

LEGAL AFFAIRS

Arsenio Hall Case: The Novel Aspect

by Chester L. Migden

The decision of the Labor Commissioner ordering X Management, Inc. to reimburse Arsenio Hall over \$2 million in commissions (see ELR 14:5:4) is a resounding affirmation of the classic Buchwald case, sometimes referred to as the "Jefferson Airplane" case, some years ago. The basic premise is personal managers operating their business without talent agency licenses may not solicit employment for their clients. Doing so is a violation of the Talent Agency Act which allows the Labor Commissioner to order reimbursement of commissions.

After Buchwald (no relation to Art), the Talent Agency Act was amended to provide a one year statute of limitations to integrate the impact of that type of decision. It was one of the gains made by the personal managers in the legislature in the early '80's. Since its enactment no one was sure how the statutory one year rule would work. The importance of the Hall case is that it is some construction! It is more than just interesting.

The Act on this point provides: "No action or proceeding shall be brought pursuant to this chapter with respect to any violation which is alleged to have occurred more than one year before the commencement or proceeding."

The Labor Commissioner's decision says this means that if a violation occurred more than a year before the petition to hear the controversy is filed then the Labor Commissioner has no jurisdiction to hear the controversy. But, and it's a big but, nothing limits the remedies

the Labor Commissioner can impose if there are violations within the one year period. Therefore by way of remedy, the Labor Commissioner reasons, there is no limit as to how far back the remedy or order of reimbursement of commission can go! As the Labor Commissioner put it, "The section does not restrict the Labor Commissioner from fashioning a remedy which voids the contract ab initio and requiring the reimbursement of all compensation from the date of the void contract."

The Labor Commissioner as a matter of fact didn't do that for other reasons - mainly that Eddie Murphy who withdrew from the company to help his friend Arsenio Hall would be damaged by such a far reaching result. But, the ruling that nothing in the statute provides that Buchwald is overruled and the case gave the Labor Commissioner the right to void the whole contract.

Labor Commissioner rulings in cases are subject to a trial de novo. In other words the losing party can go to

court and try the whole thing over again. This action is now pending. In the meantime the Labor Commissioner's ruling is the law. It is generally the case that courts give considerable weight to administrative agency rulings. It is also clear that the Labor Commissioner's ruling follows the language of the Act.

The issue, frequently debated by the experts, now has a lot more flesh on its bones. The Hall case is also a bit of a cause celebre because Howard Weitzman, the attorney for X Management, is also attacking the constitutionality of the Talent Agency Act. On that score we think he has as much chance as he did of winning the 100 meter dash at Barcelona.

Chester L. Migden is Executive Director of the Association of Talent Agents [ELR 14:5:3]

RECENT CASES

Arsenio Hall may recover \$2.15 million in commissions paid to personal manager who acted as unlicensed talent agent

In September 1987, Arsenio Hall entered into a personal management agreement with X Management; Hall terminated the agreement in August 1990. In a proceeding before the California State Labor Commissioner, Hall alleged that X Management acted as a talent agent without being licensed under Labor Code section 1700.5 and requested that the Labor Commissioner declare the agreement void and require X Management to return all fees collected from Hall or his employers arising from Hall's activities in the entertainment industry.

The Labor Commissioner determined that during the relevant time period, X Management, through its

principals Robert Wachs and Mark Lipsky, served as a talent agency without being licensed as such; that the 1987 personal management agreement was void and unenforceable; that neither Hall nor X Management had any obligations or liabilities under the agreement; and that X Management was not entitled to any further commissions.

The Labor Commissioner further found that X Management engaged in an act of self-dealing and overreaching while acting as an artist's manager and talent agent for Hall during the one year period prior to August 8, 1990, and that X Management was not entitled to any compensation received from Hall after August 8, 1989.

X Management was ordered to pay Hall about \$2.15 million, received in compensation after August 9, 1989, which arose out of the personal management agreement. Hall was not estopped from claiming the relief sought in the petition, noted the Labor Commissioner's ruling,

even if many of the acts "were taken at his express request, encouragement, and insistence... and with his full knowledge of such acts..." Apparently, not all of the complained-of acts were taken at Hall's request, nor was he fully informed of all of X Management's activities.

The Labor Commissioner's ruling also pointed out that since the agreement was void ab initio, the provisions of the Personal Management Agreement providing for the arbitration of all disputes regarding the terms of the agreement did not deprive the Labor Commissioner of jurisdiction to hear the petition and make an award enforcing the provisions of the statute.

In its statement of facts, the Labor Commissioner described the background of the parties, and the close relationship between Hall and Wachs. Hall testified that when Wachs presented the Personal Management Agreement to him in 1987, Hall signed the agreement without reading it. Wachs allegedly stated to Hall that

the agreement was a "standard contract," and did advise Hall that the commission for X Management would be fifteen percent. Hall further testified that Wachs encouraged him not to hire a talent agent; X Management proceeded to obtain contracts for Hall as a television show host, as an actor, and as a product endorser.

The Labor Commissioner observed that had Wachs advised Hall before signing the Personal Management Agreement that Hall would have to hire a talent agent (normally at a ten percent commission) and an attorney to review his contracts, "Hall might not have wanted to retain X Management at a 15% commission." Furthermore, Wachs had a self-interest in procuring employment for Hall, and was "in a position to negotiate deals that benefitted him at the expense of Mr. Hall."

X Management's violations of the Talent Agencies Act included negotiating with Fox Square Productions for Hall to serve as the guest host of a nightly talk show;

negotiating with Paramount Pictures for Hall to act in "Coming to America" and other films; and arranging the contract with Paramount Television for the "Arsenio Hall Show" - Wachs and Lipsky each were paid \$5,000 a week as Production Executives on the show. Hall claimed that for eight months he was not aware of the payments to Wachs and Lipsky. Upon Hall's objections, Wachs and Lipsky stopped receiving payments although their names continued to appear on the show's credits.

From August 1989 to August 1990, Wachs and Lipsky negotiated a new movie contract with Paramount; negotiated a \$1.5 million contract for Hall with the Coca-Cola Company to do television and radio commercials and other promotions; and arranged for Hall to host the 1990 MTV Video Music Awards.

In discussing instances of self-dealing and overreaching by X Management, the Labor Commission noted that the payment to Wachs and Lipsky as "Production

Executives" for the Arsenio Hall Show was "one of several incidents of misconduct on the part of X Management that show a pattern of such conduct on the part of X Management throughout its relationship with Mr. Hall."

In October 1989, Wachs told Hall that they had an oral agreement that X Management was entitled to fifty percent of all the profits from the Arsenio Hall Show. Hall, according to the Labor Commissioner, stated that he never entered such an agreement. In a footnote comment, the Labor Commissioner noted that the discussion of the fifty percent arrangement may have occurred during the negotiations with Paramount for The Arsenio Hall Show. X Management had proposed forming a production company to produce the show, with Paramount splitting the profits with the production company. The deal never was made, but Wachs, stated the Labor Commissioner, apparently "attempted to distort Hall's

consent to split the profits with Paramount into an agreement to share the profits from the Show with Mr. Lipsky and [Wachs]."

It was bad faith and overreaching for Wachs to have insisted that the purported oral agreement was made, particularly considering Hall's "trust in and reliance on" Wachs as his lawyer. Asking Hall to give up fifty percent of the profits of The Arsenio Hall Show was unconscionable, declared the Labor Commissioner, given "how little, if anything, X Management and its principals contributed to the success of the show." Indeed, concluded the Labor Commissioner, X Management, as a talent agent, successfully advanced Mr. Hall's career, not because of Mr. Wachs, but because of Mr. Lipsky.

Hall had argued that X Management had no authority to appear in the matter because it did not have the consent of Lipsky to make such an appearance. The Labor Commissioner, applying general principles of

corporation law, stated that X Management had a fiduciary duty to Wachs to defend his interests. And since Wachs was the president of X Management, he had the authority to hire counsel and authorize the corporation to appear in the controversy and defend itself.

The Labor Commissioner rejected X Management's argument that the company never initiated any contacts with potential employers. The evidence showed that the company initiated contacts with studios seeking employment for Hall and exploited those contacts in efforts to obtain employment contracts for Hall. The word "procure," when used with the word "employment," stated the Labor Commissioner means "either to secure employment or to bring about employment or cause employment to occur...It means to arrange employment. It means to negotiate for employment."

X Management's claim that it was not in the "occupation" of acting as a talent agent for Hall also was

rejected. Being a talent manager may be an "integral part" of the personal managing business, observed the Labor Commissioner, but the state legislature has declined to amend the Talent Agency Act to exempt personal managers. In any event, the evidence showed that the procurement of employment for Hall indeed "was an occupation that X Management regularly or habitually engaged in."

With respect to the remedy available to Hall, the Labor Commissioner emphasized that the Talent Agency Act was an exercise of the police power of the state, that the Commission was not bound by the principles of contract law, and that not voiding the contract would permit X Management to continue to profit "enormously" from its violations of the statute.

X Management stated that Hall directed it to collect information for him and procure employment opportunities. The contention was not factually correct in its

entirety, declared the Labor Commission, but also was irrelevant. The fact that Hall may have directed X Management to proceed to negotiate deals had "no bearing" on whether or not X Management required a license. The Labor Commissioner reiterated that Hall "was led to believe by X Management that he did not have to have any talent agent because X Management was acting in that capacity. He was never told by Mr. Wachs, who purported to be his lawyer, that X Management required a license from the State to act on his behalf as a talent agent."

Hall was not in *pari delicto* with X Management - the statute was written for the protection of the class of persons of which Hall was a member. There was no evidence that Hall knew that a license was required by X Management and even if Hall did know, that did not excuse X Management from its violation of the law, stated the Labor Commissioner. Similarly, the fact that Hall

may have consented to some of X Management's activities was immaterial - Hall could not consent to a violation of the law.

X Management further argued that the statute was intended to protect artists of limited economic means and not artists who are wealthy and can protect themselves. The Labor Commissioner pointed out that when Hall entered the agreement, the performer was "financially strapped." Subsequently, Hall "was exploited in the negotiations with Paramount concerning The Arsenio Hall Show." Hall may have been wealthy at that point, "yet he still needed protection from his agent." The legislature intended the statute to apply to all artists regardless of income, declared the Labor Commissioner.

The Labor Commissioner pointed out that estoppel was not a recognizable defense, because, as a matter of public policy, the state has an interest in encouraging the reporting of violations of the Talent Agencies Act and

detering such violations. To recognize the defense of estoppel would defeat the public policy and "handicap the enforcement of the Act..."

Even if the defense of estoppel was available, X Management did not satisfy the elements of the defense. Hall made no representations and did not conceal any material facts, and there was no evidence to support any of the elements of the defense.

As a matter of public policy, the Labor Commissioner also refused to recognize the defense of waiver.

Depriving X Management of all of its income from Hall as a result of procuring employment in violation of the Talent Agencies Act was particularly justified, stated the Labor Commissioner, considering Wachs' "self-dealing, deceptions, dishonesty, and lack of professionalism in dealing with Mr. Hall and Mr. Wachs' willful violation of the Act. Because Mr. Wachs was the president of X Management and its co-owner, his conduct

thoroughly poisoned X Management." The Commissioner also found it "reprehensible" that Wachs represented to Hall that Wachs would be his lawyer, and found "incredible" Wachs' testimony that he was unaware that he needed a license.

There was a lack of evidence, continued the Labor Commissioner, that Lipsky or Eddie Murphy knowingly or willfully violated the Talent Agencies Act. (Murphy withdrew from X Management in 1989 because he did not want to take money away from Hall.)

X Management received a total of about \$2.62 million in commissions under the personal management agreement. The company received about \$2.15 million of the fees after August 9, 1989, and the Labor Commissioner ordered X Management to reimburse the latter amount to Hall.

The Labor Commissioner concluded by recalling that X Management's quantum meruit argument did not

apply to the statutory action brought by Hall, and, again, that even if the argument did apply, there was evidence that X Management "received more than full value for its services." The Commissioner also upheld the one year statute of limitations, thus precluding Hall's recovery of all the commissions he had paid to X Management since the inception of the personal management agreement.

Hall v. X Management, Inc., Before the Labor Commissioner of the State of California (April 24, 1992) [ELR 14:5:4]

Arbitrator upholds Writers Guild determination in dispute over "29th Street" credit

In February 1987, Paramount Pictures hired Frank Pugliese to write a first draft screenplay and a set of revisions for the film "29th Street." Pugliese delivered a final draft screenplay in December of 1988, but, in January 1989, Paramount abandoned the project and granted MGM a one year option (subsequently extended for a second year) in Paramount's rights, title and interest in 29th Street. MGM hired George Gallo to write a screenplay based, as was Pugliese's work, on the life story of Frank Pesce and upon a treatment written by Frank Pesce and James Franciscus.

In May 1990, MGM transferred its rights in 29th Street to 20th Century Fox. Fox, in conjunction with 29th Street Productions, produced the film.

In February 1991, the production company submitted to the Writers Guild of America, West, Inc. a Notice of Tentative Writing Credits for the film listing Gallo, Pesce, Pugliese and Franciscus as participating writers. A

second notice submitted in March 1991 listed the same writers. However, when the company submitted a third notice of credits, Pugliese's name was deleted from the list.

The Guild filed an arbitration, contending that Pugliese, in accordance with the 1988 Theatrical and Television Basic Agreement between the Guild and the production company, should have been included as a participating writer. The Guild determined, in part, that Pugliese and Gallo wrote about the same subject matter, that the writers were given the same source material and worked with the same production executives.

The production company noted that Gallo never saw the Pugliese scripts, did not rewrite the Pugliese scripts and that the scripts were optioned by MGM and purchased by Fox only for studio reciprocity and/or legal clearances purposes and not for any creative reasons. It was noted that Fox did not acquire the Pugliese scripts

until six weeks after the company had acquired all of MGM's other rights in the film.

Arbitrator Sol Rosenthal first cited paragraph 9 of Theatrical Schedule A of the Basic Agreement, which provided, in relevant part, that "A writer who has participated in the writing of a screenplay, or a writer who has been employed by the Company on the story...shall, for the purposes of this Basic Agreement, be considered a participant." And paragraph 11 provided that "Before the writing credits for a motion picture are finally determined... the Company will send each participant...and to the Guild concurrently a written notice which will state the Company's choice of credit on a tentative basis, together with the names of all participants..."

Arbitrator Rosenthal, after reviewing the Guild's findings, stated that the fact that Gallo's writing services contracts did not mention the Pugliese scripts was not

significant, and further observed that the testimony showed that Pugliese had "detailed conversations" with Pesce (who was working as an associate producer on the project) about the various drafts of his scripts.

The arbitrator found that there was a chain of title to the project, which included the Pugliese material; that the evidence showed that the Pugliese scripts were part of the project; and that, although "there may be incidental breaks in the chain of title," the parties intended that the Pugliese scripts move from company to company with the project. It was observed that Fox did not purchase the Pesce/Franciscus treatment from Pesce until June 1990; the production company did not allege that this lapse in time placed the treatment outside the chain of title.

The Guild, according to Arbitrator Rosenthal, followed its customary practices in determining that Pugliese was a participating writer; the determination was supported

by the evidence; and, under the collective bargaining agreement and the Guild's custom and practice, the Guild established that Pugliese was entitled to credit as a participating writer on 29th Street.

Arbitrator Rosenthal concluded that 29th Street Productions violated paragraphs 9 and 11 of the Theatrical Schedule A of the 1988 collective bargaining agreement by failing to list Pugliese as a participating writer on the Notice of Tentative Writing Credits dated March 1991; ordered the company to submit a revised notice; and enjoined the company from preparing or releasing prints and/or videocassettes of the film unless and until the production company submitted the notice of credits listing Frank Pugliese as a participant and the Guild subsequently issued a final determination of credits.

In the Matter of the Arbitration between Writers Guild of America, West, Inc. and 29th Street Productions,

Opinion and Award of Arbitration Tribunal (July 22, 1991) [ELR 14:5:6]

Author's copyright infringement claim against "Coming to America" is dismissed

Alveda King Beal claimed that the film "Coming to America" infringed her copyrighted book, "The Arab Heart." The book, as described by Federal District Court Judge Julie E. Carnes, recounts the adventures of an Arabian prince who attends college in the United States, marries an American woman, and then returns to his country.

The court granted summary judgment to the Paramount parties and ordered the dismissal of the action on the ground that Beal did not raise a genuine issue of material fact on the issue of substantial similarity. It was

observed that there were very general, but not copyrightable, similarities in theme between the two works and that other similarities naturally arose from the generalized theme of a foreign prince coming to the United States. Furthermore, the plots of the works differed greatly, as did the relationships and characterizations of the protagonists, and the mood and settings of the book and film.

In all, no reasonable trier of fact could find that the copyrightable portions of the two works were substantially similar, concluded the court.

Beal v. Paramount Pictures, Case No. 1:91-CV-1266 (N.D.Ga., Aug. 10, 1992) [ELR 14:5:7]

Editor's age discrimination claim against McGraw-Hill is dismissed

In 1963, Kenneth J. Stein began working for Aviation Week Magazine (subsequently renamed Aviation Week & Space Technology), a weekly publication of McGraw-Hill, Inc. McGraw-Hill terminated Stein's employment in 1988 when the editor was sixty-four years old. Stein sued the publisher alleging the violation of the Age Discrimination Act of 1987.

McGraw-Hill noted that in 1986, Stein began receiving negative performance appraisals. Stein responded that his productivity, as measured by his total number of by-line stories, was the same for the period of 1984 to 1987 as from 1978 until 1981.

A Federal District Court in New York granted McGraw-Hill's motion for summary judgment. Judge Martin stated that Stein, as a matter of law, did not make the minimal showing of qualification necessary to

preclude granting the publisher's motion for summary judgment.

Stein also failed to show that the dismissal occurred under circumstances giving rise to an inference of discrimination. There was no direct or statistical evidence of age discrimination, and the publisher did not hire a younger individual to replace Stein. The editor claimed that McGraw-Hill's reasons for discharging him were pretextual, arguing that he was treated differently from others with similar productivity levels.

Judge Martin observed that while Stein measured productivity based on the number of columns written, the publisher relied on the number of the editor's by-lines, a method challenged by Stein as an "inaccurate and unfair method of assessing output." But Stein did not offer any evidence that the by-line method was chosen to discriminate against him on the basis of age, or any proof that the company recently switched its way of

calculating productivity. In all, there was no reason to believe that McGraw-Hill intentionally chose a technique for measuring output in order to disadvantage Stein - the editor's claim of average productivity did not provide a basis to infer discrimination.

Stein's evidence was insufficient to establish a prima facie case of age discrimination, did not demonstrate pretext, and did not show that Stein was fired under circumstances giving rise to an inference of discrimination, and the court, accordingly, dismissing Stein's age discrimination claim as well as a claim under New York's Human Rights Law.

Stein v. McGraw-Hill, Inc., 782 F.Supp. 207 (S.D.N.Y. 1992) [ELR 14:5:7]

Rejection of age discrimination claim against television station is affirmed

As reported at ELR 13:4:13, WGN television, in 1987, transferred Ron B. McCoy, who was then 45 years old, from a position as the station's director of creative services to the newly-created position of director of promotions and publicity. McCoy kept the same salary and benefits, but had substantially less responsibility. In 1988, WGN fired McCoy, along with about 40 other individuals; the station had experienced ongoing financial difficulties.

McCoy sued WGN, alleging that his transfer was an age based demotion and that he was terminated based on his age in violation of the Age Discrimination in Employment Act of 1967. A Federal District Court in Illinois granted WGN's motion for summary judgment. A

Federal Court of Appeals has affirmed the District Court's decision.

Federal District Court Judge James T. Moody, sitting by designation, considered whether WGN's stated reasons for transferring and terminating McCoy would be genuinely subject to attack at trial on the ground that they allowed an inference of age discrimination. Although stating that McCoy presented a "close case," the court found that WGN acted because of financial pressures and continued concerns about McCoy's performance. Judge Moody commented that "Even if the performance concern was a complete mistake, even if McCoy was the best possible person for the job," the court would not second-guess WGN's business judgment concerning McCoy's performance status. Again, even if the station should have known that McCoy would not work out in his new position for either

performance or financial reasons, the statute did not provide a remedy for the mistake.

McCoy v. WGN Continental Broadcasting Co., 957 F.2d 368 (7th Cir. 1992) [ELR 14:5:8]

Radio announcers' age discrimination claims against station are upheld and court orders hearing on withholding of front pay

In 1987, Century Broadcasting Corporation's radio station in Chicago hired new managers who changed the station's format (from beautiful music to adult contemporary), and fired six announcers who were over forty years old. A twenty-seven year old announcer was not fired, and the company hired five new announcers who were under forty years old.

The Equal Employment Opportunity Commission, on behalf of the announcers, sued Century for violating the Age Discrimination in Employment Act. Two of the announcers chose to withdraw from the lawsuit. The Commission presented evidence that the announcers were in the protected age group; that their job performance met the company's expectations; that they were discharged; and that Century sought replacements for them. The Commission introduced evidence that the terminated announcers had the capability to work.

A jury found in favor of the Commission with respect to three of the claimants, but in favor of Century as to the fourth announcer. The jury also found that Century's violation was willful, resulting in double damages. A Federal District Court entered judgment on the verdict.

Federal Court of Appeals Judge Ripple first found that there was little support for Century's argument that the decision to fire the announcers was based on the

company's belief that the announcers did not have the conversational style required for the new easy listening/soft adult contemporary format, and that the announcers were identified with the failing beautiful music format. The station's program director did not tell the announcers to adopt a "conversational" style, and did not suggest that the music or the format was changing.

There also was no support for the argument that the announcers were fired because they were too strongly identified with the beautiful music format. And there was substantial evidence to support the Commission's claim that the station wanted younger-sounding announcers.

It also was observed that the jury could have given significant weight to the fact that the termination letters that Century sent to the announcers contained "demonstrably false" reasons for the firings. In all, a reasonable jury could have found that age was a determining factor in

Century's decision to terminate the announcers, and the District Court correctly denied Century's motion for judgment notwithstanding the verdict.

The court also found that the District Court did not abuse its discretion in refusing Century's request for a new trial or in denying reinstatement to one of the announcers, but reversed the District Court's denial of front pay for three of the announcers and remanded the matter for further consideration of the issue.

Judge Manion dissented from the majority's decision to uphold the jury's finding that Century was liable for liquidated damages because the company willfully violated the age discrimination statute. For Judge Manion, the question was whether company representatives were consciously motivated by age when they acted, or whether their action was based on the unconscious application of an age-based stereotype. Knowledge of the statutory requirements by itself was not enough to show

willfulness, and Judge Manion did not agree that the evidence was sufficient for a jury to find that Century willfully violated the statute. Among other factors, the dissent noted that Century, pursuant to the format change, fired a number of sales representatives, engineers and other employees and that of a total of twenty-four employees (including the announcers fired by Century, sixteen were younger than forty. Century also retained two feature announcers, aged fifty-two and sixty.

Judge Manion suggested that the evidence did not reveal the systematic removal of older employees which would raise the inference that Century consciously sought to fire older announcers because they were old. The evidence supported a jury finding of an age discrimination violation, but in Judge Manion's view there was no showing of the consciously motivated age discrimination as required to meet the statute's willfulness standard.

United States Equal Employment Opportunity Commission, 957 F.2d 1446 (7th Cir. 1992) [ELR 14:5:8]

Distributors of modified satellite television descramblers prevail in motion to dismiss indictment under wiretap laws

Stephen L. Shriver and other parties were charged with conspiring to violate federal wiretap laws, 18 U.S.C. sections 2511-2512, 1343 and 47 U.S.C. section 605 for allegedly selling modified satellite television descramblers. The government claimed that the descramblers were used for the surreptitious interception of wire, oral or electronic communications.

Federal District Court Judge Richard Mills pointed out that the legislative history of section 2512 indicated that

it was intended to apply to a relatively narrow category of devices principally used for wiretapping or eavesdropping. The 1986 Electronic Communications Privacy Act updated the wiretap laws to account for new computer and telecommunications technology. The updated version added electronic communications to the types of communications covered by the original laws, noted the court, and there was no question that satellite transmissions were within the scope of the 1986 statute. However, the legislative history stated that the private viewing of satellite cable programming would continue to be governed by section 605.

Judge Mills stated that section 605 clearly applied to the conduct charged in the instant proceeding. The term "surreptitious" as used in the wiretap laws referred to the "design of the interception device, not its use" (emphasis by the court). Because the primary function of a surreptitious device is fundamentally different from that

of a satellite descrambler, the court concluded that descramblers were not within the spectrum of devices prohibited under section 2512. The Shriver parties thus could not be charged with violations of the wiretap laws and the court granted the motion to dismiss the indictment.

United States v. Shriver, 782 F.Supp. 408 (C.D.Ill. 1992) [ELR 14:5:9]

Court refuses to dismiss indictment against distributor of unauthorized descrambling devices

The owners of S & S Satellite in Iuka, Mississippi, were indicted for manufacturing and distributing Videocipher II descrambler devices in violation of 47 U.S.C. section 605(e)(4). The devices, when modified,

descramble satellite cable programs, allowing the user to receive the program through a home satellite dish without paying any subscription fees.

The statute defined "satellite cable programming" as "video programming which is transmitted via satellite and which is primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers..." The S & S parties argued that, given the statutory definition of satellite cable programming, section 605(e)(4) did not criminalize the conduct with which they were charged. S & S claimed that the statute was directed at prohibiting the modification of commercial descramblers which are used by cable operators to descramble television signals before retransmittal by wire to their cable subscribers. According to S & S, the statute was ambiguous and the indictment failed to state the commission of a crime.

Federal District Court Chief Judge Senter noted that there was "absolutely no doubt" that the conduct with which the S & S parties were charged was prohibited under section 605 as it existed before 1988. After reviewing the legislative history of the challenged amendment, the court found that Congress did not intend to decriminalize activity "which had so clearly been found prohibited" and intended to outlaw the practices with which the S & S parties were charged. The legislative history did not indicate that Congress intended only to reach those individuals who modify commercial descramblers, and the S & S parties' motion to dismiss was denied accordingly.

United States v. Scott, 783 F.Supp. 280 (N.D.Miss. 1992) [ELR 14:5:9]

Modifier of satellite descrambler devices is properly charged under Electronic Communications Privacy Act

As described by Federal Court of Appeals Judge James R. Browning, Jack Lande modified General Instruments Videocipher II descrambler units to enable home satellite dish owners to view scrambled pay television programming without payment. Lande pled guilty to numerous charges and was sentenced to thirty-five months in prison.

Judge Browning has affirmed a Federal District Court decision denying Lande's motion to dismiss charges based on the Electronic Communications Privacy Act (also known as Title 1 or the Wiretap Law). Lande had argued that the statute did not apply to the piracy of satellite television.

Lande modified the satellite descrambler module by copying the electronic "address" of a subscriber's Videocipher unit on blank computer chips. Lande then installed the chips in other Videocipher descramblers, giving the modified units the same electronic address as the unit of the subscriber, a technique known as "cloning," and added a new computer chip to the "cloned" Videocipher units so the modified descramblers would unscramble all stations. Lande sold the modified descramblers to nonsubscribers, enabling them to receive scrambled satellite television programs without paying a subscription fee.

Judge Browning noted that Congress was aware of the broad sweep of the statute, provided express exemptions for the interception of certain unscrambled satellite television signals and for the interception of cable television carried by wire, and was aware of scrambled satellite pay television. The fact that the statute did not contain

an express exemption for piracy of scrambled satellite pay television was not due to Congressional oversight or unfamiliarity with the problem.

United States of America v. Lande, Case Nos. 91-30185, 91-30186 (9th Cir., June 30, 1992) [ELR 14:5:10]

Chicago White Sox owners obtain summary judgment in Jimmy Piersall's action alleging libel and tortious interference with radio broadcast contract

In 1981, Jerry Reinsdorf and Edward Einhorn, the owners of the Chicago White Sox baseball team, hired Jimmy Piersall, a former major league baseball player to work as a broadcast commentator on "SportsVision," a cable television program owned and operated by

Reinsdorf and Einhorn. During that time, Piersall also was employed by NBC-owned radio station WMAQ as an announcer and talk show host. In April 1983, following the first White Sox game of the season, Reinsdorf and Einhorn discharged Piersall as SportsVision broadcaster.

During certain interviews in September 1983, Reinsdorf, referring to Piersall and Harry Caray, another former White Sox announcer, stated: "I don't mind criticism, but they both told a lot of lies. They wanted us to lose. They thought they were bigger than the club and did not want the attraction shifting to the field." Reinsdorf also stated that "The public could not know the truth about them; they are both liars. They both said things on the air they knew were not true."

In November 1983, WMAQ terminated Piersall's employment. Piersall sued SportsVision, Reinsdorf, and

Einhorn for libel and for interference with his business relationship with the radio station.

An Illinois trial court decision granting the SportsVision parties' motion for summary judgment has been upheld.

The appellate court stated that Piersall did not clearly and convincingly show that Reinsdorf seriously doubted the truth of his statements. The record indicated that Piersall made a number of untrue statements. Judge Campbell found that Piersall did not establish a genuine issue of material fact as to whether Reinsdorf acted with actual malice.

Piersall also did not show that Reinsdorf's statements were actionable per se as unprotected expressions of opinion. Judge Campbell agreed with the trial court that the general statement that someone is a liar, without being put in the context of specific facts, was merely opinion. It did not appear to the court that there were any

specific facts "at the root of Reinsdorf's statement, complete or incomplete, capable of being objectively verified as true or false."

With respect to the tortious interference with business relationship claims, the court noted that the SportsVision parties submitted affidavits and depositions of WMAQ personnel stating that Reinsdorf had nothing to do with Piersall's termination. Piersall did not present any evidence to refute these facts and the trial court properly granted summary judgment on the tortious interference claims.

Piersall v. Sportsvision of Chicago, 595 N.E.2d 103 (Ill. App. 1992) [ELR 14:5:10]

Action challenging forfeiture provisions of Child Protection and Obscenity Act is ruled nonjusticiable

The American Library Association and other organizations challenged the 1988 Child Protection and Obscenity Enforcement Act. The statute provided, in part, that producers of material containing visual depictions of actual explicit sexual activity would be required to determine the age of the performers, to maintain records containing this information, and to attach to each copy of the material a statement about the location of the records. The provision applied to the original creators of the works, and to those parties who duplicated, reproduced or reissued the sexually explicit material.

The statute's criminal forfeiture provision authorized the forfeiture, after conviction of a child pornography offense, of materials depicting sexual conduct, as well as the gross profits traceable to the offense, and the

property used to commit the offense. The statute permitted the seizure, before trial, of property that would be forfeited upon conviction, and authorized Federal District Courts, upon the government's performance of certain conditions, to issue an order preserving the property's availability for forfeiture after trial.

The civil forfeiture section of the 1988 Act, pertaining only to child pornography, did not require a criminal prosecution as a predicate for pretrial seizure or a criminal conviction as a predicate for forfeiture. The same categories of property would be subject to forfeiture, but property used to commit the child pornography offense or property obtained through the offense was not subject to forfeiture if the owner did not know of or consent to the acts constituting the violation.

A Federal District Court found that the recordkeeping provisions of the statute violated the First Amendment and the due process clause of the Fifth Amendment, and

enjoined the enforcement of the provisions. The court also found certain aspects of the forfeiture provisions unconstitutional. However, the court supplied a limiting construction by enjoining the enforcement of the provisions unless the government engaged in a prior adversarial proceeding. And only upon a finding of a "pattern" of activity" would the government be entitled to apply post-conviction forfeiture provisions to property used in committing the obscenity or child pornography offense, and to property traceable to the proceeds obtained from commission of the offense.

Federal Court of Appeals Judge Randolph noted that in November 1990, after oral argument in the case, the President signed the Child Protection Restoration and Penalties Enhancement Act of 1990; the statute modified the record keeping provisions of the Child Pornography and Obscenity Enforcement Act. The enactment of the statute mooted the question of whether the

recordkeeping provisions of the Child Protection Act were constitutional, and the court therefore vacated the portion of the District Court's judgment concerning those provisions and remanded the case with instructions to dismiss that portion of the complaint.

Judge Randolph then agreed with the government that the claims presented by the various associations were not justiciable. It appeared to the court that the associations and their members were not the targets of the challenged provisions. The government had not prosecuted nor threatened with prosecution the associations or their members. The associations, stated the court, challenged the provisions on their face prior to any enforcement "which may never occur, and prior to application of the provisions to anyone who has allegedly committed the underlying criminal acts."

Judge Randolph pointed out that the Supreme Court has upheld pre-enforcement facial constitutional

challenges only if parties show that the challenged law either could never be applied in a valid manner, or, that even though it may be validly applied to a party it nevertheless is so broad that it may inhibit the constitutionally protected speech of third parties. The associations did not meet these standards, ruled the court.

The associations argued that the claim was justiciable because the forfeiture provisions were unconstitutional prior restraints. But the question of whether use forfeiture constituted a restraint on speech seemed to the court to depend on the nature of the property and the circumstances of the offender - no information was presented as to these factors in the instant case. Furthermore, forfeiture was not a "previous" sanction but would be imposed only after a party's conviction. It also was observed that the association had not identified or described a single film, photograph or other item they or their members suppressed as a result of the statute, or

the comparable use forfeiture provision in the 1984 statute; had not presented evidence concerning the factual context in which the court was asked to review the constitutionality of the legislation; and had not demonstrated a "credible threat" that the government would enforce the provisions against them. Their subjective "chill" was not a sufficient injury to warrant judicial relief.

Judge Wald, dissenting in part, would have found that the associations' challenges to the pretrial seizure provisions of the statute were justiciable, and would have agreed with the District Court's conclusion that the sections of the statute that authorize pretrial seizure of expressive material based on an *ex parte* showing of probable cause were unconstitutional. Judge Wald, unlike the District Court, would have rejected the associations' facial challenge to the section authorizing a

pretrial restraining order to preserve assets subject to post-conviction forfeiture.

American Library Association v. Barr, 956 F.2d 1178 (D.C.Cir. 1992) [ELR 14:5:11]

Court dismisses indictment charging video store owner for criminal possession of stolen property in connection with allegedly unauthorized videotapes

A New York grand jury indicted Ralph Borriello, the owner of three video stores, for crimes involving the sale of unauthorized recordings, the failure to disclose the origin of recordings, and possession of stolen property.

A New York trial court, upon reviewing the grand jury minutes, found that a prima facie case was established

for all of the crimes, except for criminal possession of stolen property.

Judge Kreindler observed that the unauthorized copies of the videotapes may have come from various sources. There was no evidence before the grand jury that the recordings in issue were duplicated from a stolen master tape or from a tape that did not belong to Borriello. The only thing that could have been considered "stolen," stated the court, was the magnetic pattern on the tape which ultimately produced video images.

The court then pointed out that at common law intangible property was not the subject of larceny. Thus, Borriello did not commit common law larceny by obtaining intangible images on the allegedly unauthorized copies. There was no evidence before the grand jury of "trespass," "trick," "embezzlement" or "false pretenses" as required by the applicable statute. Furthermore, in order to steal property, there must be a taking from an owner.

A copyright holder has the right to the economic benefit from the copyrighted material, but not to its possession, recalled Judge Kreindler.

The state did not prove that Borriello was not the owner of the unauthorized recordings or that there existed a person with a superior possessory interest in the recordings. As part of the crime, the state was required to show that the alleged perpetrator "possessed" stolen property, i.e., had physical possession or otherwise exercised dominion or control, over, again, tangible property (emphasis by the court).

Judge Kreindler stated that there were indications that the legislature did not intend that possession of unauthorized recordings would constitute possession of stolen property. The legislature included computer data, programs and other computer intangibles within theft crimes and amended the definition of property to include computer data and programs. But the definition of

property was not amended to include "unauthorized recordings." The court, emphasizing that a separate statute covered crimes relating to unauthorized recordings, found that the theft crimes statute was not intended to include unauthorized videotapes and dismissed the indictment on that charge accordingly.

People v. Borriello, New York Law Journal, p. 25, col. 3 (Kings City., June 17, 1992) [ELR 14:5:12]

Opera singer Frederica von Stade's application to relocate children to California is denied

In the ongoing dispute between opera singer Frederica von Stade and her former husband, Peter Elkus (ELR 13:3:8; 13:8:19), a New York appellate court has reversed a trial court ruling that granted von Stade

permission to relocate the couple's two daughters to California, the residence of her new husband.

The children and Elkus opposed the proposed relocation, as did the guardian ad litem and a court-appointed child psychiatrist. The trial court, however, agreed to the relocation at the end of the school year, in June 1992, upon a showing that the children had been properly prepared for the move. The court subsequently found that von Stade made the requisite showing.

The appellate court determined that the trial court applied an improper standard and that von Stade did not meet the requisite standard of exceptional circumstances justifying relocation. The fact that von Stade's new husband lived in California and could not relocate and that the move would be advantageous to von Stade's career were insufficient, in the absence of a showing of economic necessity or other exceptional circumstances, to justify the relocation of the children, stated the court.

Von Stade's frequent absences due to professional engagements were cited as "an important consideration in any best interests assessment." It also was observed that "the quality of the father's visitation can only suffer when frequency and flexibility are diminished."

The trial court relied on factual findings which were insufficient to uphold its determination and, in some, instances were not supported in the record, stated Judge Joseph P. Sullivan. In all, relocation "would have an adverse effect on the nature and quality of the father's relationship with the children," concluded the court in denying von Stade's application.

Elkus v. Elkus, New York Law Journal, p. 21, col. 3
(N.Y. App., Aug. 27, 1992) [ELR 14:5:12]

Ohio court orders further proceedings in wrestling coach's libel action against newspaper

In a decision issued in December 1990, but only recently published, an Ohio appellate court remanded to the trial court Michael Milkovich's libel action against the News-Herald.

The court described the course of the litigation between the parties which arose from the publication, in about 1974, of a sports column written by J. Theodore Diadiun. The column discussed a decision by the Ohio High School Athletic Association to place the high school wrestling team coached by Milkovich on probation for a year; the association also declared the team ineligible for the 1975 state tournament.

After lengthy state court proceedings, the United States Supreme Court, in June 1990 (under the case name *Milkovich v. Lorain Journal Co.*; ELR 12:2:8; 12:6:19),

rejected separate protection under the First Amendment for certain statements designated as "opinions."

On remand, the News-Herald argued that an Ohio Supreme Court decision in a related case, *Scott v. News-Herald*, 496 N.E.2d 699 (1986), held that, independent of the United States Constitution, the Ohio Constitution provided a privilege for opinions. Appellate Court Judge Ford noted however that the Ohio Supreme Court had based its reasoning solely upon its interpretation of federal case law; that the United States Supreme Court expressly rejected this interpretation in *Milkovich*; and that there was "little support for the contention that Scott can still stand for the proposition that the Ohio Constitution extends a privilege for 'opinion.'"

According to Judge Ford, the United States Supreme Court held that the statements in the column implied an assertion of perjury susceptible of being proven true or false, rather than an assertion of a protected "idea." The

matter therefore was remanded to the trial court for further proceedings to determine if the column was written with the requisite level of fault in view of Milkovich's status, under the law of the case, as a private person. Upon a prima facie showing of defamation, Milkovich would have to prove by clear and convincing evidence that the News-Herald failed to act reasonably in attempting to discover the truth or falsity or defamatory character of the publication.

Milkovich v. News-Herald, 591 N.E.2d 394 (Ohio App. 1990) [ELR 14:5:13]

Advertising agency is held liable for costs of television advertising placed on behalf of client

In 1985, Direct Results Marketing, Inc. placed advertising for Thermal Guard of Ohio, Inc., also known as Thermal-Lok, on WUPW TV-36. Direct Results audited the station's confirmation/contract to insure that the advertising was broadcast, and then sent a copy of the contract to Thermal-Lok. Thermal-Lok paid Direct Results for the advertising, and Direct Results, after deducting its commission, paid TV-36.

In 1988, Thermal-Lok did not pay TV-36 for the advertising which Direct Results placed with the station, and the station eventually sued Direct Results and the advertiser for about \$5100.

A trial court entered judgment in favor of TV-36 against the advertiser in the amount of the unpaid balance due, and, in a subsequent proceedings, entered judgment for TV-36 against Direct Marketing for about \$4,800.

An Ohio appellate court, in a decision issued in December 1990, but only recently published, has upheld the trial court's ruling. It was noted that the confirmation/contract in issue provided, in pertinent part, that the station would bill the agency monthly unless otherwise provided on the face of this contract and that the station agreed to hold the agency, with specified exceptions, solely liable for payments to be made under this contract (emphasis added by the court). Direct Results presented no evidence from the advertiser which indicated that there was an agency/principal relationship between them. And, concluded Judge Bowman, such an agency/principal relationship would not serve to alter the terms of the confirmation/contract entered into between Direct Results and TV-36. In all, the trial court's decision was supported by competent and credible evidence.

WUPW TV-36 v. Direct Results Marketing, Inc., 591 N.E.2d 1345 (Ohio App. 1990) [ELR 14:5:13]

Briefly Noted:

Baseball Fan Conduct.

On June 23, 1983, John Walsh attended a double-header at Busch Memorial Stadium in St. Louis. Walsh brought a sign with him, and held up the sign several times during the first game; the sign read "Trade Whitey" on one side, and "Who's on first?" on the other. During the second game, Walsh moved to a seat located eight rows behind the Cardinals' dugout. An usher repeatedly asked Walsh to keep the sign down, but Walsh ignored the request, threatened the usher, refused to relinquish the sign, and eventually was escorted from the

stadium by the ushers and searched and handcuffed by the police outside the stadium.

Walsh sued the club alleging assault and false imprisonment. The trial court entered judgment on a jury verdict in favor of the club.

A Missouri appellate court has affirmed the judgment, rejecting Walsh's claims that the trial court erred in several respects, including giving the club's affirmative defense instructions. Walsh also challenged the testimony of the club's former assistant for stadium operations; the employee noted that the wording on a baseball game ticket from 1983 stated that the ticket was a revocable license to enter the club's premises. According to Walsh, there was an insufficient foundation for admitting the employee's testimony because the club did not offer proof that a ticket - the best evidence of the wording in issue - was unavailable after a search. The trial court did not abuse its discretion in determining that there was a

sufficient foundation for the introduction of the testimony concerning the wording on the tickets. And there was no dispute that the ticket did grant the club a revocable license to enter the stadium, observed Judge Ahrens; the dispute concerned whether and under what circumstances the license was revoked.

Walsh v. St. Louis National Baseball Club, Inc., 822 S.W.2d 559 (Mo.App. 1992) [ELR 14:5:14]

First Amendment.

In 1988, the Stow City School District Board of Education released Harold Adkins as the coach of the high school boys' basketball team. Earlier in the year, Adkins' comments about the team's disappointing season were reported in a local newspaper; the teacher/coach

claimed that the board's actions violated his First Amendment rights.

An Ohio trial court ordered Adkins reinstated with back pay. An appellate court, in a decision issued in November 1990, but only recently published, has reversed the trial court's decision.

It was observed that the quotes attributed to Adkins in the newspaper article pertained primarily to his team's poor performance. The teacher/coach was reported, but not quoted, to have commented that the basketball program was underfunded due to the district's failure to pass a levy. Adkins denied that he was responsible for any of the reported material.

In dismissing Adkins' claim, the court pointed out that the teacher/coach had not attempted to arouse public debate or promote a cause and did not meet the burden of demonstrating that his conduct was constitutionally protected.

Adkins v. Stow City School District Board of Education, 591 N.E.2d 795 (Ohio App. 1990) [ELR 14:5:14]

Theater Patron Injury.

M. Cebula claimed that when she was returning home from a program sponsored by the American Film Institute at the Kennedy Center, she was severely attacked and robbed by unidentified individuals while using the public streets and metro system of the District of Columbia. The action against the Kennedy Center, and many other parties, for failure to maintain a safe environment was removed from a District of Columbia trial court to the Federal District Court for the District of Columbia.

Judge Charles R. Richey, in granting summary judgment to the Kennedy Center parties, noted that Cebula did not demonstrate that any of the parties owed her a duty of care, that the harm was foreseeable to any of them, or that she was injured on the property or in the immediate vicinity of any of their property at the time of the crime. The property owners had no duty to protect a person who passed through their property from a crime committed elsewhere.

Cebula v. Bush, 778 F.Supp. 567 (D.D.C. 1991) [ELR 14:5:14]

Student Athlete Drug Testing.

In 1984, the University of Colorado instituted a drug testing program for participants in intercollegiate

athletics. In response to a class action filed by student athletes, a trial court held that the program violated the students' right to freedom from unreasonable searches under the Fourth Amendment and under the Colorado constitution. The court also held that the consent given by the students was coerced, and therefore invalid, and enjoined all drug testing of intercollegiate athletes unless supported by probable cause.

An appellate court, in a decision issued in December 1991, but only recently published, first noted that the university was a state institution and that the actions of university officials constituted state action. The court held that the collection and testing of urine performed as part of the university's drug testing program was a "search" within the meaning of the Fourth Amendment and Colorado constitution, and agreed with the trial court that the search was unreasonable.

The appellate court also stated that there was sufficient evidence for the trial court to conclude that the university failed to demonstrate that the students voluntarily signed the consent forms, but disagreed with the portion of the mandatory injunction prohibiting any drug testing of athletes unless supported by probable cause. The court affirmed the injunction only as it prohibited drug testing under the procedures previously used by the university parties.

The Colorado Supreme Court, in July 1992, granted certiorari in the matter.

Derdeyn v. University of Colorado, 832 P.2d 1031 (Colo.App. 1992) [ELR 14:5:14]

Invasion of Privacy.

A series of promotional disposable drinking cups sold as Dixie Cups included the name and likeness of Charles Vinci, the 1956 and 1960 weightlifting Olympic gold medalist. An Ohio trial court granted the American Can Company's motion for summary judgment in Vinci's action for invasion of privacy.

In affirming the trial court ruling, an Ohio appellate court, in a decision issued in October 1990, but only recently published, stated that the mention of Vinci's name and the names of other athletes "within the context of accurate, historical information was incidental to the promotion of the Dixie Cups" by the partnership between the Minute Maid Corporation and the United States Olympic Committee. The reference to the athletes was purely informational, according to the court, and there was no implication that the athletes used, supported, or promoted the product.

Judge Joseph P. Mallone, in dissent, stated that a genuine issue of material fact remained to be litigated. It appeared to Judge Mallone that certain evidentiary material might lead a factfinder to infer that the companies' purpose in using the athletes' names, identities and achievements "was to put their products before the public in a favorable light and enhance the promotional value of the cups."

Vinci v. American Can Company, 591 N.E.2d 795 (Ohio App. 1990) [ELR 14:5:15]

Cable Television.

For about forty years, Warner Cable and its predecessors supplied cable television service to the residents of Schuylkill Haven Borough. In 1981, the town granted

the company a ten year exclusive franchise, and subsequently authorized extensions of the franchise term. In February 1990, the town announced that it planned to build and operate a competing cable system.

In response to a declaratory judgment action brought by Warner Cable, a Federal District Court in Pennsylvania found that the municipality did not have the authority under either state or federal law to build, own or operate a cable television system. The court then found that in the absence of an injunction, Schuylkill Haven Borough most likely would build a cable system that would compete with Warner's system, causing Warner to lose customers and good will. The court therefore granted Warner's motion for summary judgment and granted the requested injunctive relief.

Warner Cable Communications Inc. v. Borough of Schuylkill Haven, 784 F.Supp. 203 (E.D.Pa. 1992) [ELR 14:5:15]

Inmate Film Screenings.

A group of inmates from the Diagnostic Unit Inmate Council of the Arkansas Department of Correction sought declaratory and injunctive relief against the Motion Picture Association of America with respect to the distribution of video cassettes within prisons. According to the inmates, the distributors of the video cassettes received a fee of about \$15,000 annually from the Department of Correction; the inmates claimed that the funds to pay for the distributors' services were provided from the Inmate Welfare Fund, an account established for the general benefit of inmates in the Department. The

inmates, arguing that they were living in a controlled environment removed from public access and that no admission fees were charged, sought permission to obtain video cassettes from local rental agencies (at a rental rate of about \$2.50).

A Federal District Court ruled that the inmates failed to state a claim upon which relief could be granted.

A Federal Court of Appeals noted that the Department of Correction was the entity which acquired performance rights for the video cassettes shown in the prisons. Stating the view that declaratory relief might be appropriate given the state's expenditure of inmate welfare funds and the possibility that the "prison situation" might constitute an exception to the copyright law's public performance requirements, the court reversed the District Court's decision. The matter was remanded and the District Court was directed to appoint counsel for the

inmates and to consider whether the Department should be joined.

Judge Bowman, in dissent, did not perceive how joining the Department of Correction would create jurisdiction. It did not appear to Judge Bowman that there was any controversy between the Department and the licensing parties, so that even if the Department were to be joined, there still would be no case or controversy. Given that the court acknowledged that there was no case or controversy, Judge Bowman would not have directed the appointment of counsel.

Diagnostic Unit Inmate Council v. Motion Picture Association of America, Inc., 953 F.2d 376 (8th Cir. 1992)
[ELR 14:5:15]

Inmate Filming.

William Jones/Seymour, a Pennsylvania state prison inmate sued Alan J. LeFebvre, a prison official, among other parties, alleging civil rights violations under 42 U.S.C. section 1983. Jones/Seymour claimed that his constitutional rights were violated when he was filmed, without his consent, while walking in the main corridor of the prison; a television camera operator and a reporter had visited the prison to prepare a subsequently broadcast report on overcrowding.

Federal District Court Judge VanArtsdalen accepted, for purposes of LeFebvre's motion for summary judgment, Jones/Seymour's allegations that no oral warning was given that filming would occur, and that Jones/Seymour indeed was filmed and that his image was broadcast.

The court then found that Jones/Seymour did not state a claim for the violation of his Fourth Amendment right

to be free from unreasonable searches and seizures. It also was noted that "not every tort committed by an individual acting under color of state law creates a cause of action under section 1983," and that only when the interference is with the most private aspects of the individual's life does a constitutional violation exist. The fact that Jones/Seymour was in prison was a matter of public record, and the inmate therefore failed to state a claim for the violation of his right of privacy under the Fourteenth Amendment.

A Bureau of Corrections administrative directive concerning obtaining consent prior to filming an inmate did not create any protectible rights, concluded the court, in granting LeFebvre's motion for summary judgment. Judge VanArtsdalen declined to exercise pendent jurisdiction over any potential claims under state tort law. Jones/Seymour v. LeFebvre, 781 F.Supp. 355 (E.D.Pa. 1991) [ELR 14:5:15]

Jurisdiction/Art Sale.

Cincinnati Art Galleries bought an F.S Cozzens work from Donald F. Fatzie. Fatzie had assured the gallery that the work was a watercolor, but, upon inspection, the gallery determined that the work was an inexpensive print or copy.

An Ohio trial court ruling on behalf of the gallery has been affirmed by an appellate court in a decision issued in December 1990, but only recently published. The court stated that personal jurisdiction was properly exercised over Fatzie, a resident of Maryland. It was noted, among other factors, that Fatzie's activities, such as cashing the gallery's \$7,500 check and shipping the art work to Ohio, constituted transacting business in Ohio. The fact that Fatzie had no physical presence in Ohio

did not preclude a determination that he transacted business in the state, declared the court.

The assertion of personal jurisdiction was within the due process limits of the state's long-arm statute - the circumstances of the matter indicated that Fatzie acted "purposefully and reasonably foresaw that the instant transaction would have consequences in Ohio."

The court concluded by finding that although punitive damages were warranted, the amount of the award - \$75,000 - exceeded the gallery's demand, in its complaint, for \$8,000 in punitive damages. The gallery failed to amend the prayer in the complaint until the final day of trial; the amendment was untimely and the amount of punitive damages was reduced accordingly.

Cincinnati Art Galleries v. Fatzie, 591 N.E.2d 1336 (Ohio App. 1990) [ELR 14:5:16]

Soccer Injury.

In a decision issued in July 1990, but only recently published, an Ohio appellate court affirmed a trial court decision granting summary judgment to various parties in a negligence action brought by Charles Edwin Brown, Jr. Brown, a member of the Wilmington College soccer team, was playing in a match against a Tiffin University team, when Tiffin player Neil Day knocked Brown to the turf. As described by the court, "with Brown sitting on the ground and play continuing elsewhere, Neil Day kicked him in the mouth with his right knee. The kick fractured Brown's jaw."

Brown sued Day for assault and battery, and sued Tiffin University and its coach for negligence in failing to control and prevent Day from causing injury to Brown.

The court found that Brown did not show that the school was negligent in supervising and controlling Day. Brown's failure to cite prior examples of Day's violent behavior precluded imputing knowledge, to the school and its soccer coach, of the athlete's propensity toward such behavior.

Brown v. Day, 588 N.E.2d 973 (Ohio App. 1990) [ELR 14:5:16]

Insurance/Athlete Injury.

John Wissel, while playing in a high school football game, suffered an injury which left him a quadriplegic. Wissel and his father sued various parties, including the Ohio High School Athletic Association, alleging the negligent failure to provide certain equipment, warn of

safety hazards, implement rule changes and instruct the students about certain tackling techniques.

In a separate action, United States Fire Insurance Company sought declaratory judgment against the association, claiming that the company's insurance policy excluded coverage for Wissel's injuries. An Ohio trial court granted U.S.Fire's motion for summary judgment, finding that an "athletic participants exclusion" clause in the insurance policy in issue excluded insurance coverage for any damages awarded to Wissel as a result of his injuries.

An Ohio appellate court, in a decision issued in April 1991, but only recently published, has affirmed the trial court's decision.

The Wissels had argued that the acts for which they were suing the association arose prior to John Wissel's injury on the field, that the acts were not committed by athletic participants, and that the association's potential

liability did not arise from the activities of any person engaged in a game or contest.

The court found that the exclusionary language clearly restricted from coverage any liability incurred by the association as a result of a person's participation in an athletic contest. John Wissel's unfortunate injury occurred on the field, observed the court, as a direct result of his participation in an athletic contest, and the injury and resulting damages led to the association's potential liability, not the alleged antecedent negligence.

United States Fire Insurance Company v. Ohio High School Athletic Association, 595 N.E.2d 418 (Ohio App. 1991) [ELR 14:5:16]

Wrestler Eligibility.

Paul Collier transferred to Brown University after spending his first two semesters of college at the University of Nebraska. The National Collegiate Athletic Association notified Collier that he would not be allowed to wrestle during the 1991-1992 academic year because the athlete did not successfully repeat a course he had failed during his first semester at Nebraska.

A Federal District Court in Rhode Island has denied Collier's request for a preliminary injunction restraining the association from preventing him from participating in the remaining intercollegiate wrestling matches during the academic year. Senior Judge Pettine pointed out that Collier would have been barred by association regulations from wrestling at Nebraska during 1991-1992, and, pursuant to the regulations, was not eligible to compete at Brown.

The court declared that Collier's due process right were not violated by the association's refusal to permit him to

wrestle - the association was not a state actor, the due process requirement of the constitution was not involved in the matter, and Collier's constitutional claim was denied.

Collier v. National Collegiate Athletic Association, 783 F.Supp. 1576 (D.R.I. 1992) [ELR 14:5:17]

Jockey Injury.

Gerald E. Ailes, a professional jockey, was injured while racing a horse at Portland Meadows. A pretrial motion to dismiss the action based on the statute of limitations was denied. The jury returned a verdict on behalf of Ailes. Subsequently, the trial court granted Portland Meadows' motion for judgment notwithstanding the verdict, finding that the action was time-barred.

An Oregon appellate court (ELR 13:1:19) reversed the trial court's decision on the basis of Ailes' argument that Portland Meadows had "waived" its right to move for judgment notwithstanding the verdict on the statute of limitations ground by not raising that issue in its motion for directed verdict at the close of all the evidence. The trial court, according to the appellate court, therefore had no "authority" to grant Portland Meadows' motion for judgment notwithstanding the verdict on the cited ground; the appellate court reversed the judgment and remanded the matter for reinstatement of the jury verdict.

The Oregon Supreme Court declared that the issue before the court was whether the appellate court properly considered whether it should reach the perceived error. It was noted that Ailes had not preserved the waiver issue in the trial court and had not raised it in his opening brief on appeal; the issue arose only in Ailes' reply brief.

In all, the issue of waiver was not properly preserved at trial or raised on appeal.

The court further found that the appellate court did not expressly exercise its discretion to consider an error of law apparent on the face of the record, and that the appellate court's apparent motivation for its decision was wrong. The matter was remanded for further consideration.

Ailes v. Portland Meadows, Inc., 823 P.2d 956 (Ore. 1991) [ELR 14:5:17]

Golf Course.

Anita Hellman and M. Stanley Goldberg owned a home adjacent to the tenth fairway of a Santa Barbara country club golf course. The club began operating in

1957; Hellman purchased the property in 1985. After moving in, Hellman discovered five to ten golf balls on the property every week. Since 1985, the home owners collected about 1,300 golf balls which were not retrieved by the owners. Golf balls almost hit Hellman and Goldberg on several occasions, and Hellman and Goldberg's cars were dented by golf balls. In response to Hellman's action seeking damages and an injunction for nuisance, a California trial court noted that the evidence indicated that golf balls landed on the Hellman parties' property at the same rate since the club opened in 1957 and that Hellman did not establish the existence of a nuisance.

An appellate court has affirmed the trial court's decision, stating that the court reasonably inferred that the complained-of circumstances existed since the club opened; that the court set forth the relevant factors, such as locality, prior use, and the nature and extent of the

injury; and noted that Hellman and Goldberg came to the property with the knowledge that it was next to a golf course, "which put them on at least constructive notice that golf balls would be landing on their property."

Hellman v. La Cumbre Golf and Country Club, Case No. B055857 (Ca.Ct.App., May 26, 1992) [ELR 14:5:17]

Motorcyclist Injuries.

In June 1986, Eric Rausch, riding a motorcycle owned by Gregory Simmons, participated in a professional motorcycle race. During the race, which was sanctioned by the American Motorcyclist Association, another driver crashed his motorcycle on the race track. Rausch struck the downed motorcycle and received serious injuries.

Rausch unsuccessfully argued that association officials failed to warn him of the downed motorcycle.

In affirming a trial court decision granting summary judgment to the association, an Ohio appellate court, in a decision issued in October 1990, but only recently published, noted that Rausch and Simmons had signed release agreements on the day of the event which served to relieve the association from any negligence. And it was not shown that the association recklessly, willfully or wantonly exposed Rausch and Simmons to more danger than a motorcycle racer ordinarily faces in participating in a motorcycle race. The court found, however, that the trial court erred in concluding that intentional misconduct would have to be proved in order to raise the claim of willful and wanton misconduct.

Simmons v. American Motorcyclist Association, Inc.,
591 N.E.2d 1325 (Ohio App. 1990) [ELR 14:5:18]

Previously Reported:

The following cases, which previously were reported in the Entertainment Law Reporter, have been published: *Black v. MTV Networks Inc.*, 576 N.Y.S.2d 846 (13:12:5); *Chamberlain v. Cocola Associates*, 958 F.2d 282 (13:10:16).

The United States Supreme Court has let stand the decisions in *Broadcast Music, Inc. v. Claire's Boutiques, Inc.* (14:1:12) and in *Edison Brothers Stores, Inc. v. Broadcast Music, Inc.* (13:9:8), cases in which it was found that two retail store chains were not liable for copyright infringement on the basis of the "homestyle" radio exemption of the Copyright Act. The court also let stand the decision in *United States of America v. American Society of Composers, Authors and Publishers*, In

the Matter of the Application of Turner Broadcasting System (13:8:6) in which it was held that ASCAP was required to provide source licenses and per-program licenses to cable program suppliers.

According to news reports, a Federal Court of Appeals, in a brief order, affirmed Federal District Court rulings (13:12:17; 11:3:14) in *Love v. Kwitny*.

It has been reported that a settlement, the amount of which was not disclosed, was reached in a dispute involving the destruction of the mural "Filling Up On Ancient Energies." In 1980, Shell Oil Company hired several artists, known as the East Los Angeles Streetscapers, to paint the mural on the wall of a service station in East Los Angeles. In 1988, the company authorized the destruction of the wall to which the mural was affixed; the mural, except for a 120 square foot remnant, was destroyed. A California appellate court (13:2:9) found that paintings in the form of murals were

protected by the California Art Preservation Act, and remanded the matter for further proceedings.

IN THE NEWS

National Football League's limited antitrust system violates federal antitrust laws

A Federal District Court jury in Minneapolis has declared that the National Football League's limited free agency system violated federal antitrust laws. The jury found the league liable in the cases filed by eight current and former players, but awarded damages, amounting to about \$540,000, to only four players; the awards will be tripled for a total of about \$1.6 million.

The jury determined that the league's "Plan B" had a harmful effect on competition; that the limited free

agency system was too restrictive; and that the players suffered economic injury as a result of the system. Under Plan B, a team may protect 37 players each February; the remainder of the team's roster may sign elsewhere. The jurors did not find that Plan B contributed to "unbalanced competition" - the team owners therefore may attempt to devise other rules that are less restrictive. [October 1992] [ELR 14:5:19]

Los Angeles court rejects claims against attorney in dispute over Pee-wee Herman rights

In January 1984, Paul Reubens, the creator of the Pee-wee Herman character, entered an agreement with companies owned by William E. McEuen, Richard G. Abramson and M. Kenneth Suddleson. The companies, Aspen Film Society, Inc., Aspen Recording Society, Inc.

and Aspen Merchandising, Inc. planned to produce records, license Pee-wee Herman merchandise, and produce films, television shows and a concert video.

McEuen and Abramson, according to news reports, claimed that Suddleson failed to draft follow-up contracts and to keep them notified about projects involving Reubens.

A Los Angeles trial court judge has rejected McEuen and Abramson's action against Suddleson and Irell & Manella alleging legal malpractice, fraud and breach of fiduciary duty.

Judge Madeleine Flier agreed that Suddleson and the law firm did not execute or complete various agreements, but apparently found that McEuen and Abramson, who had previously received a substantial payment to settle a dispute over the second Pee-wee Herman film, failed to prove damages. [October 1992] [ELR 14:5:19]

Brother of late basketball player Hank Gathers agrees to voluntary dismissal of emotional distress claims

A Los Angeles Superior Court judge has dismissed claims of negligent infliction of emotional distress brought against two doctors by relatives of Loyola Marymount University basketball star Hank Gathers.

Gathers collapsed during a March 4, 1990 basketball game at Loyola Marymount, and died a short time later. According to news reports, an autopsy revealed that the cause of death was cardiomyopathy, a heart disorder.

Dr. Daniel Hyslop was a Loyola staff physician and Dr. Benjamin Shaffer was the doctor-on-duty when Gathers collapsed.

Judge J. Gary Hastings also dismissed a negligence claim against a sports medicine group that provided orthopedic care to the Loyola Marymount basketball teams. It was claimed that the group was negligent for failing to establish an emergency plan after becoming aware, in December 1989, of Gathers' heart problems.

Lucille and Charles Gathers, Hank's mother and his older brother, apparently decided not to travel from Philadelphia to Los Angeles to testify. Derrick Gathers, another of Hank's brothers, then voluntarily dismissed his claims upon obtaining a waiver of costs.

Other parties in the matter had settled their claims or were dismissed. Gathers' mother and son received a total of \$2.4 million in their wrongful death action, primarily from a settlement with the university and a judgment against Dr. Vernon Hattori, a cardiologist. [October 1992] [ELR 14:5:19]

MCA Records prevails in dispute over Chess Records catalog

A Los Angeles trial court judge has ruled that Marshall E. Sehorn owns no rights to the Chess Masters Catalogue. MCA Records claimed that it had paid \$3 million in 1985 to purchase exclusive worldwide rights to the catalog from Joseph Robinson Sr. of Sugarhill Records. According to news reports, the catalog includes works by Chuck Berry and Muddy Waters.

Sehorn argued that he had entered a contract with Robinson in 1976, but did not have the original document. Judge Abby Soven ruled that the alleged copies of the contract could not be authenticated, and refused to admit the copies into evidence. [October 1992] [ELR 14:5:19]

DEPARTMENTS

In the Law Reviews:

The Beverly Hills Bar Association has published an Entertainment Law Symposium Issue, available from the Beverly Hills Bar Association, 300 S. Beverly Drive, Suite 201, Beverly Hills, CA 90212, with the following articles:

Killing the Golden Goose: Hollywood's Death Wish by Pierce O'Donnell, 26 Beverly Hills Bar Association Journal 102 (1992)

Switchable Video: The Implications of Telephone Company Entry into Television by Richard Riley and Adam S. Berns, 26 Beverly Hills Bar Association Journal 109 (1992)

Fishing in the Black Box: Developments in International Music Royalty Collecting by William I. Hochberg, 26 Beverly Hills Bar Association Journal 114 (1992)

Law of Trade Dress Comes of Age: Two Pesos, Inc. v. Taco Cabana, Inc. by Helen Jorda, 26 Beverly Hills Bar Association Journal 119 (1992)

Representation in the Entertainment Industry: How Much is Enough by Susan G. Schaefer, 26 Beverly Hills Bar Association Journal 122 (1992)

The Profit Participation Conundrum: A Glossary of Common Terms and Suggestions for Negotiation by Gunther H. Schiff, 26 Beverly Hills Bar Association Journal 123 (1992)

Negotiating Contracts for Entertainers in Gaming Ventures by Owen J. Sloane, 26 Beverly Hills Bar Association Journal 128 (1992)

Making the Case against Illicit Sampling by Nancy L. McCullough, 26 Beverly Hills Bar Association 130 (1992)

Music Sampling: Legal Overview, Practical Guidelines by Gregory T. Victoroff, 26 Beverly Hills Bar Association Journal 134 (1992)

Is It Really a Record Company? by Susan Butler, 26 Beverly Hills Bar Association Journal 138 (1992)

Law and Contemporary Problems, published in Durham, North Carolina, has issued Volume 55, Number 2 with the following articles:

Foreword: A Tribute to Robert W. Kastenmeier by L. Ray Patterson and David Lange, 55 Law and Contemporary Problems 1 (1992)

Originality and Creativity in Copyright Law by Howard B. Abrams, 55 Law and Contemporary Problems 3 (1992)

Civil Remedies for Intellectual Property Invasions: Themes and Variations by Ralph S. Brown, 55 Law and Contemporary Problems 45 (1992)

Copyright by Paul Goldstein, 55 Law and Contemporary Problems 79 (1992)

Reality as Artifact: From Feist to Fair Use by Wendy J. Gordon, 55 Law and Contemporary Problems 93 (1992)

505 and All That-The Defendant's Dilemma by Peter Jaszi, 55 Law and Contemporary Problems 107 (1992)

Congressman Robert Kastenmeier and Professor John Stedman: A Thirty-Five Year Relationship by John A. Kidwell, 55 Law and Contemporary Problems 129 (1992)

At Play in the Fields of the Word: Copyright and the Construction of Authorship in the Post-Literate Millennium by David Lange, 55 Law and Contemporary Problems 139 (1992)

The Tell-Tale "Heart": Determining "Fair" Use of Unpublished Texts by Karen Burke LeFevre, 55 Law and Contemporary Problems 153 (1992)

Copyright and Information Policy by Jessica Litman, 55
Law and Contemporary Problems 185 (1992)

Nation, Duration, Violation, Harmonization: An International Copyright Proposal for the United States by David Nimmer, 55 Law and Contemporary Problems 211 (1992)

Bob Kastenmeier and the Legislative Process: Sui Generis and Proud Of It by Ralph Oman, 55 Law and Contemporary Problems 241 (1992)

Understanding Fair Use by L. Ray Patterson, 55 Law and Contemporary Problems 249 (1992)

Grading the Performance of a Legislator by Leo J. Raskind, 55 Law and Contemporary Problems 267 (1992)

Design Protection and the Legislative Agenda by J. H. Reichman, 55 Law and Contemporary Problems 281 (1992)

Robert W. Kastenmeier: Copyright Legislator Par Excellence by Michael J. Remington, 55 Law and Contemporary Problems 297 (1992)

Computer Programs, User Interfaces, and Section 102(b) of the Copyright Act of 1976: A Critique of Lotus v. Paperback by Pamela Samuelson, 55 Law and Contemporary Problems 311 (1992)

Copyright, Potential Markets, and the User Interface: Defining the Scope of the Limited Monopoly by Todd D. Daubert, 55 Law and Contemporary Problems 355 (1992)

The Entertainment and Sports Lawyer, published by the American Bar Association Forum on the Entertainment and Sports Industries has published Volume 10, Number 1 with the following articles and is available from the American Bar Association, 750 N. Lake Shore Drive, Chicago, IL 60611-4497.

The Court of Arbitration for Sport: An Alternative for Dispute Resolution in U.S. Sports by Stephan Netzle, 10 The Entertainment and Sports Lawyer 1 (1992)

The New Role of Intellectual Property in Commercial Transactions by Melvin Simensky, 10 The Entertainment and Sports Lawyer 5 (1992)

Further Trials and Tribulations of Sports Agents by Mark T. Gould, 10 The Entertainment and Sports Lawyer 9 (1992)

Sports Participation by "Handicapped" Athletes by Matthew J. Mitten, 10 The Entertainment and Sports Lawyer 15 (1992)
[ELR 14:5:21]