to La Farge affect[ed] the market for and the tax implications of donating La Farge's works among the segment of the population that trades such works as well as the community of scholars with an interest in La Farge..."

Judge Sweet then determined that Yarnall did not act with gross irresponsibility in making the alleged statements about a work known as the Garland Window, and that the challenged statements concerning works known as the Rooster Window and the Hollyhocks Window were protected under the New York State Constitution and under the First Amendment and were not actionable.

The Metropolitan Museum of Art, named as a party due to Yarnall's association with the museum on several projects, sought summary judgment with respect to claims based on Yarnall's letters. The court rejected the museum's argument that New York's qualified privilege protected the statements in issue. Judge Sweet further found that even assuming that McNally was a limited purpose public figure, the art collector raised a factual issue as to the question of malice.

The museum prevailed, however, on its claim that Yarnall was not an employee of the museum for the purposes of the challenged correspondence, and the court granted summary judgment in favor of the museum with respect to the claims arising therefrom. Judge Sweet also granted the museum's motion for summary judgment on McNally's claims for tortious interference with contractual relations and prospective business relationships.

In a separate proceeding, the court denied McNally's motion to include Yarnall's lawyer and law firm as parties due to the attorney's purported statement in a newspaper article that McNally owned a "houseful of quasi-La Farges." The statements in issue related to the underlying litigation, directly referred to a possible defense, and appeared in an article that gave balanced treatment to both sides of the controversy and clearly identified the speaker as Yarnall's attorney. Judge Sweet concluded that the alleged statement was absolutely privileged under New York law.

McNally v. Yarnall, 764 F.Supp. 838; 764 F.Supp. 853 (S.D.N.Y. 1991) [ELR 13:5:15]

Restorer must return wayward 1930s mural to city of Stamford

In 1934, the Works Progress Administration commissioned James Daugherty to paint six murals for the walls of Stamford High School. The murals were painted on light-weight canvas panels, and were displayed in a music room from 1934 until 1970; the complete work measured over eight feet tall and more than one hundred feet long. When the school was renovated in 1970, workers, without the authorization of school officials, removed the murals and placed them with other construction debris.

In 1971, the General Services Administration obtained the murals from a Stamford student who had recognized the works, stored them at his home, and notified the government of their whereabouts. A government official delivered the murals to Hiram Hoelzer, an art restorer in New York. The official stated that it was understood that Hoelzer would store the murals on behalf of the

United States Government, restore them when funding became available, and return the murals to the government upon being instructed to do so. Although a member of the high school's art department had noticed the loss of the murals, school officials took no further action.

In 1980, an art history student notified Stamford school officials of the location of the murals, but it was not until 1986 that the city requested the return of the works. Hoelzer, who had not been paid for storing the pieces or for his preliminary restoration efforts, rejected the city's request and, in 1989, sued the city seeking a declaratory judgment to quiet title in the murals. The matter was removed to federal court, and the court ruled that the murals belonged to the city of Stamford. Federal Court of Appeals Judge Irving R. Kaufman agreed that the District Court correctly stated that New York law requires the owner of lost property to make a demand, within a reasonable time for the return of the goods in order secure a claim in replevin and to begin the running of the three year statute of limitations. The District Court had cited the case of DeWeerth v. Baldinger, 836 F.2d 103 (2d Cir.1987; ELR 10:1:6), cert. denied, 486 U.S. 1056, in imposing an obligation of due diligence upon owners searching for lost property. However, in Solomon R. Guggenheim Foundation v. Lubell, 77 N.Y.2d 311 (1991; ELR 13:1:11), the New York Court of Appeals removed the due diligence requirement with respect to the statute of limitations defense in actions for the repossession of lost or stolen art.

Thus, the city of Stamford's claim was not affected by a due diligence requirement, stated Judge Kaufman, particularly because the city had no reason to believe its possessory interest was "in jeopardy." The city's cause of action accrued in 1986, upon the refusal of the first demand for the return of the mural, and the action was brought within the three year statute of limitations. The court also agreed with the District Court that there was no compelling evidence that the city intended to relinquish the ownership of the murals.

Judge Jon O. Newman, concurring in the court's opinion, emphasized that the diligence of the original owner in seeking to locate an art work would be a relevant consideration in applying the doctrine of laches.

Hoelzer v. City of Stamford, Conn., 933 F.2d 1131 (2d Cir. 1991) [ELR 13:5:16]

Art gallery parties may add statute of limitations defense in third party claim arising from dispute over ownership of Chagall gouache

In Solomon R. Guggenheim Foundation v. Lubell (ELR 13:5:16), the Guggenheim Foundation sought to recover possession of a Chagall gouache. Mrs. Jules Lubell brought a third party action against the executors of the estate of the deceased owner of the gallery which had sold the work to Mrs. Lubell and her husband.

The gallery owner had warranted title in 1967 when the Lubells purchased the Chagall work. The executors argued that Lubell's cause of action for breach of warranty of title was time barred because the applicable statute of limitations was four years from the date of delivery of the gouache. It also was argued that Lubell's cause of action for fraudulent misrepresentation was barred because the third party action was served more than two years from the time when Lubell "discovered the fraud, or could with reasonable diligence have discovered it..."

Lubell claimed that the breach of warranty cause of action had not accrued because Lubell sought indemnity in the event that the Guggenheim prevailed; an indemnity claim would not accrue until after judgment was entered against the party seeking indemnification. Lubell also challenged the contention that the facts constituting the purported fraud could have been discovered with reasonable diligence prior to the end of October, 1987; according to Lubell, the relevant facts were not available to her until the Guggenheim made its formal demand.

A New York trial court, declining to rule "at this time," on the question of whether the cause of action for breach of warranty was a claim for indemnity or was time barred, granted the executors' motion to amend their answer to add the defense of the statute of limitations to the two causes of action in the third party complaint.

Solomon R. Guggenheim Foundation v. Lubell, New York Law Journal, p. 21, col. 2 (N.Y.Cnty., Sep. 24, 1991) [ELR 13:5:16]

Dispute over distribution of Dali lithographs is remanded for reconsideration of damages

Litigation over the right to receive income from lithographic reproductions of certain Salvador Dali illustrations resulted in a 1989 Federal District Court jury verdict awarding breach of contract damages of $1.14 million to Werbungs und Commerz Union Austalt. When Collectors' Guild, Ltd. challenged the verdict, Judge Charles H. Tenney denied the company's motion for judgment notwithstanding the verdict, but stated that a new trial would be ordered unless Werbungs agreed to accept about $718,000 in damages, rather than the amount awarded by the jury; it was pointed out that if additional evidence concerning Collectors' Guild's inventory of unsold lithographs had been admitted, the jury might have returned a smaller award (ELR 12:2:15).

A Federal Court of Appeals has affirmed the District Court's judgment on the issue of liability, but reversed and remanded for a new trial on the issue of damages.

The Collectors' Guild argued that the District Court improperly precluded certain sales and inventory evidence that was relevant to establishing the amount of income earned by the company on the sale of the reproductions; the court had determined that the evidence should have been produced in response to Werbungs' discovery request. In addition to excluding the evidence, the court instructed the jury that in evaluating the evidence on damages, the jury could consider whether Collectors' Guild engaged in "any wrongful [discovery] conduct" that "contributed to Werbungs' inability to establish its damages with certainty."

Judge Frank X. Altimari found that the District Court abused its discretion and committed plain error when, through its instruction, "it allowed the jury, in effect, to sanction Collectors' Guild for its late production of documents." The court went "too far in attempting to assure that Collectors' Guild did not benefit from its late production of documents," and the instruction contributed to what was, as described by the court, "clearly a punitive damage award." Remittitur was not an appropriate measure to compensate for an excessive verdict and "did not cure the court's defective jury instruction."

Federal Court of Appeals Judge Mahoney dissented only from the court's decision not to reach the issue of whether the District Court's preclusionary rulings were proper. Judge Mahoney would have reversed for instructional error; declared that there was no error in the

District Court's preclusionary rulings, and remanded without any directions limiting the discretion of the District Court on the issues of damages and discovery sanctions.

Werbungs und Commerz Union Austalt v. Collectors' Guild, Ltd., 930 F.2d 1021 (2d Cir. 1991) [ELR 13:5:17]

Briefly Noted:

Andy Warhol Licensing Agreement.

In a 1987 licensing agreement, the Estate of Andy Warhol granted Schlaifer Nance & Company the exclusive rights to license Warhol's artwork, trademarks and copyrights. A Federal District Court in New York has upheld Schlaifer Nance's decision to litigate various claims, rather than submit the claims to arbitration. The licensing agreement's limited arbitration clause allowed claim splitting, and a pending arbitration proceeding therefore did not bar the instant action, ruled the court in denying the estate's motion for summary judgment or a stay.

Schlaifer Nance & Company, Inc. v. Estate of Warhol, 764 F.Supp. 43 (S.D.N.Y. 1991) [ELR 13:5:17]

Trademark Infringement.

Pristine Industries, the manufacturer of sportswear displaying the registered "Hotdogger" name and/or a cartoon-type picture of an unregistered "anthropomorphic hotdog" character, sought a preliminary injunction to prevent Hallmark Cards, Inc. from distributing a Christmas tree ornament featuring a figure of a hotdog on skis. In denying the requested relief, Federal District Court Judge Robert W. Sweet noted that the word "hotdogger" was a common slang term for a "show-off" and was not a strong mark; that the ornament was sold under the Hallmark and Keepsake Ornament trademarks; and that, although there were substantial similarities between Pristine's Hotdogger character and Hallmark's ornament, some differences did exist. Judge Sweet also observed that Pristine's and Hallmark's products were not proximate, given the nature of the products and the differences in marketing strategies; that there was no overlap in the consumers of the products; that both groups of consumers were highly sophisticated; and that there was evidence showing that Hallmark created the ornament in good faith.

The court, finding that there was no likelihood of confusion between Hallmark's and Pristine's products, rejected Pristine's causes of action alleging trademark infringement under the Lanham Act, common law trademark infringement, and unfair competition. The court also rejected a cause of action under New York's anti-dilution statute.

Pristine Industries, Inc. v. Hallmark Cards, Inc., 753 F.Supp. 140 (S.D.N.Y. 1990) [ELR 13:5:18]

Toys "R" Us Trademark.

A Federal District Court in Puerto Rico has granted a preliminary injunction to Geoffrey, Inc., the holder of the Toys "R" Us trademarks and service marks in an action against a company using the name Toys 'R Us.

Judge Pieras, in finding that Geoffrey, Inc. had demonstrated that it would probably succeed on the merits of its trademark infringement action alleging the wrongful use of the mark, noted that Geoffrey was the senior user of the marks in issue; that the marks were almost identical and the kinds of goods involved were identical; that there was considerable similarity in the parties' channel of trade, advertising and classes of prospective customers; and that Toys "R" Us was a strong mark.

The court also found that Geoffrey stated a cause of action under section 43(a) of the Lanham Act for unfair competition or false designation of origin, and that the company demonstrated that it had superior rights over the mark and probably would succeed on the merits of this claim.

It was further found that Geoffrey established that the company's reputation and goodwill would be adversely affected in the absence of a preliminary injunction, and that Geoffrey's interest in preventing potential injury to the company's reputation in the future outweighed any inconvenience to the Toys 'R Us parties. The public interest would best be served by granting the injunction, stated Judge Pieras, who further noted that the Toys 'R Us parties began using the mark in issue after Geoffrey had registered its marks in commerce and "should not be able to trade on the reputation and goodwill that [Geoffrey] has invested in and maintained."

Geoffrey, Inc. v. Toys 'R Us, 756 F.Supp. 661 (D.Puerto Rico 1991) [ELR 13:5:18]

Theater Landmark Designation.

During the 1980s, the New York City Landmarks Preservation Commission conducted extensive studies and hearings concerning the designation as landmarks of several dozen Broadway theaters. In 1987, the commission, upon receiving the approval of the city's Board of Estimate, issued forty-seven landmark designations for twenty-eight theaters (some theaters were landmarked as to interior as well as exterior). Theater owners, including the Shubert and Nederlander Organizations, and the League of American Theatres and Producers challenged the commission's action, alleging, in part that the "aesthetic, cultural, and architectural attributes of the landmarked, and the non-landmarked theatres [were] essentially indistinguishable."

A New York appellate court has upheld a trial court decision rejecting the theater owners' claims. Judge Sidney H. Asch, noting the expertise of the members of the commission, stated that a reasonable basis existed for the designations as to each theater. And, contrary to the theater owners' arguments, the commission did not improperly act to preserve the Broadway theater industry, rather than individual theaters, stated the court. It was observed that the designation proceedings considered the exteriors and/or interiors of specific buildings in terms of the criteria of the Landmarks Preservation Law, and that the commission had granted landmark status to several theaters which were located outside of the Broadway district.

Shubert Organization, Inc. v. Landmarks Preservation Commission of the City of New York, 570 N.Y.S.2d 504 (N.Y.App. 1991) [ELR 13:5:18]

Libel.

Marcia Miller, an employee of an advertising agency, volunteered to pose for photographs which were to be used to promote items produced by American Sports Company. When Miller sued the company for libel and invasion of privacy, the trial court, at the close of all the evidence, dismissed the claims.

The Nebraska Supreme Court noted that Miller had not restricted the use of the photographs; that the allegedly suggestive use of the photograph did not indicate that Miller was "promoting or selling herself for another's sexual gratification;" and that Miller was not identified in any way. Furthermore, even if the photograph were libelous, Miller had consented to the publication. The trial court erred in not finding that Miller failed to prove a prima facie case of either invasion of privacy or libel, but nevertheless reached the correct judgment, stated Judge Caporale in affirming the judgment.

Miller v. American Sports Co., Inc., 467 N.W.2d 653 (Neb. 1991) [ELR 13:5:18]

Horse Racing/Driver Suspension.

On December 17, 1987, the stewards at an Illinois race track charged Brian Pelling with several violations of the state Racing Board rules, including a charge that Pelling had conspired to affect the outcome of a race held on November 6, 1987. During that race, Pelling, driving a horse he owned and trained, finished seventh out of nine drivers; Pelling was not questioned about the race until November 14, 1987. The stewards suspended Pelling's license to drive, train, and own horses for the remainder of 1987 and recommended that no future licenses be granted for five years.

The Illinois Racing Board found Pelling guilty only on a charge of unsatisfactory driving, but suspended his license through 1993 and excluded him from the premises of all racetracks under the board's jurisdiction during that time.

A trial court decision affirming the board's ruling has been upheld by an Illinois appellate court. The court noted that the stewards had testified that Pelling intentionally drove an unsatisfactory race, and that the trial court, on the basis of the testimony and a videotape of the race, correctly concluded that the findings of the board were not contrary to the "manifest weight of the evidence." The six year suspension was not unduly excessive, stated Judge DiVito, given the intentional nature of the conduct in issue and the prior violations in Pelling's racing record. The argument that due process requirements were not met was rejected, as were Pelling's claims challenging the applicable standard of proof and the length of his suspension.

Pelling v. Illinois Racing Board, 574 N.E.2d 116 (Ill.App. 1991) [ELR 13:5:19]

Horse Racing/Mutuel Clerk.

In a decision issued in April 1989, but only recently published, an Ohio trial court has affirmed an order of the State Racing Commission revoking the license of mutuel clerk Sue Powers. As described by Judge Ringland, Powers, upon receiving a ticket presented by a winning bettor, ran the ticket through the mutuel machine which indicated that the ticket had been cancelled prior to the race. The evidence established that the ticket was manually cancelled at Powers' window one minute and eight seconds after its purchase; manual cancellation would require a clerk to punch all thirteen digits of the ticket number into a computer terminal.

The Commission considered the allegation that Powers engaged in conduct which was against the best interest of horse racing by purportedly cancelling the wager in issue, without the wager being in error and without having the permission of the ticket holder (who also was the owner of the winning horse), and revoked Powers' 1987 mutuel employee license, denied her 1988 license and ordered that applications for future licenses would be referred to the Commission.

The court found that there was sufficient evidence to support the hearing officer's conclusions, and rejected Powers' claim that the phrase "conduct which is against the best interest of horse racing" was unconstitutionally vague.

Powers v. Ohio State Racing Commission, 572 N.E.2d 262 (Clermont Cnty. 1989) [ELR 13:5:19]

Horse Racing.

In a decision issued in December 1988, but only recently published, an Ohio appellate court has reversed a trial court decision modifying a penalty imposed upon a trainer by the Ohio State Racing Commission. In January 1985, the Board of Stewards of Northfield Park suspended Victoria Kash's license for sixty days and fined her $250 after tests revealed the presence of lasix in a urine sample taken from a horse trained by Kash. The Commission upheld the decision, and the appellate court found that the order was supported by "reliable, substantial and probative evidence."

Ohio State Racing Commission v. Kash, 572 N.E.2d 734 (Ohio App. 1988) [ELR 13:5:19]

DEPARTMENTS

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