RECENT CASES

Columnist Art Buchwald is awarded $150,000, and producer Alain Bernheim $750,000, for their contributions to "Coming to America," following trial court's determination that movie was "based upon" Buchwald's treatment and that the "net profit" provisions of their contracts with Paramount were "unconscionable"

Columnist Art Buchwald and producer Alain Bernheim are entitled to a total of $900,000 on account of their contributions to the movie "Coming to America," according to a decision issued by Los Angeles Superior Court Judge Harvey Schneider at the conclusion of the third phase of the trial in Buchwald and Bernheim's case against Paramount Pictures. The court awarded

Buchwald $150,000 as compensation for his three-page treatment, and Bernheim $750,000 for his producing services.

In January 1990, at the conclusion of phase one of the trial, Judge Schneider ruled that "Coming to America" was "based upon" a treatment Paramount had optioned from Buchwald. In reaching this conclusion, the court impliedly rejected testimony by Eddie Murphy, the movie's star, that he and he alone had independently created the story on which the movie was based. (ELR 11:9:9)

Buchwald's option contract provided that if Paramount produced a movie "based upon" Buchwald's treatment, Paramount would pay him $65,000 (less advances) plus a percentage of the movie's "net profits" as defined in the contract. Paramount hired Bernheim to develop Buchwald's treatment and to be the producer of the movie, if one were produced based upon that treatment.

Bernheim's contract provided that he would be paid $200,000 for those services plus a percentage of the movie's "net profits," as defined.

"Coming to America" was a boxoffice success, but it also was unusually expensive to produce and distribute. Among other expenses, Eddie Murphy and director John Landis both received profit participations based on the movie's gross receipts, and those participations were included in the movie's production costs, as provided in Buchwald's and Bernheim's "net profit" definitions. As a consequence of the movie's costs, it did not achieve "net profits" as defined in Buchwald's and Bernheim's contracts.

When Buchwald and Bernheim realized that the movie had not reached net profits, they asked Judge Schneider to declare the "net profit" portions of their contracts "unconscionable." In December 1990, following phase two of the trial, Judge Schneider did so. (ELR 12:8:3) It thus became necessary for the judge to determine what compensation they were entitled to receive, by some means other than by reference to their "unconscionable" contracts. This was the subject of the third phase of the trial which was held in March 1992.

Witnesses for Buchwald and Bernheim testified that the fair market value of their contributions to "Coming to America" was $6.2 million, on the theory that Paramount would have paid that amount on the eve of production, after it had already committed to paying Eddie Murphy and John Landis millions of dollars whether or not the movie were made. Judge Schneider rejected this approach - one which the judge himself described as a "gun-to-the-head" approach to fair market value.

Paramount's witnesses, on the other hand, testified that the fair market value of their contributions entitled them to compensation ranging from $150,000 to $200,000 for Bernheim and from $25,000 to $65,000 for Buchwald.

Paramount also introduced testimony that by comparison with amounts earned by producers on other comparable movies, the fair value of the contributions made by Buchwald and Bernheim were $252,000 and $82,000 respectively.

Judge Schneider concluded that "Paramount's experts came closer to the mark in establishing the compensation to which plaintiffs are entitled than did plaintiffs' experts." But he did not accept the opinions of Paramount's experts completely, because in Judge Schneider's opinion, Paramount's experts "failed to ascribe sufficient value to factors which the court believes are important."

Judge Schneider explained that in valuing Bernheim's contributions, Paramount's experts: (1) did not consider "the kind of deal Bernheim might have been able to negotiate had both parties known the net profit formula was invalid"; (2) did not "give sufficient consideration to the fact that Bernheim controlled Buchwald's concept - a concept that virtually everyone who testified at trial indicated was unique - and that this control enhanced the value of Bernheim's services"; (3) did not ascribe additional value to the fact that increased media attention would have been given to the project because Buchwald's name was associated with it; (4) did not consider that Buchwald's concept was one of the "twin pillars" of the movie's success, according to one of plaintiffs' experts; (5) did not consider that Eddie Murphy and John Landis each earned millions of dollars from the movie; and (6) did not give weight to the fact that Paramount "earned tens of millions of dollars of gross profits" from the movie.

Judge Schneider observed that the $750,000 value he placed on Bernheim's services fell within the range of earnings received by producers of five other movies which were roughly "comparable" to "Coming to

America" in costs and revenues. On those five movies, producer compensation ranged from a low of $150,000 to a high of $4.3 million.

While Judge Schneider concluded that "Paramount's evidence with respect to Buchwald's entitlement to compensation was even closer to the mark than was its evidence with respect to Bernheim," the judge again found that "Paramount's experts failed to give sufficient consideration to factors which have caused the court to conclude Buchwald is entitled to somewhat more compensation than testified to by Paramount's experts." These factors were: (1) the uniqueness of Buchwald's concept and the effect of the concept on the success of `Coming to America'"; (2) "Buchwald's stature as a nationally known humorist and the media attention that would result from a film based upon a concept created by him"; and (3) "the fact that Paramount has earned tens of millions of dollars of gross profits on `Coming to America.'"

Buchwald v. Paramount Pictures Corp., Cal.Super.Ct., LASC No. 706083 (March 16, 1992) [ELR 13:11:3]

Hotel in-room video viewing system resulted in "public performances" of movies that infringe studios' copyrights

On Command's system for the electronic delivery of videotapes to hotel occupants, as described by a Federal District Court judge, consists of a computer program, sophisticated electronic switches directed by the computer program, and a bank of videocassette players, all of which are centrally located in a hotel equipment room. The videocassette players are connected to the guest rooms by wiring. Each videocassette player contains a videotape. When a guest requests a particular movie, the computer identifies the videocassette player containing that movie, switches the videocassette player to that room, and starts the movie video.

Hotel guests operate the systems from their rooms by remote control. After the television is turned on, the screen lists the movies available; the guest selects a movie by entering the appropriate code on the remote control and the video then is seen only in the room where it was selected by the guest - "it cannot be seen in any other guest room or in any other location in the hotel," commented the court. The viewer cannot pause, rewind, or fast-forward the video, and when the movie ends, it is automatically rewound and then is immediately available for viewing by another hotel guest.

The only components of the system installed in the guest rooms are the hand-held remote control and a microprocessor in the television set. At the guest's request, the hotel clerk can prevent the transmission of adult movies to a room or deactivate service to a room. The On Command system, in comparison to existing closed-circuit hotel video systems, apparently provides a larger selection of movies, offers hotel guests greater flexibility in selecting viewing times, and "eliminates the effort and potential guest embarrassment of in-house hotel video rental programs" in which videocassette players are installed in individual rooms and guests must rent videos from the hotel staff.

When On Command sought a declaratory judgment that its viewing system did not infringe the copyrights held by various studios in the films shown through the system, the court granted the studios' motion for summary judgment on their counterclaim for copyright infringement.

A copyright owner, recalled the court, has the exclusive right "to perform the copyrighted work publicly" or to authorize any such public performance. The Copyright Act states that a performance is public if it occurs "at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered." A performance also may be public if a party "transmit[s] or otherwise communicate[s] a performance or display of the work to a place specified by [the clause above] or to the public, by means of any device or process."

In Columbia Pictures v. Professional Real Estate, 866 F.2d 278 (9th Cir. 1989; ELR 10:9:13), the court held that hotel guest rooms are not "public places" for the purposes of the Copyright Act. The studios in the instant case argued that because of the dispersal of the system components, the relevant place of performance was not the individual hotel rooms, but the entire hotel. In rejecting this argument, the court stated that the video of a movie is performed only when it is visible and audible - in the On Command system, this occurred only in individual guest rooms.

However, the On Command system, in the court's view, does "transmit" movie performances by communicating movie "images and sounds" by a "device or process" from the central console in the hotel to individual guest rooms where the images and sounds are received "beyond the place from which they are sent." On Command's argument that the system was not a transmission, but an electronic rental, similar to the physical borrowing of videotapes, was rejected. And the fact that hotel guests begin the transmission by turning on the television and choosing a video was "immaterial," stated the court.

On Command's video transmission were "to the public" for the purposes of the transmit clause, for although hotel guests may not be watching videotapes in a public place, the guests are members of "the public." The relationship between On Command and the hotel guest audience is a commercial, "public" relationship regardless of where the viewing takes place, and the company therefore "publicly performed" the studios' movies, concluded the court, and was liable for copyright infringement.

On Command Video Corporation v. Columbia Pictures Industries, 777 F.Supp. 787 (N.D.Cal. 1991) [ELR 13:11:4]

Coors Co. commercial parody of Energizer Bunny does not infringe Eveready Battery's trademark or copyright and does not constitute trademark dilution

Eveready Battery Company, during the late 1980s, produced about twenty Energizer Bunny commercials featuring a mechanical toy bunny in various "commercial within a commercial" settings.

In late 1990, the Adolph Coors Co. created a commercial for Coors Light in which actor Leslie Nielsen "interrupted" a beer commercial by walking into the scene wearing a conservative dark business suit, fake white rabbit ears, fuzzy white tail and rabbit feet. Nielsen carried a bass drum bearing the Coors Light logo. After beating the drum several times, Nielsen spun around rapidly, then exited from the screen while a background announcer stated "Coors Light, the official beer of the nineties, is the fastest growing light beer in America. It keeps growing and growing and growing..." In response to Eveready's action for copyright and trademark infringement, a Federal District Court in Illinois has ruled that the Coors work was a parody entitled to the protection of the fair use provision of the Copyright Act. Judge Charles Norgle noted that the first factor in the fair use analysis - the purpose and character of Coors' use - weighed in Eveready's favor. However, the second factor - the nature of the copyrighted work- was "at best neutral," stated Judge Norgle, given that the two works served "an identical purpose for their respective sponsors."

The amount and substantiality of the portion used by Coors in relation to the copyrighted work as a whole was not sufficient to weigh in favor of Eveready. Coors used certain elements of Eveready's work in order to "conjure up" an image of the Eveready commercials, but Nielsen did not copy the majority of the Energizer Bunny's "look" and there were significant dissimilarities between the two characters.

Eveready also did not show that the Coors' work harmed the potential market for or value of the copyrighted work, concluded Judge Norgle in finding that Eveready did not establish a likelihood of success on its copyright claim.

The court also rejected Eveready's claim under 43(a) of the Lanham Act. Assuming that Eveready had a protectible trademark in its Energizer Bunny, the company was not likely to prevail on its claim that the Coors commercial created a likelihood of confusion. Eveready did have a strong mark, agreed the court, but the very strength of the mark seemed to the court to weigh against a likelihood of confusion, particularly given the "obvious parody" of the Coors' commercial. No consumer was likely to mistake Coors as the source of origin for Energizer batteries or Eveready as the source of origin for Coors beer. And Coors did not intend to create the impression in consumers that its beer was endorsed or otherwise affiliated with Energizer batteries.

Judge Norgle continued by finding that the Coors commercial was a permissible parody which did not violate the Lanham Act.

Eveready's trademark dilution claim under state law was rejected - the company did not show that the Coors' commercial was likely to dilute the distinctiveness of the Eveready mark or the power of the association created by the mark. Judge Norgle pointed out that Eveready's trademark protection was "circumscribed by the boundaries of the mark itself," i.e., the bunny symbol illustrated in the trademark application, and that the other elements of the company's commercial, although possibly copyrightable expressions under the Copyright Act, did not all constitute protectible elements of Eveready's trademark. Coors "clearly did not use the entire Eveready Bunny mark," concluded the court, in denying Eveready's motion for a preliminary injunction.

Eveready Battery Co., Inc. v. Adolph Coors Co., 19 USPQ 2d 1265 (N.D.Ill. 1991) [ELR 13:11:5]

Macauley Culkin's contract for "Home Alone" sequel is a matter of public record, but New York court grants Fox's motion to seal screenplay

A New York surrogate court has ruled that the contract between actor Macauley Culkin and Twentieth Century Fox for the sequel to "Home Alone" is a matter of public record.

Surrogate Eve Preminger noted that in determining whether to approve an infant's film contract, a court usually reviews the contract, the screenplay, a schedule of the proposed financial arrangements between the infant and employer, and a schedule of the infant's gross earnings, estimated outlays and net earnings. The studio argued that providing these documents for public review would be a "serious threat" to Culkin, claiming that the disclosure might subject Culkin to investment advisers or physical harm. Surrogate Preminger, who has not yet approved Culkin's contract, characterized these fears as "unrealistic."

Fox also claimed that the public disclosure of its financial and contractual arrangements would hamper future negotiations with other artists and that disclosure of the screenplay could give Fox's competitors an "unearned advantage which would have a devastating financial impact."

Surrogate Preminger stated that the court acts as a representative of the public in reviewing infants' contracts, and that the public interest would only be achieved if the contract and financial schedules in issue were open for review. The documents were not trade secrets and did not concern private information about a person who was a party to the lawsuit.

It also was noted that the contract terms no longer were secret -the details of Culkin's contract were "colorfully displayed on magazine covers." However, since Fox had not yet submitted the document to the court, Surrogate Preminger did not discuss the contract terms.

With respect to the disclosure of the screenplay, the court stated that a screenplay may, in some instances, be classified as a trade secret since its disclosure could substantially diminish the property right of the owner. Since Fox's screenplay was a sequel to a very successful film and was not circulated within the industry, Surrogate Preminger agreed that there was a sufficient demonstration of harm to overcome the presumption favoring disclosure, and granted Fox's motion to seal the screenplay.

According to news reports, a Los Angeles trial court has approved the Fox-Culkin contract and sealed all documents.

Matter of Macauley Culkin, New York Law Journal, p. 22, col. 2 (Mar. 20, 1992) [ELR 13:11:5]

Original lead singer of "The Five Satins" owns service mark in group name

In 1955, Frederick R. Parris became the first lead singer of the group "The Five Satins." By 1958, Parris was performing as the lead singer for various groups known as "The Five Satins," "Fred Parris and the Five Satins," or a similar name. In 1978, Parris obtained a trademark registration for "The Five Satins;" the mark lapsed in 1981. Parris received a second registration in

1984 and consistently asserted that he owned the exclusive right to the service mark.

William Baker joined The Five Satins in 1956, when Parris was in the army, and became the group's lead singer. When Baker sued Parris for trademark infringement, a Federal District Court in New York granted Parris' motion for summary judgment.

Judge Whitman Knapp stated that it was beyond dispute that Baker could show no use of the mark from the time he left the group in 1958 to the time in 1982 when Baker "adopted" the name.

In turning to Parris' counterclaims, the court agreed that the singer, who continuously used the mark since at least 1959, owned The Five Satins mark. Judge Knapp then found that Baker infringed on Parris' registered service mark and that the infringement violated New York law and common law. Parris also prevailed on a counterclaim alleging the dilution of the "distinctive quality" of the service mark.

Baker argued that Parris' declaration in the registration applications to the Patent and Trademark Office were inaccurate in stating that Parris had continuously used the mark since 1955. But the court concluded that Parris made no false or fraudulent statements in the applications.

Baker v. Parris, 777 F.Supp. 299 (S.D.N.Y. 1991) [ELR 13:11:6]

Gay rights group may not use the name "Pink Panther Patrol"

A Federal District Court in New York granted MGM-Pathe Communications' motion for a preliminary injunction barring a gay rights group from using the name "Pink Panther Patrol," although ruling that the group may continue to use a paw print design as part of its logo.

Judge Pierre N. Leval found that MGM showed a substantial likelihood of confusion, irreparable harm and likelihood of success on the merits. It was noted that the Pink Panther is "a highly distinctive, successful and widely recognized mark referring to MGM's enormously popular comic character and films." The patrol's use of the name, stated Judge Leval, would raise questions in the minds of the public as to whether the promoters of the "comic" Pink Panther were engaged in sponsoring the patrol's cause and efforts. Such confusion would likely have an adverse effect on the value of MGM's mark, with the harm being difficult to measure and to compensate. The fact that other establishments might be using the Pink Panther did not preclude a finding that

MGM would suffer irreparable harm from the patrol's use of the mark.

After reviewing the factors relevant to a determination of the likelihood of confusion, and rejecting the patrol's claim that MGM's action was barred by the First Amendment, the court concluded that MGM was entitled to a preliminary injunction. Judge Leval did not consider MGM's parallel claim under the New York's Anti-Dilution statute.

The court refused to extend the preliminary injunction to bar the patrol's use of the paw print because it was less clear that MGM possessed trademark rights in that image, that the patrol's image infringed MGM's design, and that confusion would result from the patrol's use of the paw print, absent the use of the Pink Panther name.

MGM-Pathe Communications Co., v. Pink Panther Patrol,, 774 F.Supp. 869 (S.D.N.Y. 1991) [ELR 13:11:6]

Cinematographer who lost vision in one eye during filming of "Maximum Overdrive" may proceed with negligence claim against Stephen King and other parties

In July 1985, Armando Nannuzzi was working as the director of photography of "Maximum Overdrive," a film about self-propelled machines which turn on humans. In one scene, Stephen King, the film's writer and director, planned to have a lawnmower advance toward the camera, which was set at ground level and elevated to shoot upward by wooden wedges; a special effects staff person would stop the machine just short of the camera.

When King insisted on the use of blades in the lawnmower, special effects coordinator Steve Galich, over the protests of his assistant, David Sandlin, ordered the blades, which had been removed for safety reasons, re-installed on the machine. On the day of shooting, King again called for the use of the blades, purportedly stating: "I don't care, just do it." King and Sandlin did not discuss safety concerns or precautions with Nannuzzi or the camera crew. Nannuzzi, who claimed that he did not know that the lawnmower had blades in it, did not ask for shields and was not offered them. Nannuzzi's interpreter was not present.

As described by New York trial court Judge Diane A. Lebedeff, there were no rehearsals of the shot, and, when filming began, the lawnmower took off "like thunder" (according to Nannuzzi) or "like a runaway horse" (according to King). King called "cut," and two men leapt forward to stop the machine, but the lawnmower kept moving - its blades, raised in front by alterations to the wheels, chopped the wood wedges supporting the camera. Nannuzzi moved forward to hold the camera, and one of the splinters from the supports pierced his right eye.

Nannuzzi, who had been the cinematographer for films directed by Visconti, Zeffirelli, and for Leone's "The Good, The Bad and The Ugly," tragically lost the vision in his "shooting eye."

Nannuzzi brought a negligence action against King, Galich, Sandlin, and other parties.

Judge Lebedeff first struck the King parties' workers compensation defenses, noting that there was no showing that the production obtained coverage in North Carolina for its workers and evidence was not presented to support the contention that Nannuzzi was a covered employee.

The court then found that there was no legal basis for Nannuzzi's claims against Dino De Laurentiis Productions (an affiliate of Dino De Laurentiis Corporation, the film's owner) or against North Carolina Film Corporation, the studio facility which provided the props for the film.

Judge Lebedeff rejected the King parties' contributory negligence defense - Nannuzzi was not involved in setting up the shot involving the lawnmower. And assuming that North Carolina law would apply, the court found that, on the record, the King parties did not conclusively demonstrate Nannuzzi's contributory negligence so as to warrant granting their motion for summary judgment.

Nannuzzi was entitled to proceed with a strict products liability claim based on the allegation that the King parties were engaged in an inherently dangerous activity, continued the court.

It was further found that King, Galich and Sandler demonstrated "no legally persuasive basis to dismiss the negligence claim;" and that Nannuzzi may proceed with a claim that Dino DeLaurentiis Corporation was vicariously liable for the torts of the individual parties sued by the cinematographer and for the negligent supervision of DeLaurentiis. DeLaurentiis obtained the services of key personnel, observed the court, and, in particular, chose to hire an inexperienced director admittedly unfamiliar with applicable safety procedures. The court declined to grant a motion for dismissal brought by Trucks Productions. Producer Martha Schumacher was the president of Trucks, the company whose name appeared on the bill of sale for the lawnmower. Trucks' role remained a question of fact, stated Judge Lebedeff, as did the role of Adams Apple Productions whose president was the film's executive producer Melvin Pearl. Adams Apple, in the court's view, "more than any other entity had control over the production." Bon Bon Enterprises' motion for dismissal also was denied - the payroll service company apparently had the right to "call upon a certain level of performance and care in relation to stunts." In all, the vicarious liability of the various parties must be determined by a jury, declared the court.

With respect to the motions for dismissal brought by International Film Corporation, Schumacher's personal service company, and by Philtrum Corporation, King's personal service company, the court found that the involvement of a personal service corporation "gives rise to an assumption that some degree of control by the personal service corporation did exist." And neither International Film nor Philtrum cited support for the position that a personal service corporation would not be vicariously liable for the torts of its servant whose services the personal service corporation provided.

Judge Lebedeff concluded by stating that there was no basis on which to dismiss Nannuzzi's claim for punitive damages.

Nannuzzi v. King, New York Law Journal, p. 34, col. 3 (N.Y.Cnty., Feb. 24, 1992) [ELR 13:11:7]

Gilbert O'Sullivan obtains preliminary injunction barring distribution of Biz Markie album containing allegedly infringing excerpts from "Alone Again (Naturally)"

In December 1991, a Federal District Court in New York granted a preliminary injunction to Grand Upright Music Limited, the copyright owner of the musical composition "Alone Again (Naturally)," written and recorded by Raymond "Gilbert" O'Sullivan. O'Sullivan claimed that the rap piece "Alone Again," a composition included in the "I Need a Haircut" album by Marcel Hall, (professionally known as Biz Markie) infringed O'Sullivan's song.

The Biz Markie work used three words from "Alone Again (Naturally)" and a portion of the music taken from the O'Sullivan recording. The injunction restrained Warner Brothers Records from distributing the album.

Judge Kevin Thomas Duffy found that Grand Upright Music obtained a valid copyright from O'Sullivan, and noted that the Biz Markie parties had attempted, unsuccessfully, to obtain permission from O'Sullivan to use portions of "Alone Again (Naturally)." On the basis of the evidence, the court stated that it was clear that the rap performers "knew that they were violating the [copyright owner's] rights as well as the rights of others. Their only aim was to sell thousands upon thousands of records. This callous disregard for the law and for the rights of others requires not only the preliminary injunction sought by the [copyright owner] but also sterner measures." Judge Duffy referred the matter to the

United States Attorney for the Southern District of New York for consideration of prosecution under federal law.

Grand Upright Music Limited v. Warner Brothers Records, Inc., Case No. 91 Civ. 7648 (S.D.N.Y., Dec. 17, 1991) [ELR 13:11:8]

Rap performer "Essence" obtains declaration of noninfringement of trademark in action against publisher of Essence magazine

Tamara Lisa Hutchinson, a rap music performer professionally known as "Essence," has obtained a declaration of noninfringement of trademark in a declaratory judgment action against Essence Communications, Inc., the publisher of Essence magazine.

Federal District Court Judge Charles S. Haight Jr. found that for purposes of ascertaining consumer confusion, the relevant consumer group would be "individuals who listen to rap music at live performances or on recordings...and individuals who purchase such recordings." The court then reviewed the factors bearing on the likelihood of consumer confusion, first noting the strength of the Essence magazine trademark, and Essence Communications' use of the mark for a television show and in connection with the licensing of a variety of products. It was observed, however, that the publisher had not used the mark for producing or distributing live or recorded musical performances, or for promoting or sponsoring musical performers, except for granting a license to a group of rock musicians known as "Rare Essence" permitting the group to use the mark Essence on T-shirts and other merchandise.

Judge Haight adverted to the "very considerable amount of third-party registration and usage of the name Essence," and found that such use diluted the strength of Essence Communications' trademark in the field of musical entertainment. There was no evidence of public awareness of the publisher's Essence mark for the sponsorship of musical performers, declared the court, in concluding that the factor of the strength of the mark favored Hutchinson and record producer Joseph Saddler.

The publisher's claim to be in the musical entertainment business - the product proximity factor - was rejected. Although the magazine (and Essence Communications' no longer aired television program) reported on the music industry, it appeared to the court that the magazine covered a broad range of subjects. And the publisher did not participate in the merchandising of music or musical entertainment.

The court proceeded to find that there was no evidence that Essence Communications planned to expand its business into the areas of performing rap music or sponsoring or promoting rap performers; that the publisher did not present evidence of actual confusion by the magazine's readers or advertisers, or by consumers of rap music; and, after lengthy consideration, that a survey conducted by the publisher, while evidence of some actual confusion, was not entitled to significant weight.

Judge Haight further found that there was no evidence that Hutchinson was aware of Essence magazine prior to December 1989; that the performer began using the name Essence in early 1989; and that Hutchinson did not copy Essence Communications' mark.

In all, the publisher did not show the requisite likelihood of confusion arising out of Hutchinson's use of the name Essence, and significant equitable considerations favored Hutchinson's use of the name. The court granted

Hutchinson a declaration of noninfringement and dismissed Essence Communications' counterclaim for infringement. Notwithstanding the fact that Judge Haight regarded the publisher's cease and desist letter to Hutchinson and later litigation position as "inconsistent with the purpose of the trademark laws," the court declined to award attorneys' fees to Hutchinson, stating that the publisher's claim of infringement was "colorable."

Hutchinson v. Essence Communications, Inc., 769 F.Supp 541 (S.D.N.Y. 1991) [ELR 13:11:8]

Individual mentioned in two books about assassinations of President John Kennedy and Dr. Martin Luther King, Jr. may proceed with libel claim

The books, "Contract on America: The Mafia Murder of President John F. Kennedy" and "Mafia Kingfish: Carlos Marcello and the Assassination of John F. Kennedy" referred to New Orleans physician Lucas A. DiLeo's purported presence, along with other individuals, at a meeting with James Earl Ray in December 1967, prior to the assassination of Dr. Martin Luther King, Jr. Dr. DiLeo's name apparently was included in a journalist's unpublished manuscript; the manuscript was mentioned in the 1979 Findings and Recommendations of the House Select Committee on Assassinations. The committee report, as cited by Federal Court of Appeals Judge E. Grady Jolly, found "no support for [the journalist's] contention that Ray met with persons involved in organized crime in New Orleans before the assassination." The two books in issue used the report's data, but one of the works contained differences from the report which were "potentially significant in the aggregate" and the other work did not advert to the committee's "somewhat exculpatory conclusion."

When Dr. DiLeo brought libel actions against the authors and publishers of the books, a Federal District Court, citing Louisiana's privilege of fair reporting, entered summary judgment against DiLeo.

The Court of Appeals determined that Louisiana recognizes a privilege to report fairly. However, the court agreed with DiLeo's argument that sufficient evidence was presented to warrant jury consideration of the question of whether the qualified privilege was abused. Judge Jolly emphasized the "circumscribed nature" of the court's decision - that abuse was a jury issue and, on the record before the court, a reasonable jury could find that the publishers and authors abused and thus forfeited their privilege of fair report. The District Court judgments dismissing DiLeo's complaints was reversed and the matters were remanded for further proceedings.

Doe v. Doe, 941 F.2d 280 (5th Cir. 1991) [ELR 13:11:9]

Decision granting summary judgment to National Enquirer in libel action brought by Engelbert Humperdinck is affirmed

In 1980, a New York Family Court ruled that Arnold Dorsey, better known as Engelbert Humperdinck, was the father of Kathy Jetter's daughter. The court ordered Dorsey to pay child support and educational expenses.

In 1988, Jetter sought an increase in child support payments and an order requiring Dorsey to purchase life insurance naming Jetter's daughter as his beneficiary. In an affidavit, Jetter stated that "The request for life insurance is of a dire necessity. Upon information and belief, [Dorsey] has AIDS related syndrome and has been treated at Sloan Kettering in New York. Jetter gave the National Enquirer a copy of the affidavit. The tabloid, in its December 27, 1988 edition, published an article that focused on the allegations in Jetter's affidavit.

The Enquirer, in a front page story, displayed a photograph of Dorsey accompanied by the headline: "Mother of His Child Claims in Court...Engelbert Has AIDS Virus." The headline for the article itself stated: "Mom of Superstar Singer's Love Child Claims in Court...Engelbert Has AIDS Virus." The article quoted Jetter as saying: "I never would have filed the court papers if I wasn't 100 percent convinced he has the AIDS virus;" reported Dorsey's denial of the affidavit's allegation concerning AIDS; and published a photograph of Dorsey with the caption "Engelbert denies he has the AIDS virus."

Dorsey, who tested negative for the HIV virus and who asserted that he never received medical treatment of any kind at a Sloan Kettering hospital facility, sued the Enquirer for defamation. A Federal District Court granted summary judgment to the tabloid on the ground that the article was a fair and true report of allegations made in a judicial proceeding and thus was privileged under California law and protected by the United States Constitution. The District Court further held that the incremental harm doctrine shielded the Enquirer from liability.

A Federal Court of Appeals has affirmed the District Court decision. Dorsey argued that section 47(4) of the California Civil Code was inapplicable because the Enquirer article did not report on a "judicial" proceeding within the meaning of the statute. New York Family Court proceedings are confidential, rather than open to the public, and thus outside the scope of the statutory privilege, according to Dorsey.

Judge Robert R. Beezer found that there was no support for limiting the scope of the privilege as proposed by Dorsey.

The court then rejected Dorsey's contention that a trier of fact should have been allowed to determine whether the article was a "fair and true" report of the affidavit's contents. There was no dispute over what occurred in the judicial proceeding, or any dispute over the contents of the Enquirer article, stated Judge Beezer and the District Court could determine, as a matter of law, whether the article was a fair and true report.

Dorsey, citing, in part, the Enquirer's publication of statements "elaborating" on the affidavit's allegations, claimed that the article was not a fair and true report of the affidavit's contents. The court disagreed, finding that the Enquirer, in quoting from the affidavit, "capture[d] the gist" of the affidavit. Dorsey noted that the article included out-of-court statements by Jetter and by an investigator, but those statements "did not exceed the degree of flexibility and literary license accorded newspapers in making a 'fair report' of a judicial proceeding," observed Judge Beezer.

The court declined to address whether the article was protected by the Constitution and whether the incremental harm of the allegedly defamatory portion of the article was too nominal to allow recovery.

Judge Harry Pregerson agreed that section 47(4) would apply to family court proceedings from which the general public is excluded. But Judge Pregerson, stating that reasonable minds could differ as to whether the Enquirer's article was a fair and true account of Jetter's affidavit, would have allowed a trier of fact to determine the issue.

Dorsey v. National Enquirer, Inc., Case Nos. 90-55017; 90-55344 (9th Cir., Dec. 11, 1991) [ELR 13:11:9]

96-year old woman whose photograph was published in the "Sun" in conjunction with story entitled "World's oldest newspaper carrier, 101, quits because she's pregnant!" may proceed with defamation claim against tabloid

The October 2, 1990 issue of the "Sun" published a photograph of Nellie Mitchell in conjunction with a story entitled "World's oldest newspaper carrier, 101, quits because she's pregnant!" The story purported to report on "papergal Audrey Wiles" in Stirling, Australia, who had been a newspaper carrier for 94 years.

Nellie Mitchell, a 96-year old Arkansas resident, has operated a newsstand since 1963. Prior to that, she delivered newspapers on a paper route.

In response to Mitchell's defamation action, the Sun argued that the article issue was satire, humor or fiction, and was not meant to be a truthful statement of facts. The author of the article admitted that the article was entirely fictional; the editor of the Sun stated that when Mitchell's picture was selected, the publication "assumed she was dead."

Federal District Court Chief Judge H. Franklin Waters noted that a law review analysis recommended that a party alleging defamation by fiction should be required to show that the alleged tortious statement was false; that the motivation for the portrayal was to cause injury to the allegedly defamed party; that the portrayal was "of and concerning" the party; and that such portrayal could be reasonably understood as describing actual qualities of the party or actual events in which the party participated. In cases involving private parties and no issue of public concern, the inquiry would be whether the publisher negligently published a falsehood, stated Judge Waters.

The court refused to find that the challenged article was clearly fiction, although agreeing that the style of the writing was part of the context in which to evaluate the alleged defamatory statements. In the circumstances of the instant case, a trier of fact will have to determine whether the complained-of material could reasonably be understood to convey actual facts about Mitchell or actual events in which she participated. The "facts" conveyed were "not so inherently impossible or fantastic that they could not be understood to convey actual facts. Nor can we say that no person could take them seriously...[e]ven if the headline and certain facts contained in the article could not be reasonably believed other facts, e.g. the implication of sexual promiscuity, could reasonably be believed."

Judge Waters also noted that the articles in the Sun were written in a purportedly factual manner; no distinction was made between the articles that were wholly fictional and the articles that were intended to be factual; fictional articles were not denoted as such; and that the Sun "apparently intends for the readers to determine which articles are fact and which are fiction or what percentage of a given article is fact or fiction." The layout, captions, and style of writing contained in the complained-of article was similar in format to news articles.

The court therefore denied the Sun's motion for summary judgment.

Mitchell v. Globe International Publishing, Inc., 773 F.Supp. 1235 (W.D.Ark. 1991) [ELR 13:11:10]

Former Walt Disney licensee is entitled to proceed with action arising from alleged conversion of design materials

In January 1981, a company known as Picture That, Inc. obtained a nonexclusive license to reproduce certain Walt Disney characters in artistic print form. Picture That forwarded character sketches to F.J. Warren Limited to prepare blocks and dies from which final prints were produced.

In May 1984, Picture That filed a voluntary petition under Chapter 11 of the Bankruptcy Code. Disney subsequently terminated its relationship with the company.

The Bankruptcy Court, on its own, ordered that the bankruptcy action be converted to Chapter 7 because Picture That apparently did not comply with its obligations under Chapter 11. The bankruptcy trustee notified certain creditors that he had abandoned all property entrusted to him, including the blocks and dies.

Picture That claimed that because no creditor objected to the abandonment, the title in the blocks and dies reverted back to Picture That. The company alleged that after Disney canceled the license with Picture That, Disney granted Warren a license to reproduce Disney characters; that Warren and its subsidiary had notice of the bankruptcy proceeding and retained the blocks and dies illegally; and that Warren used the blocks and dies to perform the license with Disney.

In 1987, Picture That demanded that Warren return the blocks and dies. A New York trial court has ordered further proceedings on Picture That's action for an accounting and damages allegedly sustained from Disney and Warren's alleged conversion and use of Picture That's property.

Judge Glen, after allowing, on different grounds, Disney and Warren to amend their answers to allege a statute of limitations defense, stated that a three year statute of limitations would apply since Picture That had alleged only the tort of conversion, and did not present a breach of contract claim. The court then found that Warren's continued possession of the blocks and dies during the voluntary petition period was not a conversion. And the record did not indicate that an action was filed against Warren to compel the return of the blocks and dies to the trustee in the short time period when the voluntary action was converted to an involuntary action. Judge Glen stated that "Warren's passive failure to turn over to the trustee the blocks and dies, in response to a notice from the Bankruptcy Court advising Warren that [the] voluntary petition [was] converted to an involuntary Chapter 7 petition [did] not constitute an overt or positive act which constitute[d] the unauthorized exercise of ownership such that it altered the condition of the blocks and dies or deprived Picture That of its rights to them."

The court determined that an issue remained as to whether the unauthorized use of the property constituted a conversion, and that there was a triable issue of fact as to when the limitation period began to run. The motions of Disney and Warren for orders dismissing Picture That's complaint were denied accordingly.

Picture That, Inc. v. F.J. Warren Limited, New York Law Journal, p. 25, col. 6 (N.Y.Cnty., Nov. 19, 1991) [ELR 13:11:11]

Dispute arising from film license agreement is transferred from New York to California court

In 1978, Melvin Simon Productions granted Viacom International, Inc. a twenty-five year exclusive license to sixteen specified films for television exhibition throughout the world, with the exception of exhibition by the three television networks.

In 1981, Koala Productions, owned by Rudy Durand, sued Simon and Viacom in a California trial court alleging that Durand's right to make the final edit of the film "Tilt" (one of the licensed films) had been violated by a version of the film exhibited in theaters and on television. Simon, pursuant to the indemnification provision of the licensing agreement, provided Viacom with a defense to the action and to an action, ultimately dismissed, in a Federal District Court in California.

Simon eventually agreed to settle with Durand and Koala, and assigned to Koala any further right, title and interest in "Tilt." Koala agreed to indemnify Simon for any post-settlement liability relating to the litigation.

Subsequently, Viacom, along with NBC and Warner Bros., settled with the Tilt parties; Viacom paid $50,000 pursuant to the settlement. Viacom, in accounting to Simon, deducted the settlement sum and an additional $9,000 in attorneys' fees.

When Simon requested payment of the withheld funds, Viacom brought the instant action in a Federal District Court in New York alleging that Simon had improperly "collaborated" with Koala in settling the earlier litigation. Viacom sought to have the court declare that Simon was liable to indemnify Viacom. Simon proceeded to sue Viacom in a Los Angeles trial court to recover the funds; the action was removed to a Federal District Court in California. The Federal District Court in New York first declared that it lacked jurisdiction over Koala. Viacom did not allege that Koala performed any act in New York, but that Viacom was the assignee of rights acquired under a New York contract, entered into by

Viacom and Simon, relating to the ownership of Tilt. "Acquiring all rights to a twelve year old motion picture in California from a California entity does not constitute an activity equivalent to transacting business in New York," stated Judge Sweet. Koala settled a California litigation with a California entity and obtained Simon's interest in Tilt - the right to receive money from Viacom did not constitute transacting business in New York. It also was noted that Simon may have assigned the ownership of Tilt, but not the agreement covering sixteen films and setting forth obligations and rights of Simon beyond the right to receive distribution fees.

The court, after determining that Simon was subject to jurisdiction in New York, transferred the action to the Central District of California because the events at issue and almost all of the pertinent witnesses were in California. The fact that New York law may govern the claim was not dispositive, observed Judge Sweet, who also pointed out that Simon and Koala were subject to personal jurisdiction in California.

Viacom International, Inc. v. Melvin Simon Productions, Inc., 774 F.Supp. 858 (S.D.N.Y. 1991) [ELR 13:11:11]

Bankruptcy Court erred in imposing constructive trust in favor of television stations on funds owed by advertisers to air time buyer

Carolin Paxson Advertising purchased air time for clients from television and radio stations in El Paso, Texas. In 1987, Paxson obtained a bank loan, granting the bank a security interest in the company's accounts receivable. When Paxson became a Chapter 7 debtor under the Bankruptcy Code in January 1989, the bank sought to foreclose on its security interest in the collateral.

Two local television stations asserted that the money owed to Paxson by advertisers who purchased air time was not subject to the bank's security interest because it was not the property of Paxson's estate. The Bankruptcy Court imposed a constructive trust in favor of the television stations on the funds owed by the advertisers. A Federal District Court affirmed the Bankruptcy Court's decision.

A Federal Court of Appeals has reversed the District Court ruling. Judge Edith H. Jones noted that the District Court did not find that Paxson was an agent of the advertisers. And even if an agency relationship had existed between Paxson and the advertisers, the television stations, as third parties, were not entitled to a constructive trust on this ground.

Judge Jones stated that the District Court erred in finding that Paxson acted as an agent for the television stations in collecting the money owed by the advertisers.

Representatives of the television stations had testified that they believed that Paxson was solely responsible for payment of air time. Furthermore, noted the court, the television stations did not have the right to control Paxson; the course of dealing between the parties indicated that no control was asserted or exercised; Paxson's activities served the interests of both the stations and the advertisers; and, at best, Paxson was an independent contractor of the stations. The ruling imposing a constructive trust on the proceeds owed to Paxson by the advertisers was reversed, and the matter was remanded for further proceedings.

Matter of Carolin Paxson Advertising, Inc., 938 F.2d 595 (5th Cir. 1991) [ELR 13:11:12]

United States Supreme Court declines to review ruling that National Football League team owners must pay about $18 million in delinquent player pension funds

The Bert Bell National Football League Player Retirement Plan is a pension and benefit trust for members of the National Football League Players Association, structured under federal law. The Players Association selects three members of the Plan's board; the National Football League Management Council, an organization of NFL team owners, selects another three trustees. The Commissioner of the National Football League is a seventh, but non-voting, member of the board.

In 1982, the Players Association and Management Council negotiated a new collective bargaining agreement. The owners agreed to contribute $12.5 million to the plan each year for five years provided that the contributions would be allowable as deductions under the Internal Revenue Code. When the plan's investments during the early 1980s produced greater revenue than expected, the plan became overfunded. In March 1984, the owners paid only $7.5 million into the plan, claiming that the additional $5 million represented funds that were not, in the owners' view, immediately deductible under the Internal Revenue Code.

In early 1987, the Internal Revenue Service indicated that the $12.5 million contributions would not be fully deductible in the years the contributions were paid. The management trustees then filed a declaratory judgment action with respect to the plan's use of the phrase "allowable as deductions." The player trustees filed a counterclaim alleging that the management trustees had breached their fiduciary duties by failing to act in the best interests of the plan's beneficiaries, and also sought to recover, from the NFL, the management council and the twenty-eight individual football teams, the unpaid contributions and interest.

A Federal District Court held that the phrase "allowable as deductions" did not contain time limitations; the full $12.5 million was due each year, and the clubs could carry over excess contributions and deduct them in future years. The court entered judgment against the clubs in the amount of $17.8 million plus double interest, attorneys' fees and costs.

The court subsequently granted summary judgment for the player trustees, stating that the management trustees faced "inherent conflicts of interest;" should have consulted outside counsel; and had the power under the plan to increase benefits in an actuarially sound manner. The effect of the court's finding that the trustees breached their fiduciary duties was that the trustees were liable for the same $17.8 million in unpaid contributions previously assessed against the clubs, plus interest and attorneys' fees.

A Federal Court of Appeals in Virginia has agreed with the District Court that the term "allowable as deductions" did not contain a temporal limitation. The clubs, under the Internal Revenue Code, can carry forward any contributions not deductible in the year the contributions are made; thus the plan required that the full $12.5 million be paid each year, stated Judge Wilkinson, in upholding the finding that the clubs owed the plan $17.8 million in unpaid contributions.

Judge Wilkinson then noted that the plan granted the trustees the discretionary power to increase player benefits in an actuarially sound manner and declared that the District Court's appointment of a special master to determine an increase in benefits was an unwarranted interference with the trustees' powers.

The player trustees also argued that the management trustees faced a conflict of interest because the clubs would benefit by $600,000 to $700,000 each if efforts to obtain the contributions were not pursued. Judge Wilkinson stated that the applicable statute permitted individuals to serve "as a fiduciary" who also might be "an officer, employee, agent, or other representative of a party in interest." The owner trustees took reasonable steps to resolve the conflict over whether funds were due and to determine the clubs' potential liability - this was "not a case where fiduciaries attempted to write off a clearly owed debt in order to profit themselves." In all, the owner trustees reasonably discharged their fiduciary duties and the court, accordingly, reversed the District Court's holding that those duties were violated.

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

Bidwell v. Garvey, 943 F.2d 498 (4th Cir. 1991) [ELR 13:11:12]

Federal District Court in Minnesota issues further rulings in football players' antitrust action against National Football League

As reported at ELR 13:6:13, Federal District Court Judge David Doty determined that the National Football League's nonstatutory labor exemption ended as of November 6, 1989, the date on which the National Football League Players Association notified the NFL of its decision to abandon collective bargaining rights, because at that point the parties no longer had an ongoing "labor relationship."

The players, arguing that there were no class representatives remaining with the standing or interest to pursue the antitrust action against the NFL, moved to decertify the class and dismiss all claims involving the league's conduct after November 6, 1989, without prejudice. Judge Doty, based on prior rulings of the court and of the Federal Court of Appeals, agreed to do so.

The parties also agreed that all individual and class claims involving the right of first refusal/compensation system (other than Plan B) and the NFL Player Contract based on the league's conduct prior to November 6, 1989, would be dismissed with prejudice.

The court denied the NFL's request to dismiss with prejudice any class claims seeking damages for the implementation of Plan B after February 1, 1989, but prior to November 6, 1989. Thus, players other than the named parties were entitled to sue for damages resulting from the implementation of Plan B during the 1989 NFL season.

With respect to claims involving the college player draft, Judge Doty noted that no new replacement representatives had, or were likely to come forward to pursue the draft claims. The court therefore decertified the class and dismissed without prejudice any class claims concerning the college player draft arising prior to November 6, 1989.

The players asked the court to dismiss their abuse of monopoly power claims without prejudice because the named parties did not plan to pursue those claims in either an individual or representative capacity; the players also argued that the NFL was unable to demonstrate the type of prejudice necessary to justify an order dismissing those claims with prejudice.

The court first chose to consider the NFL's pending motion for summary judgment on the abuse of monopoly power claims. For purposes of the motion, the court assumed, without deciding, that the NFL parties had monopoly power. Judge Doty then found that to the extent that the players' abuse of monopoly power claims survived the prior Federal Court of Appeals decision in Powell, a material issue of fact existed concerning whether the NFL parties abused their monopoly power. Sufficient evidence was presented, stated the court, to raise a jury question about whether the NFL parties "had a tacit agreement, understanding or conspiracy to refrain from bidding on players." The court, accordingly, denied the NFL's motion for summary judgment on the players' remaining abuse of monopoly power claims.

Returning to the players' request, Judge Doty decertified and dismissed without prejudice any abuse of monopoly power claims that survived the Federal Court of Appeals decision in Powell.

Powell v. National Football League, 773 F.Supp. 1250 (D.Minn. 1991) [ELR 13:11:13]

Antitrust claim against manufacturer of official professional sports team jackets is dismissed

Starter Sportswear has been the sole manufacturer of authentic official satin team jackets pursuant to licensing agreements between the company and Major League Baseball, the National Hockey League, the National Basketball Association and the National Football League. Trans Sport, under the name of its predecessor, the Stickley Corporation, sold Starter jackets on a retail basis. When Trans Sport began distributing the jackets to other retailers, Starter eventually refused to ship the store's order of jackets unless Trans Sport agreed not to transship Starter product.

Trans Sport claimed that Starter's refusal to deal with Trans Sport violated section 2 of the Sherman Act. A

Federal District Court in New York has granted Starter's motion for summary judgment, stating that even if Starter possessed monopoly power in the product market, the company did not use this power to gain a monopoly or a competitive advantage at the distribution level. Furthermore, noted Judge Thomas J. McAvoy, even accepting that Starter possessed monopoly power at the distribution level, the company did not willfully maintain its natural monopoly - preventing Trans Sport from continuing in the wholesale distribution market did not constitute the unreasonable exercise of Starter's distribution monopoly power under federal antitrust law.

Judge McAvoy pointed out that Starter had been the sole distributor of its products; that Starter had valid objectives for its direct dealing distribution system, such as controlling counterfeiting; that Trans Sport's presence as a distributor resulted in higher costs to the retailers with whom it conducted business; and that it was "eminently reasonable for a manufacturer to desire to ensure that its products are marketed in an appropriate manner by retailers who project a quality image with which the manufacturer wants to be associated and by a retailer who is willing...to advertise and display the product properly."

In all, Starter was entitled to maintain and enforce its natural monopoly over the distribution of its products, concluded the court, stating that it would not countenance "the disruption of this manufacturer's effective and successful distribution system just so another firm can realize additional profits for itself."

Trans Sport, Inc. v. Starter Sportswear, Inc., 775 F.Supp. 536 (N.D.N.Y.1991) [ELR 13:11:14]

Z Channel may proceed with antitrust claim against Home Box Office and film distributors arising from enforcement of "no-advertising" clause in licensing agreements

The licensing agreements entered into between Z Channel, a pay cable television service in Los Angeles, and program suppliers, contained a provision precluding Z Channel from carrying paid advertising during the period for which the films were licensed.

Home Box Office, as a company engaged in providing pay cable service in the Los Angeles area (rather than in its role as a producer and distributor of films to other cable providers), entered licensing agreements with film distributors; the agreements contained a provision prohibiting the distributors from licensing the same films to any other cable television channel which carried any paid advertising.

Thus, noted Federal Court of Appeals Judge Canby, Z Channel's ability to display paid advertising was restricted pursuant to both of the above-described agreements.

In 1988, when Z Channel began exhibiting sports programming, the company unsuccessfully attempted to modify its licensing agreements in order to display paid advertising during the sports segments. Z Channel claimed that Home Box Office insisted that distributors comply with their no-licensing-to-advertisers agreements.

Subsequently, Z Channel sued Home Box Office alleging that the enforcement of the no-advertising agreements constituted an unreasonable restraint of trade in violation of section 1 of the Sherman Act, and seeking declaratory and injunctive relief.

A Federal District Court in California, citing Newman v. Universal Pictures, 813 F.2d 1519 (9th Cir. 1987;

ELR 8:12:9), cert. denied, 486 U.S. 1059 (1988; ELR 10:2:15) granted Home Box Office's motion for summary judgment.

After an appeal was filed in the case, new owners acquired Z Channel and began an all sports program. Since Z Channel had sought declaratory and injunctive relief to permit the company to show licensed films and sports programs, interspersed with advertising, Home Box Office argued that the appeal was moot. Z Channel responded that it would be entitled to seek damages for lost advertising revenue upon prevailing on its antitrust claim. Judge Canby agreed that Z Channel alleged restraints that could have resulted in financial damage to the company and that the issue was sufficiently before the court to reject a dismissal for mootness.

The court then determined that the District Court applied the decision in Newman too broadly. Newman involved a claim brought by Paul Newman and director

George Roy Hill who entered contracts with Universal Studios in connection with the production of two films. Universal agreed to pay Newman and Hill a percentage of exhibition revenue. Newman claimed that Universal and other major studios had conspired to apply the profit participation clauses in their contracts so as to minimize the amounts paid to the actor and other talent, particularly with respect to videocassette revenue. The court had upheld the dismissal of Newman's action for failure to state a claim of antitrust injury, focusing on the fact that the only alleged injury to competition was the competition for Newman's and Hill's services in making the two films in issue.

Judge Canby emphasized that in Newman, the only competition alleged by the parties predated the alleged conspiracy. In the instant matter, although some competition may have ended when Z Channel entered licensing agreements, the company set forth two other forms of competition allegedly affected by the Home Box Office parties' purported violation of the antitrust laws. When Z Channel was considering including paid advertising during sports broadcasting, the company was negotiating with distributors for new film licenses. The negotiations were conducted while the distributors, as described by Judge Canby, "were insisting on retaining their 'no-advertising' clauses in new licenses, and, more significantly, when HBO was insisting that the other distributors continue to insist upon those clauses in any new licenses they might grant." To the extent that these actions by Home Box Office and the other distributors injured the competition for film licenses, Z Channel met the requirements of causation and competitive injury.

Furthermore, Z Channel alleged injury to the company's "struggle for competitive viability in the cable television market." As to those licenses for which Z Channel was continuing to negotiate, the company was competing with other cable channels, "not only for the rights to certain films, but also for survival and success in the cable television market."

The distributors who, of their own independent choice, decided to enforce their no-advertising restrictions were entitled to do so, continued the court. However, Z Channel claimed that Home Box Office, by using its dominant market position and its restrictive licensing agreements, coerced the distributor parties to enforce their agreements against Z Channel. Home Box Office's alleged conduct and the acquiescence of the distributor parties constituted the complained-of anticompetitive activity. And that conduct was "clearly capable of causing an injury to the competition between Z Channel and the other cable service, including Home Box Office," stated the court.

Z Channel presented evidence that Home Box Office threatened action against the distributors under Home

Box Office's agreements if the distributors did not enforce and retain the no-advertising restrictions against Z Channel, and that the distributors responded to that pressure. The court therefore declined to find as a matter of law that there was no triable issue as to whether Home Box Office's actions, with respect to the distributors, caused competitive injury between Z Channel and other cable services.

Upon finding that the District Court erred in concluding that Newman controlled the case, the court remanded the matter for further consideration of the legality of the agreements in issue, the reasonableness of any restraints on trade, and other remaining issues.

Federal Court of Appeals Judge Kozinski, in dissent, stated "This case is dead, procedurally as well as substantively. By breathing new life into it, my colleagues create much business for the lawyers but ill-serve the interests of the parties and the cause of sound judicial administration." Judge Kozinski pointed out that Z Channel's complaint did not seek money damages; that the requested declaratory and injunctive relief were not available; and that Z Channel had abandoned the coercion theory because there was "not a morsel of evidence to support it" - the various distributors had valid business reasons for refusing to modify their agreements.

Z Channel Limited Partnership v. Home Box Office, Inc., 931 F.2d 1338 (9th Cir. 1991) [ELR 13:11:14]

Art gallery may not sell consigned works to recover excess costs incurred by artist in producing "big sculpture"

In March 1991, the Prisunic Gallery agreed to exhibit works by Bernd Naber. The artist planned to create a huge sculpture for the proposed April 1991 exhibition, and the gallery stated that it would spend $27,300 to help produce the artist's work in exchange for two paintings valued, at the time, at $12,000 each. The gallery also expected to receive, under specified conditions, ten percent of the value of any sculpture produced during the exhibition.

By September, 1991, the gallery parties had spent $100,000 on the cost of producing Naber's as yet unfinished 150 foot long sculpture. The gallery, without Naber's prermission, began dismantling the sculpture because another art exhibition was scheduled to open.

When the gallery refused Naber's request to return fifty other works that he had created, the artist sought a preliminary injunction to prevent the gallery from removing the items from the state or from the gallery premises, or from transferring, selling, dismantling or otherwise disposing of the works (the Big Sculpture was not included in Naber's request for injunctive relief).

The gallery argued that the parties' "unique consignment arrangement" was a joint venture. But New York trial court Judge Arber noted that even if the parties had entered a joint venture, the gallery's plan to sell the art works over Naber's objections would not further the joint control and management of the venture.

Judge Arber found that a consignment agreement existed between the parties and that Naber sufficiently established a likelihood of success on the merits since the artist, as a consignor, had both title and right to possession superior to that of the gallery.

Naber also demonstrated the requisite irreparable harm - for an artist, stated the court "style, display and promotion are factors that contribute to an artist's career and reputation."

The fact that the gallery planned to sell the art works in order to recover its losses from the Big Sculpture supported granting a preliminary injunction to preserve the status quo pending the outcome of litigation, stated Judge Arber, who commented that it was possible that the gallery was "attempting to hold [Naber's] work hostage, or to sell it for their own benefit."

The court found that the gallery held the art works as a trustee for Naber. Although sympathizing with Naber's financial difficulties, Judge Arber rejected the artist's request for the return of all fifty pieces of art before a decision on the merits. The court did find that Naber had established superior title to twenty-four items created prior to the March 1991 agreement, and granted Naber's motion seeking the return of those works. Judge Arber also granted Naber's motion for a preliminary injunction barring the gallery from removing or otherwise disposing of the twenty-six works remaining in the possession of the gallery.

Naber v. Steinitz, New York Law Journal (N.Y. Cnty., Jan 27, 1992) [ELR 13:11:16]

Ruling that insurer is not required to defend and indemnify theater owner for action brought by injured minor is upheld

In November 1988, a fifteen year old identified only as "Jane Doe" attended a 12:00 a.m. showing of "The Rocky Horror Picture Show." Doe claimed that when the film ended, a man took her to a theater washroom and sexually assaulted her.

Doe sued Entertainment Group, the theater owner, for negligence, citing the alleged lack of supervision and failure to provide adequate security.

United National Insurance Company brought a declaratory judgment proceeding to clarify its obligations to Entertainment Group under its insurance policy with the theater owner.

The insurance policy in issue provided coverage for bodily injury or property damage "caused by an occurrence and arising out of the ownership, maintenance or use of the Insured premises and all operations necessary or incidental thereto..." The policy excluded coverage for any claim asserting a cause of action for assault and/or battery, and for bodily injury arising out of alleged and/or actual "sexual molestation" of a minor; coverage was denied under these provisions even if the asserted injury resulted from an "omission" of the insured or its employees.

A Federal Court of Appeals has upheld a District Court decision granting summary judgment to United National with respect to the company's claim that it had no obligation to provide a defense or to indemnify any party for claims arising from Doe's lawsuit. The District Court had characterized Doe's state court lawsuit as a negligence action, and the Court of Appeals agreed that the insurance policy excluded coverage even when the injured party alleged that the assault was the result of the insured's negligence.

United National Insurance Company v. Entertainment Group, Incorporated, 945 F.2d 210 (7th Cir. 1991) [ELR 13:11:16]

Entry form waiver precludes injured bicycle rider's negligence claim against sponsors of triathlon

Susan Banfield completed and signed an official entry form to compete as a professional in the 1985 Bud Light United States Triathlon Series. The competitions, were sponsored, organized and promoted by CAT Sports, Anheuser-Busch, Inc., Quaker Oats Company, the International Swimming Hall of Fame, Triathlon Federation and other parties. Banfield was operating her bicycle along the designated bicycle race course in Fort Lauderdale when she was struck and seriously injured by a car owned and operated by Songea Louis.

When Banfield brought a negligence action against Louis and against the sponsors of the competition, the rider alleged that the triathlon parties failed to establish and maintain a safe bicycle course and failed to properly control traffic around the course.

A trial court ruled that the sponsors were not liable because a waiver provision on the entry form barred

Banfield's negligence claim. Just above the signature line, the entry form stated: "Waiver: Read Carefully Before Signing." The waiver extended to claims based on the negligence, action or inaction of the event sponsors. The court, concluding that the parties entered a binding contract when Banfield mailed her entry and the entry was accepted by the sponsors, entered judgment on behalf of the sponsors.

An appellate court has upheld the trial court's ruling on the ground that the waiver was clear and unequivocal and was not unconscionably broad. The court rejected Banfield's argument that a factual determination was required with respect to the relative bargaining positions of Banfield and the sponsors. It was further found that although certain sponsors were not specifically named in the waiver, the trial court properly entered final summary judgment in their favor, and that Banfield did not

make a sufficient showing of "great prejudice to the dominant public interest" to warrant
striking down the waiver.

Banfield v. Louis, 589 So.2d 441 (Fla.App. 1991) [ELR 13:11:17]

New York court voids waiver of liability signed by race car driver and allows driver's widow to pursue negligence claim

John Owen died when the race car he was driving went out of control and struck a wall of the race track at the Orange County Fair Speedway. Carol Owen sued the owner and operator of the race track and the sponsor of the race in which her husband was to participate on the day of the accident.

Owen, prior to the race, had signed a Release and Waiver of Liability and Indemnity Agreement releasing various parties from all liability "whether caused by the negligence of the releasees or otherwise" and assuming full responsibility for any risk of bodily injury, death or property damage.

Under New York law, agreements entered into between the owner or operator of any recreation facility and the user of such facility, "pursuant to which such owner or operator receives a fee or other compensation for the use of such facilities, which exempts the said owner or operator from liability" are deemed to be void as against public policy and wholly unenforceable.

In determining whether Owen had paid a fee to participate in the race, New York appellate court Judge Casey noted that only licensed members of the Drivers Independent Race Tracks, Inc. were eligible to participate in the race. Drivers, owners and crew members were required to pay a $40 membership to DIRT in return for a license; the license would entitle the bearer to a pit pass. In Lago v. Krollage, 78 N.Y.2d 95 (ELR 12:9:17), the New York Court of Appeals had held that such a fee was for a license and was not a fee for the use of a recreational facility within the meaning of the applicable statute. Carol Owen submitted proof that her late husband had paid an additional admittance and/or insurance fee each time that he entered a race.

Judge Casey stated that whether the additional fee paid by Owen was a general admission fee or a fee for entrance into the pit area was irrelevant - Owen could not participate in the race without paying the additional fee. And the fee was for the use of the facility within the statutory meaning, declared the court.

The court rejected the claim that Owen's participation in auto racing was in furtherance of the speedway venture and not a recreational activity. Owen, notwithstanding nineteen years of experience as a race driver, pursued auto racing as a hobby, according to Judge Casey.

Judge Casey further found that the public policy embodied in the statute applied to the express assumption of risk as well as to the release or waiver provision of the agreement; rejected a claim of implied assumption of risk; stated that the evidence presented was insufficient to determine whether, as a matter of law, Owen was aware of and appreciated the enhanced risk arising from the placement and condition of a retaining wall; and concluded that the trial court properly denied the race track parties' motion for summary judgment.

Judge Levine, in dissent, would have found that the owner and operator of the race track and sponsor of the races had a complete defense in the release and express assumption of risk signed by Owen as a condition to his participation in racing at the track. Judge Levine expressed the view that, irrespective of whether Owen paid a fee in order to race his car, the release was not invalidated by the statute because Owen's status was not that of a "user" of a pool, gymnasium, [or]place of amusement or recreation, or similar establishment, within the meaning of the statute. The release was signed in consideration for being permitted to participate in the races, commented Judge Levine, not for Owen's admission as a spectator to the races. Owen "was a knowledgeable, experienced participant, fully aware of the risks as to which he waived suit, and whose participation was in furtherance of the speedway venture" and the release should have served as a complete defense.

Owen v. R.J.S. Safety Equipment, 572 N.Y.S.2d 390 (N.Y.App. 1991) [ELR 13:11:17]

Stock car racetrack owner is not liable for injuries suffered by spectators who signed release forms prior to entering restricted area

In a case decided in 1989, but only recently published, an Ohio appellate court has upheld a trial court decision granting summary judgment to the owner of a stock car racetrack in an action brought by individuals injured while observing a race from a restricted infield area. John and Louis Toth gained access to the restricted area by signing a release form; their injuries occurred when a car driven by John Toth's son went out of control.

The court pointed out that when the Toths chose to relocate to the restricted area, they became "participants" in the race. Furthermore, the Toths had testified that they intended to offer assistance, in the form of mechanical help and/or advice, to John's son during the race. The release clearly and unequivocally declared that the signer intended to release the racetrack of "all liability," and the court found that on the basis of the express language, "an ordinarily prudent and knowledgeable person should have known that by signing the agreement, he was contracting away all rights to hold the other party liable for negligence." There was no evidence to establish that the racetrack's conduct was willful or wanton. In all, public policy did not prevent the Toths from contracting away liability and there was a valid waiver of such liability for any damages arising from the racetrack's alleged negligence.

The court also rejected the Toths' argument that the release was invalid because they were mistaken as to its content. The Toths admitted that they signed the release without reading it, but, as the court pointed out, the document in large printing at the top of the page stated: "Release and Waiver of Liability and Indemnity Agreement." Even if the Toths had not read beyond the headline, they would have been notified of the document's purpose, declared the court.

The release agreement was not invalid or unenforceable merely because the Toths either neglected to read it or chose not to read it before signing. In the absence of an allegation of fraud or mistake, the Toths were responsible for not reading what they signed.

The argument that a trier of fact should determine whether the Toths assumed the risk of injury was rejected by the court.

Toth v. Toledo Speedway, 583 N.E.2d 357 (Ohio App. 1989) [ELR 13:11:18]

Briefly Noted:

Copyright Infringement/Music.

In July 1990, a Federal District Court in Illinois granted summary judgment to several copyright owners in an infringement action against Hunter Country Club, a "semi-public" country club whose dining room was open to the public. The club, which presented live entertainment in the dining room, declined to obtain an ASCAP license.

The court found that the copyright owners established the requisite elements for a prima facie case of copyright infringement; refused to join ASCAP, the copyright owners' licensing agent, as a party; and stated that the club's claim that ASCAP did not use its best efforts to negotiate a reasonable license fee would have to be presented to the Southern District of New York pursuant to the 1950 Amended Consent Decree.

Judge Roszkowski refused to enter the injunctive relief requested by ASCAP seeking to prevent the club from playing or using any material contained on ASCAP's repertory list, reminding the organization of the court's ruling that ASCAP was not a proper party for joinder in the action. The court granted the copyright owners statutory damages in the total amount of $3,000 for the five copyright violations, as well as attorneys' fees. The copyright owners had sought statutory damages in the amount of $1,500 for each infraction, but the court adverted to the eight month delay in ASCAP's response to the club's questions about the organization's repertory.

In February 1991, the court denied the copyright owners' motion to amend the judgment, stating that no evidence was shown of a substantial threat of continuing copyright violation sufficient to warrant the issuance of an injunction. Judge Roszkowski also denied the club's motion to vacate the judgment and transfer the action to the Southern District of New York, noting that the consent decree involving ASCAP was "only peripherally relevant" to the action.

Bourne Company v. Hunter Country Club, Inc., 772 F.Supp. 1044 (N.D.Ill. 1990) [ELR 13:11:18]

Copyright Infringement/Music.

A Federal District Court in Georgia has granted summary judgment to the owners of several copyrighted musical compositions in an infringement action against a restaurant known as the Bucket Shop.

The Bucket Shop transmitted the copyrighted works by a radio-over-loudspeakers system consisting of about twenty ceiling-mounted speakers attached to a radio receiver located behind the bar; live music was performed in one area of the restaurant. The restaurant had obtained a license from the American Society of Composers, Authors and Publishers authorizing the public performance of the works in the society's repertory. However, the Bucket Shop subsequently decided not to continue providing live music, and refused to obtain a license for the speaker system.

The court found that the retransmission of the copyrighted works via the restaurant's speaker system constituted a public performance under the Copyright Act. Judge Robert H. Hall, Jr. then stated that the Bucket Shop was unclear as to whether it was claiming a "home-system" defense, although ASCAP was "under the impression" that the restaurant raised the claim. Judge Hall proceeded to declare that the restaurant's sound system was not a "home-type" system; that the copyrighted works in issue were "further transmitted" to the public; and that, in view of the cited findings, it was not necessary for the court to determine whether the

Bucket Shop qualified as a "small commercial establishment."

The court concluded by rejecting the Bucket Shop's fair use defense, and by granting the copyright owners' request for injunctive relief and for statutory damages in the amount of $1,500 per infringement, for a total of $7,500, as well as costs and attorneys' fees of about $2,900.

U.S. Songs, Inc. v. Downside Lenox, Inc., 771 F.Supp. 1220 (N.D.Ga. 1991) [ELR 13:11:19]

Copyright Infringement/Art Gallery Liability.

At ELR 13:1:5, it was reported that a Federal District Court in New York granted summary judgment to Art Rogers in a copyright infringement action against sculptor Jeff Koons. Rogers had photographed Jim and Mary Scanlon and their eight puppies. The 1980 photograph was published in a local newspaper, exhibited at a museum and reproduced as a notecard.

A 1988 Koons exhibition at the Sonnabend Gallery included a polychromed wood sculptural version of the photograph; the piece was entitled "String of Puppies."

In a decision issued in February 1991, but only recently published, the court has amended the earlier ruling by finding that the gallery, the seller of the infringing sculptures and the recipient of fifty percent of the infringing profits, was a direct infringer of Rogers' work.

Rogers v. Koons, 777 F.Supp. 1 (S.D.N.Y. 1991) [ELR 13:11:19]

"Annie 2" Investment.

A New York appellate court has affirmed a trial court decision granting summary judgment to Roger Berlind, Stephen Graham and Lewis Allen in an action seeking to recover about $526,000 from investor Martin Heinfling. Heinfling executed three unconditional promissory notes in connection with the financing and production of the play "Annie 2." The court found that Heinfling failed to present sufficient evidence to support his defenses of fraud in the inducement and mutual mistake in having signed the notes in his personal, rather than his corporate, capacity. The promissory notes in issue were part of an investment transaction "between sophisticated, counseled parties dealing at arms length," observed the court, and the language of the notes unambiguously obligated Heinfling in his personal capacity.

The court also rejected the defenses of fraud or misrepresentation in connection with the limited partnership agreement between the parties for the production - the offering plan expressly warned investors of the substantial risks involved, "including the possibility of total loss of their investment." Furthermore, a party may not defeat summary judgment on an unconditional promissory note by alleging fraudulent inducement in connection with a separate, though related transaction.

Berlind v. Heinfling, 574 N.Y.S.2d 354 (N.Y.App. 1991) [ELR 13:11:19]

DEPARTMENTS

In the Law Reviews:

Little Ado About Something: Playing Games with the Reform of Big-Time Intercollegiate Athletics by Rodney K. Smith, 20 Capital University Law Review 567 (1991)

Of Hank Gathers and Mark Seay: Who Decides Which Risks an Athlete Is Allowed to Undertake? by Steven K. Derian, 5 UCLA Journal of Education 1 (1991)

Recent Sports Antitrust Developments: Another Perspective by Stephen F. Ross, 10 The Sports Lawyer 1 (1992) (published by the Sports Lawyers Association, 2017 Lathrop Avenue, Racine, WI 53405)

Free Agency in Japan: Is Hiromatsu Ochiai Japan's Curt Flood? by Kenneth L. Shropshire, 10 The Sports Lawyer 1 (1992) (for address, see above)

Boston Marathon Litigation by Thomas D. Lohrentz, 10 The Sports Lawyer 4 (1992) (for address, see above)

When Mickey Mouse Is As Strong As Superman: The Convergence of Intellectual Property Laws to Protect Fictional Literary and Pictorial Characters by Michael Todd Helfand, Stanford Law Review 623 (1992)

Assessing the Constitutionality of Press Restrictions in the Persian Gulf War by Matthew J. Jacobs, Stanford Law Review 675 (1992)

Losing the Battle on Obscenity, But Can We Win the War?: The National Endowment for the Arts' Fight Against Funding Obscene Artistic Works by Paul N. Rechenberg, 57 Missouri Law Review 299 (1992)

Timing is Paramount: The Impact of Paramount v. Time on the Law of Hostile Takeovers by Paul E. Burns, 19 Florida State University Law Review 761 (1992)

To Tell the Truth: Should Attorneys Be Directly Accountable for the Content of Applications for New Radio and Television Broadcast Stations? by Mark E. Wojcik, 41 DePaul Law Review 307 (1992

Protecting Characters Throught Copyright Law: Paving a New Road upon Which Literary, Graphic, and Motion Picture Characters Can All Travel by Dean D. Niro, 41 DePaul Law Review 359 (1992)

Copyright as Myth by Jessica Litman, 53 University of Pittsburgh Law Review 235 (1991)

The Entertainment Law Review, published by Sweet & Maxwell, ESC Publishing, Mill Street, Oxford OX2 OJU, United Kingdom, has published Volume 3, Issue 1 with the following articles:

The Impact of EEC Competition Law on the Music Industry by Frank L. Fine, 3 Entertainment Law Review 6 (1992)

Start of a New Competition: Sports Events and Broadcasting Rights: Experiences from the First Season in Germany by Jeijo E. Ruijsenaars, 3 Entertainment Law Review 18 (1992)

The George Michael Case: A Moral Victory? by Michael Smith, 3 Entertainment Law Review 26 (1992)

Public Support for Audio-visual Production in Luxembourg by Jacques Neuen, 3 Entertainment Law Review 28 (1992)

The Price of Fame: The Development of the Right of Publicity in the United States Part II by Oliver R. Goodenough, 14 European Intellectual Property Review 90 (1992)

Recent Developments in US Copyright Litigation by Paul R. Gupta, 14 European Intellectual Property Review 100 (1992)
[ELR 13:11:21]