RECENT CASES

Court upholds facial constitutionality of California Talent Agencies Act in case between Arsenio Hall and former manager

The Talent Agencies Act (Labor Code sections 1700-1700.47), as described by California appellate court Judge Johnson, requires individuals who procure employment for artists in entertainment fields to be licensed as talent agents by the labor commissioner. The Act exempts from licensing individuals who procure only recording contracts. Robert Wachs and X Management, Inc. claimed that the licensing requirement violated their rights to due process and equal protection.

Wachs and X Management had agreed to provide personal management to Arsenio Hall in return for fifteen percent of Hall's earnings from his activities in the entertainment industry during the term of the contract. The contract stated that Hall did not retain Wachs as an employment agent or a talent agent and further stated that the management firm had not "offered or attempted or promised to obtain employment" for Hall and was not authorized, obligated or expected to do so.

Hall subsequently filed a petition under the Act claiming that Wachs had acted as an unlicensed talent agent in obtaining and attempting to obtain employment for Hall. The performer sought to have Wachs return all monies collected from Hall or Hall's employers in connection with any of Hall's activities in the entertainment industry.

While Hall's petition was pending before the labor commissioner, Wachs and X Management filed the instant action claiming that the licensing provisions of the Act were unconstitutional because there was no rational basis for providing an exemption from the licensing requirement to those who procure recording contracts, but not for those who procure other types of entertainment industry contracts. The Wachs parties also claimed that the terms of the licensing requirements were unconstitutionally vague.

A trial court upheld the constitutionality of the licensing requirements. The labor commissioner subsequently ruled in favor of Hall (ELR 14:5:4).

Judge Johnson first emphasized that Wachs had standing only to challenge the facial constitutionality of section 1700.4 - Wachs and X Management could not challenge the application of the statute to them because the court was not presented with any facts regarding such an application.

The court then set forth the challenged exemption, as follows: "the activities of procuring, offering, or promising to procure recording contracts for an artist or artists shall not of itself subject a person or corporation to regulation and licensing under this chapter." The provision exempting the procurement of recording contracts was added to the Act in 1982, with a sunset provision of January 1, 1986. The California Entertainment Commission recommended retaining the exemption, apparently on the basis of the widespread industry practice of artists retaining personal managers, rather than talent agents, to conduct negotiations for recording contracts. The Commission expressed concern about the problems of attempting to license or regulate such activity.

For Judge Johnson, the commission's report provided a sufficiently rational basis for the challenged exemption in view of the proposition that persons in the same general type of business may be classified differently where their methods of operation are not identical.

Wachs also argued that the term "occupation of procuring [employment]" as the term is used in section

1700.4(a) did not sufficiently define the conduct which requires a license. The financial penalties to which an unlicensed agent might be exposed were sufficient to raise due process concerns, agreed the court, but the Act did have an objective content from which standards of conduct might be ascertained. The regulation of talent agencies originated with the Artists' Managers Act of 1943, recalled the court. And in the Talent Agencies Act of 1978, the state defined a talent agency as a person or corporation "who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for any artist or artists;" the Act focused on the procurement of employment.

In Judge Johnson's view, given the Act's purpose of protecting artists seeking employment and the relevant legislative history, the "occupation" of procuring employment was intended to be determined "according to a standard that measures the significance of the agent's employment procurement function compared to the agent's counseling function taken as a whole. If the agent's employment procurement function constitutes a significant part of the agent's business as a whole then he or she is subject to the licensing requirement...even if, with respect to a particular client, procurement of employment was only an incidental part of the agent's overall duties...If counseling and directing the clients' careers constitutes the significant part of the agent's business then he or she is not subject to the licensing requirement of the Act, even if, with respect to a particular client, counseling and directing the client's career was only an incidental part of the agent's overall duties." The court did not decide what degree of an agent's business might constitute a "significant part" of such business.

Although the legislature did not define the term "procure" for purposes of section 1700.4, the word was not so lacking in objective content as to render the Talent

Agencies Act facially unconstitutional, concluded the court - the term "occupation of procuring [employment]" was not "so patently vague and so wholly devoid of objective meaning that it provides no standard at all."

Wachs v. Curry, 13 Cal. App. 4th 616; 1993 Cal.App. LEXIS 140; 16 Cal. Rptr. 2d 496 (Ca.Ct.App. 1993) [ELR 15:3:3]

Action claiming that Court TV misappropriated idea for 24-hour courtroom cable television channel is rejected

Ted Kavanau claimed that during the time he was employed by Cable News Network in the 1980s he created the concept and format for a 24-hour cable television service devoted to the live broadcast of trials throughout the United States. Kavanau presented the concept to CNN's Ted Turner, but Turner declined to proceed further.

Kavanau subsequently worked for MCA Broadcasting and presented to MCA executives the concept of a "Crime Net" service focusing on crime and justice related issues, including live and taped coverage of trials. When MCA also decided not to pursue the project, Kavanau prepared a business plan for a Crime and Justice Network and continued attempting to market the programming proposal.

Kavanau eventually filed a lawsuit claiming that Courtroom Television Network and other parties misappropriated his idea for a 24-hour cable television service focusing on courtroom proceedings. Kavanau asserted causes of action for theft of creation, unfair competition and misappropriation, unlawful and tortious interference with prospective economic relations and advantage, breach of contract and denial of business opportunity. A Federal District Court in New York has granted Courtroom Television's motion for summary judgment.

Judge Robert P. Patterson, Jr. noted that in mid-1988 Kavanau met with Robert Pittman, then the president of an entity affiliated with MCA, to discuss the Crime and Justice Network. After a second meeting, the parties did not communicate further. In 1989, Pittman became a consultant to Warner Communications Inc., and began working with Steven Brill of American Lawyer Media (in which Warner held a majority interest) on developing a 24-hour courtroom cable television channel. Ultimately, the courtroom cable television channel known as "Courtroom Television Network" emerged as a joint venture of TW Courtroom Inc. (affiliated with Time Warner), Liberty Court, Inc. (affiliated with Liberty Media Corporation), In Court Holding Corporation (affiliated with Cablevision Systems Corp.), and NBC Cable

Courtroom Holding, Inc. (affiliated with the National Broadcasting Company). American Lawyer Media manages and holds a contingent interest in Court TV, described by Judge Patterson as "a national satellite cable television network devoted to televising judicial and legislative proceedings and related programming."

Judge Patterson referred to the decision in Murray v. National Broadcasting Co., Inc., 844 F.2d 988 (ELR 10:7:8) in considering the Court TV parties' argument that summary judgment was warranted because, even assuming that they used Kavanau's idea in developing Court TV, Kavanau's idea, as a matter of law, was not novel. According to Murray, stated Judge Patterson, the relevant inquiry in evaluating novelty is "whether an idea similar to the one claimed to be novel existed, not whether such a similar idea had actually been executed."

The Court TV parties presented evidence that proposals for a 24-hour courtroom cable television network were circulating as early as 1982. Although Kavanau's proposal was more developed and more definitive than pre-existing plans, noted the court, it was not the first such idea and thus did not meet the test of novelty under New York law.

It also was observed that Kavanau's proposal was a "mere compilation of and expansion on existing television elements to fill a single 24-hour cable television network;" the derivative nature of Kavanau's project demonstrated its lack of novelty. The fact that the Court TV parties, in self-promotional claims, asserted that the program was unique, was not relevant to the legal issue of novelty and Kavanau was not entitled to rely on the promotional statements to establish the novelty of his idea.

Kavanau v. Courtroom Television Network, 1992 U.S.Dist.LEXIS 11472 (S.D.N.Y. 1992) [ELR 15:3:4]

United States Supreme Court lets stand decision affirming dismissal of antitrust action challenging NCAA's no-draft and no-agent rules

As reported at ELR 12:11:13, Braxston Banks, who played football for the University of Notre Dame during the 1986-1988 seasons, entered the National Football League draft in the spring of 1990. Banks had completed three years of college eligibility, but chose to sit out his senior year to await the full recovery of a knee injury. When Banks was not selected in the draft or as a free agent, he decided to return to Notre Dame for graduate courses and to re-enter the school's football program.

The National Collegiate Athletic Association's "no-draft" rule provides that an individual loses amateur status in a sport when the individual asks to be placed on the draft list or supplemental draft list of a professional league in that sport. The NCAA's "no-agent" rule states that an individual is ineligible for participation in an intercollegiate sport if he or she ever has agreed to be represented by an agent for the purpose of marketing his or her athletic ability or reputation in that sport.

Banks participated in the draft try-outs and agreed to be represented by an agent subsequent to signing up for the draft. Notre Dame refused to request Banks' reinstatement by the NCAA because, as described by Federal Court of Appeals Judge Coffey, "no college had ever appealed to the NCAA to restore eligibility of a player who entered the NFL draft."

The District Court denied Banks' request for a preliminary injunction, stating that the athlete had not demonstrated a reasonable likelihood of success on his claim that the NCAA's regulations restrained trade in violation of section 1 of the Sherman Act.

The court, emphasizing the lack of evidence concerning the alleged anti-competitive effects caused by the alleged restraints, then granted the NCAA's motion to dismiss Banks' complaint for failure to state a claim upon which relief could be granted.

Judge Coffey first questioned the District Court's ruling with respect to Banks' attempt to assert a class action claim. It then was noted that on appeal, Banks apparently ignored the holding of the District Court and asserted that the court had found an anti-competitive impact on a relevant market. Judge Coffey pointed out that the District Court dismissed the complaint because Banks failed to allege that the NCAA rules had an anti-competitive impact on any identifiable market.

Banks' complaint did set forth two markets - one consisting of NCAA football players who enter the draft and/or employ an agent, and the second comprised of college institutions that are members of the NCAA. But the complaint, again, did not define the anti-competitive effect of any purported restraints on these markets.

The dissent would have found, according to Judge Coffey, that Banks alleged that the NCAA's no-draft rule had an anti-competitive effect on the market for college football players in that the rule foreclosed players from choosing a major college football team based on the school's willingness to waive or change the no-draft rule. For Judge Coffey, the dissent's characterization of Banks' claim was "inaccurate and further fail[ed] to allege an anti-competitive impact." The NCAA rules attempt "to promote fair competition, encourage the educational pursuits of student-athletes and prevent commercialism," stated the court, in further observing that the no-draft rule had no more impact on the market for college football players than other NCAA eligibility requirements such as grades or requiring a high school diploma.

Banks' allegation that the no-draft rule restrained trade was described as "absurd. The NCAA rules affecting college football eligibility do not restrain trade in the market for college players, stated the court, because the NCAA does not exist as a minor league training ground for future NFL players but rather to provide an opportunity for competition among amateur students pursuing a college education." The court held that the regulations of the NCAA were designed "to preserve the honesty and integrity of intercollegiate athletics and foster fair competition among the participating amateur college students." The no-draft rule and similar regulations maintain the distinction between college and professional football and preclude the existence of a college football labor market for athletes ineligible by NCAA standards.

The court also disagreed with the dissent's statement that NCAA member schools are "purchasers of labor" - the NCAA eligibility and recruiting requirements prohibit member colleges from engaging in price competition for players. Judge Coffey declared that "we should not permit the entry of professional athletes and their agents into NCAA sports because the cold commercial nature of professional sports would not only destroy the amateur status of college athletics but more importantly would interfere with the athletes' proper focus on their educational pursuits and direct their attention to the quick buck in pro sports."

The court did not reach the merits of whether the no-draft rule was a "material term of employment," as argued by the dissent, because Banks failed to allege how the no-draft and no-agent rules restrained trade under section 1 of the Sherman Act by diminishing competition in the two purported markets. Any additional markets or anti-competitive effects upon such markets alleged outside Banks' complaint were "immaterial" to the court's consideration of the District Court judgment, noted Judge Coffey. Banks did not allege an anti-competitive effect on a relevant market, i.e., how the alleged restraints diminished competition in or among the two markets at issue.

Judge Flaum dissented from the court's affirmation of the District Court's dismissal of Banks' section 1 claim. The dissent focused on the market defined by Banks as the nationwide labor market for college football players, noting that NCAA member colleges are the purchasers of labor in this market, and the players are the suppliers. The players, stated Judge Flaum, "agree to compete in football games sponsored by the colleges, games that typically garner the colleges a profit, in exchange for tuition, room, board and other benefits."

Banks alleged, according to Judge Flaum, that the challenged rules harm competition by foreclosing players from choosing a major college football team based on the willingness of the institution to waive or change the rules. The no-draft rule precludes colleges from offering a term of employment, i.e., the opportunity "to test the water in the NFL draft before their eligibility expired, and return if things didn't work out," that players would find advantageous.

The no-draft rule is detrimental to players, stated Judge Flaum, and colleges benefit from the fact that their athletes "feel tied to the institution for four years." Some players might forego entry into the NFL draft after their sophomore or junior year because, if they are not selected (or fail to join a team after being selected), the rule will prevent them from returning to college "to hone their skills and try again in subsequent years.. The rule...distorts the 'price' of labor in the college football labor market to the detriment of players."

Judge Flaum found it "unrealistic" of the court to suggest that the value of a school's in-kind benefits is limited to tuition, room and board - many other factors, monetary and non-monetary, might be considered "terms of employment." Banks, for Judge Flaum, alleged an anticompetitive effect in a relevant market and also met the burden of showing that the NCAA's rules caused him to suffer antitrust injury. Banks' injury - the revocation of his eligibility and the consequent loss of his athletic scholarship during his final year at Notre Dame - "flow[ed] from" the precise anticompetitive aspects of the NCAA rules that Banks set out in his complaint, stated the dissent.

Banks, in the dissent's view, properly alleged an anticompetitive effect in a relevant market; demonstrated antitrust injury; and should have been allowed to demonstrate, under the rule of reason, that the no-agent and no-draft rules, despite their anticompetitive effects, were not "justifiable means of fostering competition among amateur athletic teams and therefore procompetitive on the whole." Judge Flaum expressed concern that the court's decision "will provide comfort to the NCAA's incredulous assertion that its eligibility rules are 'non-commercial.'" The NCAA, continued Judge Flaum, "continues to purvey...an outmoded image of intercollegiate sports that no longer jibes with reality...College football is a terrific American institution that generates abundant nonpecuniary benefits for players and fans, but it is also a vast commercial venture that yields substantial profits for colleges..." Judge Flaum would have found that Banks cleared the threshold of alleging an anti-competitive effect in a relevant market and would have reversed the District Court's dismissal of his damages action and remanded the matter for further proceedings.

The United States Supreme Court, without comment, has declined to review the Federal Court of Appeals decision.

Banks v. National Collegiate Athletic Association, 977 F.2d 1081 (7th Cir. 1992) [ELR 15:3:5]

Court denies NBA's motion for summary judgment in antitrust action brought by Chicago Bulls and television station

In the ongoing litigation concerning the National Basketball Association's superstation rules (ELR 14:10:6; 12:12:11), a Federal District Court in Chicago has denied the NBA's motion for partial summary judgment.

The NBA claimed that its Superstation Same Night Rule, pursuant to which superstation broadcasts of NBA games are not permitted on the same night as telecasts of NBA games over Turner Network Television, was exempt from the antitrust laws under the antitrust exception created by the Sports Broadcasting Act. The Act provides, in relevant part, that the antitrust laws do not apply to any joint agreement by or among persons engaged in or conducting organized professional basketball by which any league of clubs sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games engaged in or conducted by such clubs. The Superstation Same Night Rule was included in the NBA's contract with TNT.

According to the NBA, the Seventh Circuit, in an earlier decision in the matter, broadly interpreted the Sports Broadcasting Act to conclude that a professional sports league is entitled to prohibit the broadcast of games not otherwise transferred to a national television distributor so long as the contract by which the professional sports league transfers part of its national broadcast rights limits the broadcasting of other contests.

Judge Will commented that the Seventh Circuit, "in extended dictum merely hypothesized and declined to rule on various ways in which the NBA might 'rearrange its affairs' in an attempt to qualify for the exemption." Such "hypothetical musings" were not controlling, stated Judge Will, who noted, in any event, that the NBA did not adopt any of the measures mentioned by the Seventh Circuit to try to qualify for the exemption, such as obtaining all of the telecasting rights of the member clubs and altering the clubs' allocation of revenue.

As previously found, nothing in any NBA agreement indicated that the teams agreed to share the separately owned copyrights and transfer those rights, in whole or in part, to the league. The rights to the game licensed by the Chicago Bulls to WGN were not transferred to the league, or by the league to any other party. Again, the Sports Broadcasting act applies only when the league has transferred a right to sponsored telecasting. As the Seventh Circuit affirmed, observed Judge Will, the Sports Broadcasting Act "does not, by its terms, protect joint agreements to prohibit the transfer of national broadcast rights over and above those licensed to NBC (or possibly TNT, assuming TNT's broadcasts fit within the statutory meaning of 'sponsored broadcasting." (emphasis added by Judge Will). And because each team retained the right to televise on its particular local over-the-air or cable outlet the same games that are televised by TNT, the league's transfer of rights to TNT could not be characterized as exclusive.

In a footnote comment, Judge Will observed that the Sports Broadcasting Act was intended to permit professional sports teams to pool television rights in certain or all of their games and then to sell packages of such pooled rights without violating the antitrust laws. The Act did not exempt the NBA's Superstation Same Night Rule's prohibition of non-transferred superstation telecasts from antitrust scrutiny, concluded Judge Will.

The court found another basis for denying the NBA's motion for summary judgment - it was not clear to Judge Will that TNT, as a cable television programming service, constituted "sponsored telecasting" within the statute. It appeared to the court that TNT would be better characterized as subscription television because no one receives the service without paying for it in some way; because TNT derives its revenues predominantly from subscriptions as opposed to advertising revenues from paying sponsors; and because legislative history demonstrated that "sponsored telecasting," as used in the Act, was limited to free commercial television as opposed to cable.

Judge Will denied the NBA's motion for partial summary judgment dismissing WGN's claim for damages. The NBA suggested that the WGN-Bulls contractual limitation to 25 games during the 1989-1990 and 1990-1991 seasons was based solely on the Bulls' economic and business considerations. Had it not been for the 25 game rule, noted the court, the Bulls presumably could have contracted for up to 41 games; WGN claimed that the 25 game rule was the only reason that the Bulls did not offer more games for broadcast in the specified seasons. Other evidence presented by WGN indicated to the court that sufficient questions of material fact were raised to require the denial of the NBA's motion for summary judgment. WGN also raised sufficient question of material fact to preclude summary judgment on the Superstation Same Night Rule claim, particularly given the issue of whether or not the Bulls would have licensed WGN to televise Bulls' games on nights when TNT was carrying NBA games.

Chicago Professional Sports Limited Partnership v. National Basketball Association, 808 F.Supp. 646 (N.D.Ill. 1992) [ELR 15:3:6]

Court rejects Joan Collins' RICO allegation against tabloid arising from unauthorized publication of photographs

The August 20, 1991 edition of The Globe contained an article entitled "Him Tarzan - Me Joan;" the article included photographs taken of Collins and a male guest and, as described by a California appellate court, "their conduct while on private property."

Collins sued Globe International alleging causes of action for invasion of privacy, defamation, and intentional infliction of emotional distress. Collins also claimed that the taking of the photographs and the publication and distribution of the article was a "racketeering" activity in violation of the Racketeer Influenced and Corrupt Organizations Act. According to Collins, the Globe, its owners, publishers and employees were associated together as "enterprises" engaged in interstate commerce. It was alleged that the Globe parties conspired to unlawfully take and distribute photographs of celebrity victims and to publicly distribute the purportedly defamatory and fraudulent photographs and accompanying text in order to increase the company's sales and profits.

A Los Angeles trial court overruled Globe's demurrer to the cause of action alleging the RICO claim.

Globe sought a writ of mandate directing the trial court to vacate its order and to instead grant an order sustaining without leave to amend the demurrer to the RICO cause of action.

The appellate court, ruling on a question of first impression, found that Collins was not entitled to allege a RICO cause of action based solely on ordinary tort causes of action. As a matter of law, stated the court, personal injury, including emotional distress, is not compensable under RICO. It also did not appear that there was any victim of the fraud alleged by Collins. In all, the conduct alleged by Collins in support of the RICO cause of action did not constitute racketeering activity under the statute. The court therefore issued a peremptory writ of mandate directing the trial court to vacate its order overruling the demurrer to the cause of action seeking to allege a RICO claim and to enter an order sustaining without leave to amend Globe's demurrer to the cause of action.

Globe International, Inc. v. Superior Court of Los Angeles County, 1992 Cal.App. LEXIS 1122 (Ca.Ct.App. 1992) [ELR 15:3:7]

Court refuses to issue preliminary injunction to enforce restrictive covenant in employment agreement signed by executives of Spanish language television network

Joaquin Blaya and Jose Cancela were executives with Univision, Inc., the largest Spanish language television network in the United States. In 1988, Hallmark Cards purchased Univision. In May 1992, Blaya left Univision, after working for the company for about twenty years, to join Telemundo, Inc., a competing company. Cancela also joined Telemundo.

Blaya and Telemundo brought a declaratory judgment action seeking to invalidate a restrictive covenant in Blaya's 1991 employment contract with Univision. Univision counterclaimed seeking an injunction to bar Blaya and Cancela from working for Telemundo and to restrain the executives from soliciting Univision's performers, employees and advertisers.

The covenant in issue provided that for a period of one year after the termination of Blaya's employment, Blaya would not compete with the company so long as the company paid the executive each month an amount equal to one-half of his monthly salary at the time of termination. The agreement stated that the word "compete" meant to "directly or indirectly...engage in the business of Spanish-language television in those areas of dominant influence in which Univision...has high power broadcast television stations at the time of termination of [Blaya's] employment.

As part of the consideration for the agreement, Univision agreed to pay Blaya $225,000 (one half of his annual salary) for the one year non-competition period. Although the agreement did not expressly bar Blaya from the entire United States television market, Univision's "areas of dominant influence" included the major Hispanic markets. Cancela signed a similar one year non-compete agreement, under which he was to be paid $110,000 per year.

According to Univision, Blaya actively encouraged Hallmark to acquire Univision and personally profited from the sale of his stock. In April 1992, Hallmark agreed to sell the network, for a reported $550 million, to a group of corporations controlled by Mexican and Venezuelan interests; A. Jerrold Perenchio was one of the prospective buyers. The sale awaits approval by the Federal Communications Commission. Blaya left Univision in May 1992, expressing the view that the new owners would reduce domestic program production and rely on imported programming, thereby limiting his responsibilities at the company.

Univision claimed that Blaya was "unique in his ability to attract and keep employees, talent and clients," and that he had access to trade secrets and confidential information, including the company's finances, business and marketing plans, programming product, and contractual and other arrangements with creative artists and advertisers. Cancela purportedly also had access to similar confidential information.

Acting New York trial court Judge Walter M. Schackman noted that the restrictive covenant in issue was part of an employment contract. The court expressed reluctance to enforce a restriction which, although limited in time and generous in financial support, effectively prevented Blaya and Cancela from working in the area of Spanish language television for the next year, declaring that the restriction might be "unduly broad in geographic scope."

Judge Schackman further declared that the court was "far from certain that either Blaya or Cancela are unique," that Univision was not entitled to protect as confidential the names of its advertisers, whose identities were readily available and that there was, at least, a "sharp dispute' as to whether Univision's material constituted trade secrets.

Univision did not show that it lost significant revenue or that any major advertisers canceled or refused to renew contracts since the departure of Blaya and Cancela, and it was not shown that money damages would be inadequate relief. The court, accordingly, declined Univision's motion for a preliminary injunction.

Blaya v. Univision, Inc., New York Law Journal, p. 21, col. 5 (N.Y.Cnty., July 31, 1992) [ELR 15:3:8]

Artist's "American Relix" magazine cover illustration is not work for hire

Les Kippel, the sole shareholder and chief executive officer of Relix Magazine, Inc., suggested that Stephen Duane Johannsen create an illustration for the cover of a future issue of the magazine. Kippel, according to Federal District Court Judge Frye, proposed an illustration which would substitute two skeletons and a guitar for the farmers and the pitchfork depicted in the Grant Wood painting entitled "American Gothic."

Johannsen created a colored pencil and graphite piece entitled, pursuant to Kippel's suggestion, "American Relix;" the artist granted the magazine permission to use the copyrighted illustration on the cover of an issue. Johannsen, upon learning that the Relix parties reproduced the illustration as a poster, brought a lawsuit alleging various causes of action.

A Federal District Court in Oregon initially held (ELR 14:6:16) that the Relix parties were subject to jurisdiction in the state. In the instant proceeding, Judge Frye determined that Johannsen was an independent contractor who held a valid copyright in the illustration. It was noted that Johannsen created "American Relix" in his own studio, was not directly supervised by the magazine parties, used his own tools and material, had absolute control over his hours and had no duty to provide artwork to the magazine. Relix did not provide Johannsen with any employee benefits, or pay any payroll or social security taxes on his behalf.

The court then rejected Relix's claim that there was a genuine issue of fact as to whether "American Relix" was an advertisement for the magazine. Under the 1976 amendment of the Copyright Act, the relevant issue was whether the illustration was a work made for hire, not whether "American Relix" was an advertisement.

"American Relix" was not a joint work, declared Judge Frye, because Kippel was not, as a matter of law, a joint author of the illustration. Kippel may have suggested to Johannsen how the work should appear and may have created the title for the work. But Kippel's conception of the idea behind "American Relix" was insufficient, as a matter of law, to make him a joint author of the work, concluded the court in granting Johannsen's motion for partial summary judgment.

Johannsen v. Brown, 797 F.Supp. 835 (D.Ore. 1992) [ELR 15:3:9]

Work for hire statement must be signed prior to creation of work, rules Federal Court of Appeals

Schiller & Schmidt, Inc, a seller of office supplies, claimed that a mail order catalog prepared by Nordisco Corp., a company formed by James Rybak, a former Schiller employee, infringed Schiller's mail order catalog and misappropriated trade secrets. A Federal District Court rejected the copyright infringement claim, but awarded Schiller damages of about $16,500 for the misappropriation claim.

Federal Court of Appeals Judge Posner noted that about a third of the entries in Nordisco's first catalog appeared to duplicate the corresponding entries in Schiller's summer 1983 catalog. In particular, the Nordisco catalog included 18 photographs taken by a photographer for Rybak when Rybak was employed by Schiller. Schiller owned the copyrights in the Bertel photographs if they were "works for hire," or if Bertel assigned the copyright to Schiller, stated the court. Bertel was not an employee of Schiller, but the photographs were within one of the categories of intellectual property set forth in section 101(2) of the Copyright Act, and were specially commissioned by Schiller. However, the parties had not signed a statement to the effect that the photographs were works for hire.

In 1988, after the lawsuit began, Bertel signed a statement agreeing that Schiller and Schmidt owned the copyright in the photographs and assigning to the company "any remaining copyright which I may own in any photographs which I took for Schiller and Schmidt, and any right to maintain actions, now or hereafter existing, for alleged infringement thereof..." Schiller failed to sign the statement, as required by the statute if the works were to be considered works for hire. The statutory language, observed Judge Posner is "'signed by them,' ...that is, by both parties, and it means what it says."

The court then commented that, in any event, the statement came too late, for the requirement of a written statement regarding the copyright on a specially commissioned work is not merely a statute of frauds. The requirement may protect individuals against false claims of oral agreements, stated Judge Posner, but also was intended "to make the ownership of property rights in intellectual property clear and definite, so that such property will be readily marketable. The creator of the property is the owner, unless he is an employee creating the property within the scope of his employment or the parties have agreed in a writing signed by both that the person who commissioned the creation of the property is the owner. The writing must precede the creation of the property in order to serve its purpose of identifying the (noncreator) owner unequivocally. It did not precede it here."

Schiller may not have owned the copyrights in any of the photographs in the catalog, but the catalog contained other material that was original - the layouts of the product photographs. After examining the evidence as to the creation and appearance of the layouts, the court decided to remand the case for new findings on the question of the infringement of the copyrighted layouts in Schiller's catalog.

It then was found that the District Court correctly concluded that Nordisco did not infringe the catalog as a compilation.

Nordisco conceded the misappropriation of Schiller's mailing list and did not cross appeal the award of damages. The court declined to consider Schiller's request for additional damages and was highly critical of the manner by which Schiller and the District Court attempted to calculate damages.

Schiller & Schmidt, Inc. v. Nordisco Corporation, 969 F.2d 410 (7th Cir. 1992) [ELR 15:3:9]

Copyright Act does not require dismissal of criminal charges against video store owner for alleged false labeling of unauthorized videocassette recordings

Over 800 unauthorized videocassette recordings were discovered as a result of the execution of a search warrant at three video stores owned by Ralph Borriello. The indictment alleged that Borriello violated New York Penal Law by renting to the public unauthorized videocassette recordings without the copyright owner's consent.

As reported at ELR 14:5:12, a New York trial court dismissed that part of the indictment charging Borriello with criminal possession of stolen property.

In a subsequent ruling, the court, after careful consideration, found that certain charges against Borriello were preempted by the Copyright Act. However, Judge Robert S. Kreindler determined that the federal statute did not preempt the state laws penalizing the failure to disclose the origin of a recording and the criminal possession of a forged instrument.

The focus of Penal Law section 275.35, stated the court, was on labeling or packaging, with the crucial element being that the carton or outer container holding the recording was deceptive. The required element was not that a party infringe the right of the copyright owner, but that the cover, box or jacket did not clearly and conspicuously disclose manufacturer information. The latter element made the statute "qualitatively" different from a copyright infringement claim

It was further noted that the right protected in a copyright infringement claim is the owner's property right in his/her intellectual work, while the New York statute in issue is directed at protecting the rights of consumers.

The court expressed reservations as to whether labels or packaging would be within the subject matter of copyright.

Penal Law section 170.20 concerns the falsity of any instrument in general, not specifically an instrument that would be copyrightable. The fact that certain copyrighted labels were forged did not, in and of itself, render the provision a copyright infringement statute.

Section 301 of the Copyright Act was not intended to preempt state common law protection of consumers from fraud, even where the subject matter involved was within the scope of the copyright statute, stated Judge

Kreindler, who concluded by noting that Penal Law sections 275.35 and 170.20 did not conflict with the purpose and objective of the federal act. The court denied Borriello's motion to dismiss those counts. The counts under Penal Law sections 275.25 and 275.30 were dismissed as preempted by federal statute.

People v. Borriello, 588 N.Y.S.2d 991 (Kings Cnty. 1992) [ELR 15:3:10]

Colorado Supreme Court upholds ruling that printer of NFL posters may recover fees from participant in joint marketing venture

As reported at ELR 14:2:2, Page Gallery Productions asked A.B. Hirschfeld Press, Inc. to print licensed NFL posters. Hirschfeld previously had printed promotional posters for Page in connection with a pizza parlor poster project; the parties did not enter a separate contract for the NFL project. Hirschfeld estimated that the printing charge for the NFL posters would be about $144,000; Page paid the printer $45,000.

Page entered into an agreement with Weston Group, Inc. to market the football posters. Weston agreed to lend Page about $46,000. Page then paid Hirschfeld an additional $45,000. In the absence of instructions from Page, the printer applied a significant amount of the payment to the debt outstanding on the pizza promotion project; almost $50,000 remained due on the NFL poster account.

When Hirschfeld sought to recover its printing expenses, a Colorado trial court found that Page and Weston had orally agreed that Weston would promote and market the football posters produced by Page, that Weston would receive fifty percent of the profits, that the parties' share of any losses would be deducted from any future profits, and that Page and Weston intended to enter a joint venture. The court concluded that Hirschfeld had the right to apply the funds which Page received from Weston to the printing bills due from the promotional project rather than to the joint venture's obligations, because those billings preceded the expenses incurred by Hirschfeld for the NFL posters.

A Colorado appellate court upheld the trial court's ruling that in the absence of instructions by Page, Hirschfeld was entitled to use its discretion with respect to the funds.

In upholding the appellate court decision, the Colorado Supreme Court held that it was unnecessary for Hirschfeld to identify, for Page, the debts to which the printer intended to apply Page's payments in order to make Hirschfeld's application of the payments effective. Hirschfeld did not know, and did not have reason to know, that Page may have had a duty to Weston to apply the payments differently than Hirschfeld applied them. And again, Page did not designate how the payment should be applied. The appellate court correctly decided that Hirschfeld had the right to apply Page's payments as the printer did, and judgment was properly entered against Weston for the unpaid printing costs.

Weston Group, Inc. v. A.B.Hirschfeld Press, Inc., 845 P.2d 1162, 1993 Colo. LEXIS 109 (Colo. 1993) [ELR 15:3:10]

Court enjoins unauthorized use of "Camden Yards" mark on clothing items

The Maryland Stadium Authority, the owner of the baseball park in which the Baltimore Orioles play, alleged that Roy G. Becker wrongfully used the mark "Camden Yards" in connection with the sale of various items of clothing.

A Federal District Court in Maryland noted that the name Camden Yards first became associated with a proposed sports complex in 1987; the stadium authority subsequently engaged in many promotional activities using the Camden Yards mark.

By July 1991, when Becker began selling his merchandise (initially outside of Memorial Stadium), the promotional work by the stadium authority and the media coverage of the new baseball park had conferred a secondary meaning upon the name Camden Yards. Judge Motz stated that any concern as to the secondary meaning would be eliminated by the fact that Becker intentionally copied the Camden Yards mark. The evidence of intentional copying established a prima facie case of secondary meaning sufficient to shift the burden of persuasion to Becker on that issue; it was found that Becker presented no evidence to meet this burden.

Intentional copying of a mark raises a presumption of likelihood of confusion just as it raises a presumption of secondary meaning, noted Judge Motz. The presumption aside, stated the court, the evidence established that the baseball related designs of Becker's merchandise entitled the stadium to summary judgment on the likelihood of confusion issue, and concluded by permanently enjoining Becker from using the name "Camden Yards" in distributing items of clothing or in connection with advertising or promoting the distribution or sale of such products.

Maryland Stadium Authority v. Becker, 806 F.Supp. 1236 (D.Md. 1992) [ELR 15:3:11]

Merchandising sublicensee's claims against Andy Warhol estate and foundation are dismissed

hol, who died in February 1987, was the Andy Warhol Foundation for the Visual Arts. In late 1987, the artist's estate granted Schlaifer Nance & Company an exclusive license to use Warhol's artwork in connection with the design and distribution of various products. The estate retained the final right to approve all products.

In December 1989, Schlaifer Nance granted Artwear, Inc. a sublicense to manufacture and distribute T-shirts with screen printed Andy Warhol designs; the estate refused to approve any of the designs submitted by Artwear.

Schlaifer Nance filed a lawsuit claiming that the estate failed to cooperate or use its "best efforts" with respect to the company's licensing and sublicensing activities, and that the estate had misrepresented the scope of the rights it could lawfully grant. The licensee also brought an arbitration proceeding, and, in 1991, the arbitration panel awarded Schlaifer Nance the sum of about $4.1 million, upon finding that the estate breached the licensing agreement and acted "in bad faith and in willful disregard of SNC's rights" by, among other things, unreasonably disapproving products and failing to cooperate in promoting the licensing program; the award included punitive damages. The panel also found that the actions and omissions of the estate constituted tortious conduct.

Artwear's lawsuit alleged that the sublicensee was a third party beneficiary of the license agreement and that there was an implied agency relationship between the foundation and the estate, such that the foundation, although not a signatory to the agreement, was liable for the activities of the estate.

A New York trial court has found that the license agreement did not provide for enforcement by Artwear; that Artwear was an incidental beneficiary of the agreement; and that it was not necessary to reach the issue of whether the estate was the agent of the foundation.

The court dismissed Artwear's causes of action against the estate and foundation for prima facie tort, breach of the license and sublicense agreements, fraud as against Schlaifer Nance, and tortious interference with contract, again noting that Artwear was not entitled to claim damages arising from the breach of the license agreement since the company was not a party to that agreement or a third party beneficiary.

Artwear, Inc. v. Hughes, New York Law Journal, p. 22, col. 6 (N.Y. Cnty., Mar. 23, 1993) [ELR 15:3:11]

Preliminary injunctive relief is denied in dispute over magazine title "Windows User"

Windows User, Inc., sometime in late 1991, began developing a magazine on the subject of graphical user interface computer software. The proposed name for the magazine was "Windows User;" the company, on December 6, 1991, filed an intent-to-use application with the United States Patent and Trademark Office to register the name "Windows User" as its trademark. The application was denied on the ground that the mark "merely describes the subject matter of the applicant's publication." Windows User proceeded with pre-publication activities.

In March 1992, Reed Business Publishing Ltd. began selling copies of its magazine entitled "Windows User." Reed, in February 1991, had started publishing, in the United Kingdom, a bi-monthly magazine entitled

"Windows User;" the company subsequently decided to distribute the publication in the United States and Europe.

Reed applied to register the mark "Windows User," listing January 1991 as the date of Reed's first use of the mark in interstate commerce; the company obtained trademark registrations for the "Windows User" mark in ten states.

A Federal District Court in New York has denied motions for preliminary injunctive relief filed by Windows User and by Reed. Senior District Court Judge Whitman Knapp found that Windows User did not demonstrate either a likelihood of success on the merits or that the balance of hardships was decidedly in the company's favor. The court assumed, for purposes of Windows User's motion, the proposition that Reed's pre-December 6th activities did not constitute a cognizable use of the mark.

Judge Knapp agreed with Windows User's position that 1988 Trademark Law Revision Act permits an intent-to-use applicant the right to use the date of the filing of its application as the date of "constructive use of the mark, conferring a right of priority...on or in connection with the goods or services specified in the registration against any other person..." However, Congress expressly provided that such rights were contingent on the registration of a mark on the principal register. Windows User did not have a pending application to register its mark on the Principal Register, and the court declined to find that the company demonstrated that it was more likely than not that it would be able to establish December 6 as its first use date.

In turning to the question of which of the parties' 1992 activities were more likely to constitute the requisite "use in commerce" of the mark in the United States, the court first noted that Windows User's promotional activities in March 1992 occurred at about the same time as the appearance on newsstands of Reed's product. Furthermore, Reed had filed its federal trademark application in mid-February and presented evidence which indicated that the company, as early as July 1991, planned to distribute its publication in the United States. In all, Windows User did not demonstrate the likelihood that it would establish the requisite first bona fide use of the mark "Windows User" in interstate commerce.

With respect to the balance of hardships factor, the court found that granting Windows User injunctive relief, given that the company was not prepared to publish its magazine until August 1992, would create a "temporary void" in the delivery of the information offered by Reed's magazine. Even if Windows User were to succeed in establishing its mark, permitting Reed to continue to publish its magazine under the name "Windows User" pendente lite would not irreparably damage

Windows User's ability "to produce and publish its magazine, or cause injury to its reputation, or a significant loss of customers or diversion of sales," stated the court.

Judge Knapp declared that "equity and common sense" required the denial of an injunction so that Windows User might evaluate the allocation of its promotional resources pending the publication of the magazine and the trial on the merits of the claim.

Reed did not show that it would suffer irreparable harm upon the denial of its motion for preliminary relief, concluded Judge Knapp.

Windows User, Inc. v. Reed Business Publishing Ltd., 795 F.Supp. 103 (S.D.N.Y. 1992) [ELR 15:3:12]

Court rejects Coors' Lanham Act and unfair competition claims arising from Anheuser-Busch advertising campaign

Coors Brewing complained that an Anheuser-Busch advertising campaign violated section 43(a) of the Lanham Act. Coors argued that television, radio and point-of-sale material implied that Anheuser-Busch's Natural Light beer, due to certain differences in production, was "fresher" than Coors Light.

A Federal District Court in New York denied Coors' motion for a preliminary injunction. Judge Mukasey first found that Coors did not prove the literal falsehood of the Anheuser-Busch claim that Coors Light was made from a concentrate, or of certain other advertising claims.

Coors contended that Anheuser-Busch, by repeatedly stating that Coors Light was made from concentrate and was diluted, and by showing Coors Light being shipped from Colorado in railway cars while stating that Natural Light leaves Anheuser-Busch factories fresh and ready to drink, falsely implied that Natural Light was not also made by the process of "high gravity" brewing; that all of the Coors Light sold in the Northeast was "blended" with Virginia water; and that there was a difference between Colorado Coors and Virginia Coors.

After reviewing the results of a market survey, Judge Mukasey found that Coors did not prove that the challenged commercials were likely to mislead consumers into believing that, unlike Coors Light, Natural Light was not made by a process of "high gravity" brewing. Coors also failed to support either of the remaining two claims with any extrinsic evidence.

The court rejected Coors' common law unfair competition claim, stating that there was no evidence showing that Anheuser-Busch created the challenged advertising material in "bad faith," or unfairly usurped Coors' goodwill or good reputation. A claim for deceptive practices and deceptive advertising under New York's General Business Law also was rejected.

Coors Brewing Company v. Anheuser-Busch Companies, Inc., 802 F.Supp. 965 (S.D.N.Y. 1992) [ELR 15:3:13]

Advertising agency is jointly liable for $953,000 damage award in Gillette's Lanham Act action against competitor

In January 1991, a Federal District Court in New York found that Wilkinson Sword, Inc.'s advertisements falsely announced the "shaving smoothness superiority" of the company's Ultra Glide razor compared with the

Gillette Company's Atra Plus System. The court found that Wilkinson's advertising campaign violated the Lanham Act and granted a permanent injunction.

The court subsequently awarded Gillette damages of $953,000 plus prejudgment interest plus costs. Judge Kimba M. Wood noted that Gillette provided both empirical evidence that there was actual consumer deception and evidence that Wilkinson intentionally made false representations to the public. Judge Wood also found that Wilkinson's false advertising caused Gillette to lose substantial sales in the market.

With respect to the calculation of Wilkinson's profits, the court applied section 35(a) of the Lanham Act which allows recovery for plaintiff's damages or defendant's profit - the sales the defendant enjoyed as a result of its violations, less the costs and deductions attributable to those sales - and, after careful consideration, assessed damages, based on Wilkinson's profit, of $953,000.

In August 1992, the court, in what may be the first case in which an advertising agency has been held liable for damages, imposed joint liability for the damage award on Wilkinson Sword's agency, Friedman Benjamin, Inc.

The court held that "where an advertising agency participated in the creation, development, and propagation of a false advertising campaign with knowledge of its falsity, in violation of section 43(a), the advertising agency is jointly and severally liable for the damages caused by that campaign, insofar as the ability to obtain such an award against the principal defendant would be available under the Lanham Act." Friedman Benjamin knowingly participated in the creation and development of the Ultra Glide false advertising campaign, stated Judge Wood.

The court noted the argument (not raised by the agency) that imposing damages on a party based on section 35(a) "defendant's profits" would not seem to justify the imposition of damages on an advertising agency that did not participate in that profit. However, in addition to awarding defendant's profit in order to prevent unjust enrichment, courts award such damages to deter violations of the Lanham Act and to provide parties with compensation where they have suffered damages but may not be able to calculate the damages without relying on the quantification of defendant's profit. In all, the imposition of joint and several liability was appropriate even where the award against the principal defendant was based on defendant's profit. It was noted for the record that Gillette had not proved its losses directly and did not offer any evidence regarding Friedman Benjamin's profits.

The Gillette Company v. Wilkinson Sword, Inc., 1992 U.S.Dist. LEXIS 1265; 795 F.Supp. 662, 1992 U.S.Dist. LEXIS 12276 (S.D.N.Y. 1992) [ELR 15:3:13]

Court dismisses former sound technician's sex discrimination claim against NBC

In a decision issued in September 1991, but only recently published, a Federal District Court dismissed a sex discrimination claim brought against NBC News by former employee Deborah J. Schneider.

Schneider, a sound technician, claimed that she received fewer and "less attractive" assignments, and that she resigned from her position because of the allegedly sexually hostile atmosphere at NBC's Miami bureau.

Judge Mishler, after referring to certain false and misleading information in Schneider's application for employment, reviewed Schneider's history of psychiatric, emotional and physical problems in order to determine her physical and mental abilities to perform the duties required and whether Schneider's view of the employment atmosphere was that of a "reasonable female employee."

The court found that Schneider presented a prima facie case on her claim of disparate treatment. However, NBC affirmatively proved that the number and type of assignments offered Schneider would have been substantially the same had she been a man. It appeared to the court that Schneider failed to receive some assignments because of "incompetence, indifference, refusal to submit to the authority of directors, producers and correspondents, and unreliability." NBC stated legitimate, non-discriminatory reasons for denying Schneider assignments which she believed she would have received were she a man. Schneider did not establish discrimination in any condition of employment or discriminatory intent by a preponderance of the evidence.

Schneider also did not demonstrate that a facially neutral employment practice had a significant adverse effect on her conditions of employment, or that NBC created or maintained sexually hostile working conditions. Schneider had not complained about the allegedly hostile environment until she filed charges of discrimination, and she resigned from her position in order to join her husband, who was stationed in Atlanta, not because of working conditions at NBC, stated Judge Mishler.

Schneider v. NBC News Bureaus, Inc., 801 F.Supp. 621 (S.D.Fla. 1991) [ELR 15:3:14]

New York court upholds regulation of charges for downgrading cable service

In 1972, the New York legislature granted municipal governments control over cable television companies via municipal franchise contracts; local governments possessed the authority to negotiate cable television service rates and to negotiate appropriate restraints on the pricing and marketing practices of cable television franchisees. A Commission on Cable Television was created to promote and encourage cable television development and to set standards for municipal franchise awards; the commission also reviewed franchise contracts.

The Federal Communications Commission, since 1972, has prohibited state or municipal regulation of cable television service rates other than for "basic service;" in 1984, Congress precluded local regulation of any rates for providing cable service in locations where a cable company faces "effective competition."

As described by New York trial court Judge Keegan, cable television companies generally offer their customers a variety of optional program service packages. "Standard service," in the proceeding before the court, referred to a broad package of program services, or a tier or level of cable television service subscription, that was available for a fixed monthly price. Standard service usually includes local television broadcast station signals, the signals of several distant market television broadcast stations, and signals of non-broadcast programs and services such as Cable News Network, MTV, and sports programming.

Many cable companies provide a service option known as "economy service," which consists of a limited package of channel offerings; the company usually includes the channels carrying broadcast television stations and public affairs services. Cable operators may impose an installation charge for economy service which is referred to as a "downgrade charge." If the charge is applied to a customer who previously had standard or premium service, such a charge may be restricted by the state's downgrade regulations.

In response to an action brought by the Cable Television Association of New York, Inc., the commission claimed that the introduction of economy service by a cable television company would be a "network change" (whether or not a downgrade charge" is assessed on those current customers who choose to subscribe to the new economy service) and thus was an event subject to the applicable state consumer protection requirements.

The commission, in December 1990, had adopted regulations defining a downgrade charge as "a charge imposed upon a subscriber for implementing a request by the subscriber for a change in service to a less expensive tier than the tier currently subscribed to." The regulation prohibited imposing any charge for most downgrades and limited the amount of any allowable downgrade charge. The commission defined a "network" as a channel or station, such as ESPN or CNN. A "service tier" meant a "category of cable television service or other services...for which a rate or fee is charged...including but not limited to basic services, premium networks (and) recurring pay-per-view services."

The commission's interpretation of network change was "rational," declared the court. The offering of an economy service with fewer channels than premium service, and then dropping into the economy service what was once in premium service was, in the court's view, within the definition of network change. The "manipulation of channels and thereby subscription rates [was] exactly what the legislature ...tried to prevent in its effort to protect the consumer," stated the court. The legislature provided the commissioner with a "broad regulatory authority base, stated the court, and the downgrade regulations were within such a base. It also was found that there was a sufficient nexus between the commission's authority and the downgrade regulations and that the regulations therefore were reasonable.

Cable Television Association of New York, Inc. v. New York State Commission on Cable Television, 588 N.Y.S.2d 81 (Albany Cnty.1992) [ELR 15:3:14]

Referee will determine disposition of "Son of Sam" funds

The New York State Crime Victims Board held certain funds in escrow under the provisions of the 1977 "Son of Sam" Law. In 1991, the United States Supreme Court declared that section 632-a of the Executive Law was an unconstitutional infringement of free speech. After the decision in Simon & Schuster, Inc. v. New York State Crime Victims Board, 112 S.Ct. 501 (1991; ELR 13:8:3), New York replaced the statute concerning the compensation of crime victims by criminals (ELR 14:11:18).

When the Board brought a stakeholder action, a New York trial court first considered the claimants against the funds held for Jack Henry Abbott. The funds on deposit included about $14,000 from a television and movie option for the book "In the Belly of the Beast," a $1,000 payment from the publisher of the book, and a $1,000 payment for theatrical production rights. It was noted that Ricci Ryes Adan had an unsatisfied judgment for $7.575 million, Henry Howard had a judgment for $45,000, and Abbott also claimed the funds.

Acting Judge Diane A. Lebedeff stated that on the record before the court, the priority between the victim claimants could not be determined, nor could the question of whether their judgments resulted from a timely civil action - the court referred the matter to a special referee.

With respect to the funds held for Mark David Chapman, who was declared insane after murdering John Lennon, the court observed that the law firm of Levy, Gutman, Goldbert & Kaplan claimed that Chapman had assigned funds to the firm as part payment for legal services. The funds on deposit, about $9,000, derived from a magazine article written by Chapman. Judge Lebedeff granted the law firm's motion for judgment and ordered the Board to pay the funds to Levy, Gutman.

The funds on deposit for Henry Hill, whose experiences were detailed in the book "Wise Guys" and in the film "Goodfellas," totalled about $1200 from a television interview. There were three alleged victim claimants, but their claims had not been reduced to writing. A hospital had obtained a judgment for about $8,000, and apparently had superior rights. The court directed the Board to notify the three individual claimants and to request the filing of proof of the commencement of a lawsuit or the entry of a judgment against Hill. In the absence of any response, the court stated that it would direct the distribution of the funds to the hospital.

There were six claimants to the fund held for John S. Wojtowicz, whose career as a bank robber was depicted in the film "Dog Day Afternoon." The claimants included three victims who had obtained unsatisfied judgments, and Carmen Ann Wojtowicz, a creditor pursuant to a divorce judgment. The Board held about $16,500 in escrow, representing royalties from the film.

The court was unable to determine whether the judgments of the victim claimants resulted from a timely civil suit or from an in rem action. If the judgment resulted from an in rem action, the special referee would have to determine whether the unconstitutionality of the "Son of Sam" law rendered the judgments invalid. All of the issues relating to the funds on deposit as to Wojtowicz were referred to a special referee.

There were two claimants to the $15,000 fund on deposit for the late Italian financier Michele Sindona - a bank holding a judgment of about $6 million, and the decedent's son. The fund derived from royalties from a book entitled "Power on Earth." The court referred the disposition of the Sindona fund to the special referee.

New York State Crime Victims Board v. Abbott, New York Law Journal, p. 24, col. 4 (N.Y.Cnty., April 14, 1993) [ELR 15:3:15]

General partner in "Titanic" exploration and television venture obtains disqualification of partnership's former general counsel

In August 1987, a limited partnership named Titanic Ventures was created to explore the wreck of the ocean liner Titanic and prepare a television program about the project. Americo Prisco and other limited partners were responsible for raising funds for the exploration activities. Westgate Entertainment, a general partner, was responsible for raising funds for the television production. Eventually, the limited partners voted to remove Westgate and another entity as the general partners of the venture.

Litigation arose concerning the alleged breach of the partnership agreement and the alleged breach of Westgate's assignment to the partnership of the rights contained in an agreement between Westgate and LBS

Industries, Inc. concerning the promotion and marketing of the Titanic exploration. Westgate sought to disqualify the law firm of Slavitt, Connery & Vardamis, whose partner, Robert A. Slavitt, had been general counsel to the partnership.

A Federal District Court in Connecticut, in granting Westgate's motion, noted that there was no dispute that the interests of the limited partners, the law firm's current client, were adverse to Westgate's interests.

The limited partners argued that because Westgate had supplemental representation and never paid Slavitt, Connery any fees that there was no attorney client relationship between the law firm and Westgate. Westgate's president stated that he and the company relied on Slavitt for information regarding the formation of the partnership and the LBS assignment and did not rely on other counsel in these matters.

Judge Eginton pointed out that the limited partners offered no support for the proposition that a general counsel for a partnership may represent a limited partner and not at the same time represent a general partner. Slavitt's primary duty as general counsel for the partnership was to the partnership entity, not to one of the limited partners or to Westgate. The fact that Westgate may have consulted with other lawyers did not mean that the company did not have an attorney client relationship with Robert Slavitt.

The court further commented that "it is basic partnership law that every partner is an agent of the partnership and that the knowledge of a partner regarding partnership affairs is imputed to all other partners." It was unclear to Judge Eginton how the duty of loyalty would allow a general counsel for a partnership to represent one partner against another partner in a suit arising out of partnership business.

In all, when Robert Slavitt became general counsel for the partnership, he created an attorney client relationship with Westgate which brought Westgate within the "former client ambit" of Connecticut's local rules and Rule 1.9 of the Rules of Professional Conduct.

Judge Eginton next observed that Slavitt drafted the partnership and assignment agreements, and that there was similarity between the work Slavitt performed as general counsel for the partnership and the partners' claims in the instant matter. Slavitt was in a position to receive information from Westgate concerning the company's "intentions and expectations regarding its role in the partnership" - information which "could well be relevant in this case..." A substantial relationship was found between Slavitt's representation of Westgate as general counsel to the partnership and the law firm's representation of the limited partners.

Upon establishing a substantial relationship, there was an irrebuttable presumption that the former client revealed facts requiring the attorney's disqualification. There was no need to show that the former client actually did reveal any confidences, or whether the attorney would use such information to the former client's disadvantage. Model Rule 1.9 was designed not only to protect a client's confidences, stated Judge Eginton, but also "to establish broader standards of attorney loyalty and to maintain public confidence in the legal system." Rule 1.9 was not limited to situations where a former client would be harmed by the divulgence of confidential information. The rule"imposes an ethical obligation irrespective of harm."

Westgate demonstrated that a substantial relationship existed under Rule 1.9 between Robert Slavitt's representation of Westgate as general counsel to the partnership and the law firm's representation of the limited partners.

The court concluded by finding that the limited partners would not be prejudiced by the disqualification of Slavitt, Connery.

Prisco v. Westgate Entertainment,Inc., 799 F.Supp. 266 (D.Conn. 1992) [ELR 15:3:16]

Texas Supreme Court invalidates order barring disclosure of rape victim's identity in invasion of privacy action against newspaper

The Fort Worth Star-Telegram published two articles based on a police report which contained the name of a rape victim; the articles did not contain the victim's name. Despite her request for anonymity in all public files and records concerning the offense, the victim's real name was used in the indictment.

The victim sued the newspaper for invasion of privacy, alleging that the articles contained sufficient detail to identify her.

Subsequently, the victim agreed to allow the use of her name during trial provided that the state would seal the records following the trial. When the newspaper learned about the use of the victim's name, it asked the court to reconsider an oral protective order which prohibited the Star-Telegram from publishing facts relating to the victim's identity.

After a hearing, the trial court issued a written protective order requiring all parties to maintain the confidentiality of the victim's true identity by not disclosing it to anyone other than the parties and lawyers in the civil suit.

The Texas Supreme Court noted that the information in question already was public - the state had disclosed the victim's identity during the criminal prosecution of her assailant, and the material became part of the public record of the criminal case. Trial proceedings are public information, declared Judge Gonzalez, and "the law cannot recall information once it is in the public domain." The court upheld the right of the press to disseminate information obtained through public sources; stated that the order violated the Texas Constitution and "unduly interfere[d] with the ability of the press to print already public news;" and dissolved the order. It was found that the trial court's order was an invalid prior restraint of the newspaper's constitutional right to disseminate public information, and that the trial court committed a clear abuse of discretion for which there was no adequate remedy at law. The court therefore conditionally granted the newspaper's petition for writ of mandamus (which would not be issued unless the trial court judge failed to rescind the challenged protective order).

Judge Hecht and Judge Cornyn, concurring only in the judgment, agreed that the trial court's order was overly broad and therefore invalid, but stated that the court's opinion also was overly broad. The rights of the press "have nothing to do with this case," stated Judge Hecht - the newspaper was entitled to the same rights as any other litigant; the court's references to the rights of the press were entirely dicta, in Judge Hecht's view. The victim's fear that the newspaper would publish more information about her was not sufficient to justify the court's broad protective order, concluded Judge Hecht.

Star-Telegram, Inc. v. Walker, 834 S.W.2d 54 (Tex. 1992) [ELR 15:3:17]

New York is proper forum for dispute over Picasso print

David Tunick, Inc. purchased a print of "Le Minotour-machie," purportedly signed by Pablo Picasso, from E.W. Kornfeld and his gallery, Galerie Kornfeld und Cie. Tunick claimed that the signature was forged and sued the Kornfeld parties for fraud, misrepresentation, breach of the duties of good faith and fair dealing and breach of fiduciary duty.

A Federal District Court in New York, after holding a hearing, found that Kornfeld was subject to personal jurisdiction in New York. Tunick made a prima facie showing that Kornfeld committed a tortious act outside New York that caused injury to Tunick in the state. It was shown by a preponderance of the evidence that Kornfeld regularly engaged in business and non-business activities in New York.

The court declined to dismiss the matter on the ground of forum non conveniens. Tunick was located in New York, as was the print at issue and several experts and witnesses. The fact that the case might require the court to interpret foreign law was insufficient to support dismissal.

Judge David N. Edelstein rejected Kornfeld's defense of laches, finding that Tunick did not unreasonably delay in filing the lawsuit and that Kornfeld did not suffer any prejudice during the sixteen months between the date of the auction at which Tunick purchased the print and the filing of the lawsuit. If the print was on consignment to Galerie Kornfeld und Cie, an action still would lie against the consignor upon a determination that the signature on the print was forged.

The court, upon finding that the "terms and conditions" that governed the auction at which Tunick purchased the signed print did not bar the lawsuit, that the laws of

New York State, rather than those of Switzerland, would be applied to the action, and that Tunick presented sufficient facts to state a claim on which relief could be granted, denied Kornfeld's motion to dismiss the amended complaint and motion for summary judgment and/or for judgment on the pleadings.

David Tunick, Inc. v. E.W.Kornfeld, 813 F. Supp 988, 1993 U.S. Dist. LEXIS 1180 (S.D.N.Y. 1993) [ELR 15:3:17]

Court upholds Delaware statute regulating adult entertainment establishments

Delaware's Commission on Adult Entertainment Establishments included within the definition of such establishments enterprises which offered for sale books, magazines, films and novelties of an adult nature and which made available sexually explicit film, video and live entertainment to patrons viewing from enclosed booths. The Commission required individuals operating adult enterprises to obtain a license and to comply with specified restrictions.

In 1991, the state added to the statute a provision limiting the hours of business of adult enterprises to 10:00 a.m. through 10:00 p.m. Monday through Saturday; requiring the enterprises to remain closed on all Sundays and holidays; and prohibiting the use of booths used for the viewing of films or other forms of entertainment from having doors, unless one side would be open to an adjacent public room so that the area inside was visible to persons in the adjacent room.

The owner of an adult establishment claimed that the closing hours and open-booth requirements violated the

First and Fourteenth Amendments of the United States Constitution.

A Federal District Court in Delaware, in granting summary judgment to the Commission, found that the statutory requirements were content-neutral time, place, and manner regulations. Senior Judge Murray M. Schwartz noted that "the predominate concern" of the two provisions was unrelated to the suppression of free expression and focused on the protection of the surrounding community's "quality of life and public health." And the provisions did not distinguish between types of films, videos or other forms of entertainment. The court, after pointing out that erotic communication involves only a minimal amount of protected expression, found that the state sufficiently demonstrated a substantial governmental interest in the challenged statutes, as well as that the statutes were narrowly tailored to meet those interests. Judge Schwartz declined to "second guess" the legislature's decision that the closing hours requirement was the most appropriate way to meet the state's objective of lessening the adverse secondary effects of adult entertainment establishments.

Judge Schwartz stated that the open-booth regulation did not regulate the content of communicative activity; did not infringe on the rights of patrons who wished to view the entertainment; and satisfied the narrow tailoring standard. The court further found that the closing hours requirement left open "ample opportunities to sell and consume adult entertainment.." and that Mitchell presented no case support for the existence of a privacy right to view erotic films in seclusion. The court rejected the argument that the right of privacy includes the right to watch sexually-explicit non-obscene films in completely enclosed booths in commercial establishments, and stated that in the context of the instant proceeding, patrons of adult entertainment establishments would not have a First Amendment right to the commercial, anonymous viewing of sexually-explicit entertainment.

Mitchell v. Commissioners of the Commission on Adult Entertainment Establishments of the State of Delaware, 802 F.Supp. 112 (D.Del. 1992) [ELR 15:3:18]

Court refuses to grant preliminary injunction to manufacturer of Etch A Sketch in infringement claim against competing product

Ohio Art Company, the manufacturer of the Etch A Sketch drawing toy claimed that Lewis Galoob Toys, the distributor of the Pocket Play Doodle drawing toy, violated various trademark and unfair competition laws.

After describing the packaging, appearance and display features of the two toys, Senior Federal District Court

Judge Milton I. Shadur noted that the two patents for the Etch A Sketch apparatus expired by September 1990. In late 1987, Ohio Art had sought to register a trademark consisting of a line drawing showing the bare outline of the Etch A Sketch configuration, "comprising two unadorned rectangles, with two circles in the lower corners of the outer rectangle." The Patent and Trademark Office, relying on Ohio Art's representations as to the exclusivity of use of the claimed shape, the lack of functionality of that shape and the availability of alternative designs, eventually registered the mark.

Judge Shadur found that Ohio Art was not likely to prevail on the issue of secondary meaning at trial because the presumption of secondary meaning in the Etch A Sketch configuration resulting from the registration of the mark was rebutted by evidence presented to the court. The Patent and Trademark Office was not given the opportunity to consider all of such evidence, including the fact that three other toys that used the same mechanism and that were nearly identical in shape and size to Etch A Sketch were marketed before the registration of the mark. It was noted that Ohio Art never publicly claimed any trademark right in the shape of its product until some time in 1991 - after the development of Doodle It by Galoob in mid-1990.

The court concluded that Ohio Art's configuration for Etch A Sketch was descriptive of an entire range of drawing toy products, and that no secondary meaning in the shape was likely to be established at trial.

Ohio Art also would not likely be able to demonstrate by a preponderance of the evidence that the trade dress for Etch A Sketch had acquired secondary meaning, declared the court. And even if the company presented more persuasive proof of its claim, Judge Shadur commented that Galoob marketed Doodle It with a "sharply different trade dress."

The court next determined that it was unlikely that consumers would be confused over the source or sponsorship of Doodle It, given the differences between the product and Etch A Sketch with respect to color, shape, and packaging. Ohio Art also would not likely prevail on the issue of functionality - the entire design was not arbitrary or nonfunctional, and it was "highly questionable," stated Judge Shadur that the overall configuration was entitled to registration.

Judge Shadur observed that Ohio Art, in effect, was "seeking to use the Mark as a means to extend the now-expired monopoly that had been conferred on it by the patents. It thus attempts to create a perpetual monopoly that would prevent competition by anyone who would like to make a perfectly legal use of the mechanism...and who would like to do so in a wholly functional manner that employs the patents' preferred embodiment." The Etch A Sketch product configuration may have been unique in 1960, when Ohio Art began marketing the toy, but that did not establish its nonfunctionality, stated the court, because the uniqueness resulted from the existence of a basic utility patent. The shape of the toy was closely adapted to the function performed by the patented apparatus.

It was observed that Ohio Art itself did not place any trademark significance to the shape of its product until 1987 - "added evidence," commented Judge Shadur, that the shape was functional and did not have secondary meaning.

The court, in denying Ohio Art's motion for a preliminary injunction, concluded by finding that Ohio Art did not explain its delay in seeking injunctive relief; that there was no evidence of any injury to the company arising out of sales of Doodle It, "much less any irreparable injury;" that an injunction would cause a considerable loss of sales of the Doodle It products; and that there was a strong public interest in the right of every prospective competitor to utilize an invention after the expiration of a patent and in the availability of such competing products at different price ranges.

Ohio Art Company v. Lewis Galoob Toys, Inc., 799 F.Supp. 870 (N.D.Ill. 1992) [ELR 15:3:18]

Briefly Noted:

Copyright Infringement/Music.

The American Society of Composers, Authors and Publishers, on behalf of the owners of fifteen musical compositions, sued Kissimmee Broadcasting, Inc. and its owner, Augustine Cawley, for copyright infringement. ASCAP and Kissimmee Broadcasting reached a settlement, but a Federal District Court in Florida ruled that Cawley also was personally liable for violating the Copyright Act.

It was found that Cawley had been involved in litigation with ASCAP over licensing agreements for at least one other radio station and was "well aware of the requirements necessary to fulfill his side of the contract." Cawley, as president of Kissimmee Broadcasting, represented the corporation in licensing matters; had a right to supervise the operations of Station WMJK; and also had a clear financial interest in the activities of the radio station.

In determining the amount of damages, the court observed that Cawley sold Kissimmee Broadcasting and the radio station in November 1991 and thus would not be held liable for the nonpayment of license fees after the date of sale. Judge Kellam, sitting by designation, also pointed out that although Cawley's unauthorized public performance of the music was willful, the station owner attempted to comply with a terminated license agreement by sending several annual reports to ASCAP. The court denied injunctive relief in view of the sale of the station and concluded that Cawley was liable for statutory damages in the amount of $1,500 for each infringement, totalling $22,500, plus interest from the date of judgment.

Quartet Music v. Kissimmee Broadcasting, Inc., 795 F.Supp. 1100 (M.D.Fla. 1992) [ELR 15:3:19]

Copyright Infringement/Jury Trial.

A Federal District Court in Mississippi has ruled that the court's exercise of discretion in setting statutory damages has been designated, by the Fifth Circuit Court of Appeals, as equitable in nature. The court therefore granted a motion by the Crosby Arboretum Foundation to deny Nancy Wood's request for a jury trial in Wood's copyright infringement action. Wood did not seek equitable relief and asked for maximum statutory damages for certain of the alleged infringements, and an increased amount, claiming willfulness, on other alleged infringements. Federal District Court Dan M. Russell, Jr. stated, in part, that the fact that Wood claimed damages for willfulness did not change the equitable status of the case.

Wood v. Crosby Arboretum Foundation, 793 F.Supp. 716 (S.D.Miss. 1992) [ELR 15:3:19]

Copyright Infringement.

Hung Jung Tang sued nine retail video store owners claiming that the store owners were copying, renting or selling unauthorized video copies of Korean television shows.

A Federal District Court in Pennsylvania found that Tang, who had obtained sublicenses from several companies, was entitled to protect his exclusive rights from infringement under the copyright laws; that Tang had received registrations from the Copyright Office on many of the tapes; and that Tang also was entitled to bring suit based on the copyright registration applications submitted by his licensors. Tang therefore established his ownership interests in valid copyrights.

Tang's refusal to sell certain tapes to the store owners did not constitute unclean hands, declared the court, in granting Tang's motion for a preliminary injunction to prevent further sales of the allegedly infringing videos and for impoundment.

Tang v. Hwang, 799 F.Supp. 499 (E.D.Pa. 1992) [ELR 15:3:20]

Counterfeit Tape Destruction.

Hasan A. Abdelrasul was tried and acquitted by a jury of selling a counterfeit of a mark; Abdelrasul allegedly had sold cassette tapes bearing a counterfeit trademark. After the verdict, but before the entry of the judgment of acquittal, Abdelrasul sought the return of the 917 cassette tapes seized and used as evidence against him at trial.

After a hearing, the court determined that the tapes were counterfeit and granted the state's motion to order the destruction of the tapes. Several months later, the court entered judgment of acquittal.

Abdelrasul argued that the court was required to make any finding concerning the disposition of the goods during the trial and to enter such a finding before the jury returned its verdict.

An Oregon appellate has affirmed the trial court decision, noting that at the time of the court's order, the tapes still were in the possession or control of the court; that the decision was made prior to the entry of final judgment; and that the court had the authority to hold the hearing and to enter its order.

State v. Abdelrasul, 826 P.2d 58 (Ore.App. 1992) [ELR 15:3:19]

Jurisdiction/Music Performance Rights.

The International Show Car Association, a trade organization for the custom car show industry, claimed that the American Society of Composers, Authors and Publishers and Broadcast Music, Inc. engaged in a combination and conspiracy in restraint of trade and monopolized the market for certain music performance rights. The association had obtained blanket licenses from BMI since 1968 and from ASCAP since 1979. In 1990, ASCAP and BMI, together with a "Music Task Force," developed standard rates, terms and conditions for music licenses for meetings, conventions, and trade shows. In 1991, ASCAP and BMI canceled the association's license and offered a new blanket agreement containing increased rates.

In response to the association's antitrust action, ASCAP and BMI sought to transfer venue. A Federal

District Court in Michigan found that the Southern District of New York would have subject matter jurisdiction over the case, that venue would be proper in New York and that most of the witnesses were located in New York. The court rejected the association's claim that its choice of forum was entitled to additional weight because antitrust claims were being raised.

It also was found that due to the provision of the 1950 consent judgment rendered in the Southern District of New York in connection with ASCAP's operations, it was "in the interest of justice" to transfer the action to that district. The New York consent judgment might not effect the association's antitrust claims, but the complaint also referred to the "unreasonable fees" charged by ASCAP and BMI as well as the organizations' failure to negotiate with the association over the amount. Judge Duggan noted that courts have deferred to the Southern District of New York in cases regarding the level of fees charged by ASCAP. In all, it was in the interest of justice and would promote uniform decision-making to transfer the case.

International Show Car Association v. American Society of Composers, Authors & Publishers, 806 F.Supp. 1308 (E.D.Mich. 1992) [ELR 15:3:20]

Time Warner Securities Litigation.

In 1989, Time, Inc. conducted a leveraged buyout of the former Warner Communications, Inc. The Time directors, prior to the merger, had rejected Paramount Communications' offer of $200 per share. A class action complaint alleged that Time Warner and certain individual officers of the company misled purchasers of the company's stock during the period of December 12, 1990 through June 7, 1991 by falsely claiming that the company was undervalued and that the intrinsic value of its shares was higher than the market reflected. Time Warner stock closed at $94.625 on June 7, 1991.

A Federal District Court in New York granted the Time Warner parties' motion to dismiss the class's claims of securities fraud, common law fraud and negligent misrepresentation on the grounds that the complaint failed to allege material misstatements or material omissions and that the complaint did not allege scienter on the part of the Time Warner parties.

Judge Levin noted that a complaint under section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission must allege that "in connection with the purchase or sale of securities, [a party], acting with scienter, made a false material representation or omitted to disclose material information and that ...reliance on [the party's] actions caused...injury."

The class adequately alleged that Time Warner and its officials, during the class period, encouraged holdings in the company by citing the advantages of a possible "strategic alliance" with various partners, and the complaint also adequately supported the inference that Time Warner officials were considering a stock offering during the class period but did not reveal that fact. However, the complaint, stated Judge Levin, did not allege either material misstatements or material omissions chargeable to the Time Warner parties which were subject to a duty to disclose.

The court found that the class parties failed to sufficiently allege scienter and that the complaint alleged "no more than the company's enthusiastic statements about ongoing negotiations and its silence concerning a stock offering, followed by a sudden and surprising announcement of a stock offering with no realization of the hoped-for strategic alliances. These actions do not violate the securities laws."

In re Time Warner Inc. Securities Litigation, 794 F.Supp. 1252 (S.D.N.Y. 1992) [ELR 15:3:20]

Basketball Coach Contract.

In 1987, Arthur Tolis signed a three year contract to work as the head basketball coach at the University of New Orleans. In March 1988, Tolis was notified that his employment was being terminated. Tolis subsequently entered a written compromise agreement with the Board of Supervisors of Louisiana State University which released all parties from their obligations; the parties agreed to keep the agreement confidential. In 1989, Tolis sued the Board of Supervisors, claiming that he was fraudulently induced to sign the compromise agreement by various oral promises made by a representative of the university. Tolis claimed that the Board failed to pay him the second $58,000 of a promised $116,000 payment as orally agreed in consideration for the compromise agreement. Tolis sought to introduce a tape recording of a conversation, which purportedly occurred on the day the compromise was signed, in which the coach was assured that he would be able to file a lawsuit if the Board failed to make the promised payments.

A Louisiana trial court granted the Board's motion for summary judgment, holding that Tolis was not entitled to present parol evidence to prove that the Board did not comply with the terms of the alleged oral agreement.

In reversing the trial court's ruling, the appellate court found that since Tolis alleged both fraud and error, he was entitled to present parol evidence on those issues.

The Board parties apparently admitted that they entered an agreement to pay Tolis a total of $116,000 and that Tolis did not receive the second payment until after a specified deadline. The terms of the compromise agreement itself revealed that some kind of other agreement existed between the parties; the written agreement did not state that it constituted the entirety of the agreement between the parties; and Tolis was entitled on remand to an opportunity to prove the terms of the alleged oral agreement, ruled the court.

Tolis v. Board of Supervisors of Louisiana State University, 602 S.2d 99 (La.App. 1992) [ELR 15:3:21]

Arbitration/Athlete Bonus.

In 1983, the Miami Dolphins entered into three NFL player contracts with David Overstreet; the three one-year contracts covered the 1983-1984, 1984-1985 and 1985-1986 football seasons. The team, under a "Signing Bonus Rider," also agreed to pay Overstreet $150,000 upon executing the rider and an additional $100,000 on May 1, 1986. The bonus payment was described as additional consideration for Overstreet's signing of the NFL Player Contracts and "the Player's adherence to all provisions of said contracts..."

Overstreet became a player for the Dolphins, but he died in an automobile accident in 1984. The team claimed that it had no further obligations under the signing bonus rider and did not make the $100,000 payment to Overstreet's estate.

A Florida appellate court has reversed a trial court decision granting summary judgment in favor of the estate. Judge Cope remanded the matter with directions to refer the dispute to arbitration, finding that the team did not waive any rights under the arbitration provision of the player contract, as governed by the applicable collective bargaining agreement, and that there was no showing of prejudice to the estate from the delay in seeking arbitration.

Miami Dolphins, Ltd. v. Cowan, 601 S.2d 301 (Fla. App. 1992)

Athlete Eligibility.

An Indiana High School Athletic Association rule would have prevented Shane Schafer from an additional year of eligibility for his high school basketball team. Schafer had played on the team in the fall and spring of his junior year, but then withdrew from school due to an illness. When Schafer returned to school, he planned to repeat his junior year.

An Indiana trial court found that the rules challenged by Schafer were overly broad, overly inclusive, arbitrary and capricious and did not bear a fair relationship to the intended purpose of the rules; declared that the rules violated equal protection and due process; and enjoined the association from prohibiting Schafer from participating in interscholastic athletics.

The appellate court, after extensive analysis, first determined that the association, in making and enforcing its rules, engaged in state action subject to judicial review.

Judge Barteau then stated that the court would assume, for the sake of argument, that Schafer was entitled to procedural due process, and found that the association did not violate those rights. Upon evaluating Schafer's substantive due process and equal protection claims on a rational basis standard, it appeared to the court that the state possessed a legitimate interest in seeking to maintain the importance of academic education over participation in extracurricular athletics, and that the challenged rules were rationally related to achieving the association's goal. However, following state case law, Judge Barteau concluded that the rules were overbroad, and that the decision to apply the rules was arbitrary and capricious.

The court next found that the injunction was overbroad as to Schafer's eligibility for participation in interscholastic athletics after the spring of 1992, and remanded the matter to the trial court in order to draft a more narrowly tailored injunction.

Indiana High School Athletic Association, Inc. v. Schafer, 598 N.E.2d 540 (Ind. App. 1992) [ELR 15:3:21]

Athletic Organization.

Friends Academy, a non-public secondary school, unsuccessfully applied for membership in Section VIII of the New York State Public High School Athletic Association.

A Nassau County trial court, in considering the school's challenge to the section 's actions, stated that the Executive Committee's extension of the vote deadline by one day was neither arbitrary, capricious nor an abuse of discretion and that the committee acted reasonably and within the scope of its authority in extending the original vote deadline.

However, the court found that the referendum vote required by the section 's by-laws, as a prerequisite to the admission of a non-public school, violated the school's right to equal protection under the Fourteenth Amendment. Although no fundamental right or suspect classification appeared to be involved in the matter, Judge Marvin E. Segal commented that "non-public school students have the right under the Fourteenth Amendment to be treated in the same manner as public school students with regard to participation in interscholastic athletics, absent some rational basis for treating the two classes of students differently." And the Friends Academy was entitled to be treated in the same manner as other non-public schools applying for admission to the section , absent a rational and legitimate basis for disparate treatment.

The Friends Academy met all the prerequisites for admission to the section , but was denied membership solely on the ground that it was unable to obtain a majority of favorable votes from member schools. The section did not present any rational or legitimate state interest which was served by the unequal treatment of public and non-public schools. The vote by member schools was made without any objective criteria or standards, making it impossible to determine whether or not the section 's admission procedures afforded all non-public schools the requisite equal treatment under the Fourteenth Amendment. It was further found that in view of the state's public policy of encouraging interscholastic athletic activities for all (emphasis by the court) boys and girls in grades 7-12, the denial of membership to Friends Academy, in the circumstances of the case, was arbitrary, capricious and impermissibly denied the school's right to equal protection.

Judge Segal concluded that the school was entitled to judgment declaring it to be a member of Section VIII, with all rights and privileges of membership, upon payment of any requisite membership fees.

Friends Academy v. Section VIII of the New York State Public High School Athletic Association, Inc., 588 N.Y.S.2d 525 (Nassau Cnty. 1992) [ELR 15:3:22]

Dolphin Stadium Construction.

The Lake Lucerne Civic Association challenged Dade County's land use approvals allowing the construction of Joe Robbie Stadium and accompanying commercial development in a predominantly black middle-class residential neighborhood. After lengthy litigation, the home owners and homeowner associations presented a second amended complaint, alleging various causes of action.

A Federal District Court in Florida first found that the association did not have standing to seek compensatory damages with respect to certain claims, but possessed standing to assert claims on behalf of their members in seeking injunctive relief - the participation of individual members of the associations was not required in assessing whether an injunction would be appropriate.

The court then declined to dismiss claims against the estate of Joseph Robbie, stating that it was unable at the time to determine whether the action against the estate was time barred; rejected the stadium parties' motions to dismiss for failure to join indispensable parties; and refused to find that Dade County was entitled to eleventh amendment immunity.

In considering the stadium parties' motions to strike various allegations in the homeowner associations' complaints, Judge Highsmith ordered the associations to state, in any subsequent amended complaints, how allegations of historical discrimination related to the nongovernmental parties involved in the construction of the stadium.

The court proceeded to find that the homeowner associations failed to allege either how the rezoning specifically damaged the home owners' land or diminished the value of their property, and granted the county's motion to dismiss a cause of action alleging a takings violation.

Judge Highsmith agreed that the issue of the stadium's use as a baseball park and the request to increase seating capacity were additional takings claims that were not ripe because the extent of any regulations was not yet fixed and the harm that might be caused was not yet measurable.

In addressing the homeowner associations' civil rights claims for racial discrimination, Judge Highsmith pointed out that the home owners did not sufficiently allege that the location of the stadium in a predominantly black neighborhood had adversely affected any property interest within the reach of section 1982. It was not alleged how the specific property rights of the home owners were impaired or impaired as a result of their race. The court therefore granted the stadium parties' motion to dismiss the section 1982 claim.

The court rejected the homeowner associations' causes of action, all allegedly arising from a conspiracy by the stadium parties to intentionally discriminate against the homeowners due to their race, for conspiracy to violate the equal protection clause of the Fourteenth Amendment, for conspiracy to violate 42 U.S.C. section 1985(3), for conspiracy to violate the due process clause and 42 U.S.C. section 1983, and for conspiracy to violate 42 U.S.C. 1982 and 1985(2).

The court refused to dismiss various causes of action on the grounds of statute of limitations, preclusion, the failure to state a claim for damages, and involuntary dismissal for the homeowners' alleged failure to obey court orders, and granted the homeowners "one more chance" to amend their complaint.

Lake Lucerne Civic Association, Inc. v. Dolphin Stadium Corp., 801 F.Supp. 684 (S.D.Fla. 1992) [ELR 15:3:22]

Auto Race Crew Injury.

Harry Rommell was injured while working as a volunteer member of a pit crew during an auto race at the Alabama International Motor Speedway in Talladega, Alabama. The race was sanctioned and administered by the Automobile Racing Club of America.

A Federal Court of Appeals has affirmed a Federal District Court decision granting summary judgment to the club and other parties with respect to Rommell's claims based on negligence and wanton conduct, but has reversed the court's decision granting summary judgment on Rommell's claim for breach of warranty.

The court noted that when Rommell paid his annual membership dues to the club, he signed a "Release and Waiver of Liability and Indemnity Agreement." Prior to being allowed to enter the pit area at the race track, Rommell executed another release containing the same language as that in the club membership application; he then obtained a pit permit and signed additional releases in favor of all parties involved in the event.

Senior District Judge Wesley E. Brown, sitting by designation, observed that the Alabama Supreme Court has ruled that pre-race releases are valid and not void as against public policy. Rommell had participated in racing for many years and his affidavit denying that he understood the releases which he signed was insufficient to avoid the binding effect of the documents.

Judge Brown then agreed that Rommell did not meet his burden of establishing that the club and the race track engaged in wanton conduct.

Rommell also had sued Induction Systems, Inc., the manufacturer of a gas nozzle that allegedly failed, resulting in the fire in which Rommell was injured. Judge Brown found that the trial court erred in holding, as a matter of law, that Induction's gasoline filler nozzle was "equipment" and not a "consumer good," and that Rommell's claim therefore was time-barred under Alabama law. A jury might find, stated the court, that the pit crew volunteers were not involved in "business pursuits." In view of the factual dispute concerning the primary purpose for the purchase of the nozzle and its actual use, the trial court erred in granting summary judgment on Rommell's breach of warranty claims.

Rommell v. Automobile Racing Club of America, Inc., 964 F.2d 1090 (11th Cir. 1992) [ELR 15:3:23]

Race Spectator Injury.

In August 1985, David Brown was a spectator at "motorcross" and "hare scramble" races sponsored by the Flying Wheels Motorcross Club. Brown left the spectator area on a dirt bike; travelled the wrong way on the hare scramble course; and collided with Joe Hidalgo, a participant in the race. Brown was injured and Hidalgo was killed.

Brown claimed that the Flying Wheels parties negligently and/or wantonly failed to warn spectators of the dangers at the racing site. An Alabama trial court jury returned a verdict for Flying Wheels. The Alabama Supreme Court reversed the judgment entered on the verdict, holding that a jury determination was required regarding the responsibility of club officer Dudley Carver for safety conditions, and that the duty of Carver and of the club itself were so intertwined that a reversal for a new trial of the claim against Carver mandated a new trial of the claim against the club as well.

The trial court subsequently again entered a judgment on jury verdicts in favor of Carver and Flying Wheels.

The Alabama Supreme Court has upheld the trial court decision, rejecting the argument that the trial court erred in giving certain jury charges which, according to Brown, improperly raised the issue of contributory negligence as a defense. The court noted that the charges, taken as a whole, instructed the jury that Brown's alleged contributory negligence or assumption of the risk were not defenses to claims alleging wanton conduct. The case had been tried solely on the claims of wantonness upon the dismissal, on Brown's motion, of the negligence claims.

Brown v. Carver, 599 S.2d 599 (Ala. 1992) [ELR 15:3:23]

Horse Racing.

Dr. Luel Overstreet, a veterinarian and horse owner, sued the New York State Racing & Wagering Board which upheld an administrative ruling barring his horse from running in the final of the 1991 William Haughton Memorial Racing Series at Yonkers Raceway on November 30, 1991.

Overstreet had entered his three year old pacer, Psiasian Bluegrass in a preliminary race. However, when only three horses were entered for the event, the Racing

Secretary decided to combine, in a single race, the three-year-old field with a group of horses aged four years old and up. The Race Secretary apparently did not inform the owners of the young horses that he was combining the groups, and a veteran horse won the preliminary race.

When Overstreet attempted to enter Psiasian Bluegrass in the final, the Race Secretary declared the horse ineligible because it had not run in any of the preliminary races, as required.

New York trial court Judge Schackman commented on the "Joseph Heller" aspect of Overstreet's argument that it was arbitrary and capricious to hold no preliminary races for three year olds and yet to bar his horse from the final because the horse had not run in a preliminary. Overstreet claimed that he was improperly deprived of his $2500 entry fee and had lost a potential fifty percent share of the $200,000 purse for the final.

The court stated that Dr. Overstreet must be deemed to have known of the authority granted to the Race Secretary to race two age groups together if there was a lack of declared horses to race in either event, and deemed to have been familiar with the conditions for the series which provided that only horses which had competed in the preliminaries could race in the final. Dr. Overstreet "ought to have known," stated Judge Schackman, that only one preliminary race was run on November 16th and that Psiasian Bluegrass should have entered the preliminary on November 23rd

It was found that the Race Secretary and other race officials did not act arbitrarily and capriciously in barring Psiasian Bluegrass from the final. However, the court did question the Race Secretary's failure to notify the owners of the three year olds of the combined field for the preliminary races, and suggested that the Racing

Board or Yonkers Raceway might require such notice be given to parties submitting nomination fees.

The court concluded: "There is no photo finish. The race is run. The petition is dismissed."

Overstreet v. New York State Racing & Wagering Board, New York Law Journal, p. 29, col. 4 (N.Y.Cnty., April 6, 1993) [ELR 15:3:24]

Greyhound Training.

The Kansas Racing Commission found that William Don Boatright and Rodney L. Boatright used live lures, such as rabbits, to train racing greyhounds in violation of state law and canceled the Boatrights' kennel owner occupation licenses. A state trial court decision reversing the Commission's order has, in turn, been reversed by the Kansas Supreme Court.

The Boatrights argued that the statute did not apply to their operations because the young dogs they trained were not yet racing greyhounds.

Judge Herd found that the applicable statute was not unconstitutionally vague; that the legislature intended to ban the use of live lures both in the training of young greyhounds for racing and in the actual racing of greyhounds; and that the Boatrights violated the statute.

A dissenting judge expressed the view that the Boatrights were being deprived of their livelihood "by a vague, ambiguous term, 'racing greyhounds..'" No evidence was presented that the Boatrights had trained greyhounds, which had actually raced at a racing facility, with animal lures. The dissent commented that there was no commonly accepted definition of "racing greyhounds" in the industry or from other states; that the

Commission had no jurisdiction over dogs until they arrived at the track or papers were submitted to the track; and would have affirmed the trial court's decision.

Boatright v. Kansas Racing Commission, 834 P.2d 368 (Kan. 1992) [ELR 15:3:24]

Libel.

In November 1982, the ABC television station in Buffalo, New York broadcast a series on the activities of Dr. John H. Park, a licensed ophthalmologist. During the first segment of the series, a reporter discussed a state Health Department investigation of allegations that Dr. Park performed unnecessary eye surgery and engaged in other unethical or illegal conduct. The president of the Buffalo Ophthalmologic Society then commented on the investigation, and a resolution adopted by the society appeared on the screen; in a portion of the resolution highlighted by the station, the society expressed concern about the charges.

When Dr. Park sued Dr. Klementowski and the society for libel, a trial court denied their motions for summary judgment.

A New York appellate court has reversed the trial court's decision, stating that the society's resolution was not reasonably susceptible of a defamatory meaning. Even assuming that a trier of fact would find that the statement was made of and concerning Dr. Park, the statement did not contain the hidden factual premise that Dr. Park was actually performing unnecessary or inappropriate eye surgery.

With respect to Dr. Klementowski's remark that "I guess we all have what you might call a rotten apple," the court found that the comment was a constitutionally protected expression of opinion, being "vague, ambiguous, indefinite and incapable of being objectively characterized as true or false."

The court also found that Dr. Park, a public figure for the purposes of the broadcast, did not meet his burden of presenting evidence sufficient to raise a triable issue of fact as to malice, and concluded that Dr. Klementowski and the society were entitled to summary judgment dismissing Dr. Park's complaint.

Park v. Capital Cities Communications, Inc., 585 N.Y.S.2d 902 (N.Y.App. 1992) [ELR 15:3:24]

Wyeth Art.

Don Owens, acting individually and on behalf of a class, sought a declaratory judgment to determine the rights of Greenville, South Carolina citizens and taxpayers to twenty-six original Andrew Wyeth paintings formerly on display at the Greenville County Art Museum.

The Supreme Court of South Carolina has agreed with a trial court ruling granting summary judgment in favor of collector Arthur Magill on the ground that Owens did not have standing .

In 1979, Arthur Magill purchased the twenty-six Wyeth paintings from Joseph Levine and affiliated parties. Levine, prior to the closing of the purchase, notified Magill of his understanding that Magill was acquiring the works of art for donation to the Greenville County Museum of Art "where they will be preserved for public exhibition;" the sentence was incorporated by reference into the two bills of sale for the paintings. In a footnote comment, the court pointed out that the Magills donated $750,000 for the construction of the museum - about half the total building cost. Magill loaned the paintings to the museum for public display, where they remained from 1979 until 1990, when Magill advised the museum that he was terminating the loan agreement and planned to sell the paintings.

Owens reportedly claimed that the citizens and taxpayers were the intended third party beneficiaries of the agreement between Levine and Magill and sought the return of the paintings or the payment to the Museum of all proceeds from their sale.

Chief Judge Harwell noted that the Museum Commission presented various reasons for its decision not to claim an interest in the paintings, including the fact that the Magills were generous supporters of the museum - the couple donated to the museum $6 million of the money they received from the sale of the paintings. In all, ruled that court, the museum presented overwhelming evidence which clearly demonstrated that the

Commission acted properly in deferring to the Magills' ownership of the paintings.

Owens v. Magill, 419 S.E.2d 786 (S.C. 1992) [ELR 15:3:25]

Landmark Designation.

The Teachers Insurance and Annuity Association of America owns the Seagram Building in Manhattan; the building, erected between 1956 and 1958, was designed by Bauhaus School architect Mies Vander Roh. The first floor lobby level of the building contains a commercial space occupied by the Four Seasons Restaurant; architect Philip Johnson created design elements for the restaurant.

New York's Board of Estimate adopted the recommendation of the Landmarks Preservation Commission and designated the building, its exterior plaza, interior lobby and the interior of the space occupied by the restaurant as landmarks. The association challenged the landmark designation of the restaurant area; the designation included a marble pool in one of the rooms of the restaurant, a square walnut bar, a hanging sculpture by artist Richard Lippold, metal draperies and other items.

A New York appellate court, deferring to the expertise of the Commission and the comprehensive record supporting the designation, refused to conclude that the designation was arbitrary or capricious. The association was not deprived of the economic benefit of the space, noted the court, in rejecting the argument that the association suffered an unconstitutional taking without compensation. The court also rejected the argument that the restaurant interior was not a public space subject to a landmark designation - the restaurant is not a private club, but is "customarily open or accessible to the public..."

The association also argued that the designation inappropriately included interior features which were not fixtures. Each of the features was sufficiently connected to the restaurant interior, declared the court, in affirming a ruling granting the city's motion to dismiss the proceeding.

Teachers Insurance and Annuity Association of America v. City of New York, New York Law Journal, p. 21, col. 2 (N.Y.App., Aug. 3, 1992) [ELR 15:3:25]

Art/Lost Painting.

In 1974, John Temple purchased a painting entitled "Near Yazoo Pass Mississippi" by Joseph R. Meeker. In 1982, Temple entered into a 90 day consignment agreement whereby McCaughen & Burr, Inc. agreed to attempt to sell the painting, and, if successful, to pay Temple $10,000. Temple, in accordance with the dealer's suggestion, allowed a Mississippi museum to exhibit the painting. After the exhibition closed, the museum delivered the work to its "contact," Sessions Hootsell Enterprises. The consignment period expired, but Temple agreed to allow McCaughen & Burr to keep the painting since the dealer planned to continue to try to sell the work.

In 1986, the dealer told Temple that it had lost possession of the painting and that it was hanging at Vanderbilt University.

When Temple sued various parties, a Missouri trial court, among other rulings, rejected Temple's claims alleging breach of the bailment contract, general negligence, conversion and breach of the agency contract.

An appellate court has ruled that Temple presented sufficient evidence to infer that the dealer was negligent in refusing to either return the painting or to pay Temple $10,000 for the work. The trial court therefore erred in dismissing the cause of action before the dealer offered evidence to defeat the inference of negligence.

Temple also sufficiently stated a cause of action for conversion, ruled the court.

With respect to Temple's claim for breach of the contract of agency, the court pointed out that Temple did not disclose any agency relationship between the McCaughen & Burr and Sessions Hootsell, let alone that there was a breach of the agency contract; the trial court thus did not err in failing to consider this theory of recovery.

Temple v. McCaughen & Burr, Inc., 839 S.W.2d 322 (Mo.App.1992) [ELR 15:3:26]

Horse Breeding.

In 1983, Jack Bacon entered into a "stallion service contract" with Louise Cronin's Barefoot Farms for the 1984 breeding of Bacon's mare, Musette, to the champion stallion Dandy Impression. When Bacon was advised that blood tests excluded Dandy Impression as having sired the foal to which Musette gave birth, Bacon sued Cronin alleging various causes of action.

A trial court jury found Cronin liable for breach of contract, deceptive trade practices, fraud, and negligence in her business dealings with Bacon. The trial court granted Cronin's motion for judgment notwithstanding the verdict, in part, and entered judgment for about

$29,000, plus $2,000 additional damages under the state's Deceptive Trade Practices Act.

An appellate court found that there was sufficient evidence to show that Barefoot Farms and Cronin "went outside their breach of contract and engaged in false, misleading, and deceptive acts," and to support the jury finding that Barefoot Farms failed to comply with its contractual warranties. The jury had found that Barefoot Farms deceptively represented that the services of the farm would include benefits that were not provided, i.e., that Musette was in foal by Dandy Impression.

The jury further found that Cronin's knowing violation of the statute caused Bacon to suffer mental anguish damages in the sum of $20,000. Mental anguish under the statute implied "a relatively high degree of mental pain and distress," noted the court; Bacon's anger did not provide a basis for the recovery.

The court concluded by finding that the trial court erred in granting Cronin's motion for judgment notwithstanding the verdict with respect to the jury's finding that the difference in market value of breeding services rendered by Barefoot Farms and the value of the services that the stable contractually agreed to render was $16,500. The court remanded the matter with instructions to render judgment reducing the damages by the amount awarded for mental anguish and increasing the damage award by the aforesaid $16,500.

Cronin v. Bacon, 837 S.W.2d 265 (Tex.App. 1992) [ELR 15:3:26]

Tax/Hockey Player.

Frederick Speck, as a non-resident alien, played professional hockey in the United States. Speck sought a refund based on the alleged overpayment of federal income taxes for the 1968, 1971 and 1972 tax years. In a lengthy opinion, US Claims Court Judge Marian Blank Horn denied Speck's claim.

Judge Horn noted that Speck failed to substantiate alleged deductions for business related expenses or charitable contributions for the tax years in question. In addition, certain claimed deductions were not available to Speck, as a non-resident alien, because he did not establish a clear nexus between the expenses and his hockey playing activities.

Speck also did not establish the specific number of days for which he was compensated in Canada or the United States, and the specific number of days during which he was present in the United States. Since the court did not have the information upon which to determine the portion of income subject to United States tax, all compensation, pursuant to government regulations, would be included in Speck's United States gross income.

Speck v. United States, 1993 U.S. Claims LEXIS 3 (U.S.Clms.Ct. 1993) [ELR 15:3:26]

IN THE NEWS

Damages award to producer in breach of contract action against Kim Basinger is reduced, but court awards $700,000 in attorneys' fees to Main Line Pictures

A Los Angeles trial court judge has reduced a jury award of $8.9 million to Main Line Pictures in the company's breach of contract action against actress Kim Basinger (ELR 14:12:19).

According to news reports, Judge Judith C. Chirlin let stand a $7.4 million award for breach of written and oral contracts, but rejected an additional $1.5 million award for bad faith denial of the contracts. However, the court awarded Main Line more than $700,000 in attorneys' fees, for a total award of about $8.l million. [August 1993][ELR 15:3:27]

Jury decides that New Yorker articles libeled psychoanalyst Jeffrey Masson, but fails to agree on damage award

A Federal District Court jury in San Francisco has concluded that Janet Malcolm's 1983 New Yorker article about Jeffrey M. Masson libeled the psychoanalyst, and that Malcolm, as an independent contractor rather than an employee of the magazine, was liable for any damages. The jury did not reach a verdict on the amount of damages.

After lengthy litigation (ELR 10:12:10; 11:4:7; 11:9:20; 12:2:18; 14:1:3), the jury agreed that Malcolm fabricated or distorted five statements attributed to Masson, but that only two of the statements were defamatory and known by Malcolm to be false. [August 1993][ELR 15:3:27]

Networks will broadcast parental advisories prior to airing certain violent programs

The four broadcast networks have agreed to display a parental advisory prior to the airing of prime time films, miniseries and specials containing violence. The advisory, according to news reports, will read: "Due to some violent content, parental discretion is advised." The advisory also may be aired during some commercial breaks and will be included in promotional and advertising material, such as television listings.

The networks will determine when "the overall level of violence in a program, the graphic nature of the violent content, or the tone, message or mood of the program" warrant the advisory. Other factors relevant to the placement of the advisory include the context of the violent depiction, the composition of the intended audience, and the time of the broadcast.

The agreement, which is expected to take effect for the fall programming season, does not cover children's programming, cable television or independent television stations. [August 1993][ELR 15:3:27]

Court dismisses serial killer's libel action against publisher of true crime book

Randy Kraft was convicted in May 1989 of murdering 16 men and was sentenced to death; Kraft, according to authorities, may have been involved in as many as 65 murders.

Kraft brought a $60 million libel lawsuit against Warner Books, the publisher of "Angel of Darkness," a book about the serial killer. Kraft, who has maintained his innocence, claimed that the book unfairly portrayed him, destroyed his chances of future employment, and precluded any opportunity to have his conviction overturned on appeal.

According to news reports, a Los Angeles trial court has dismissed Kraft's action, agreeing with the publisher that Kraft was "libel-proof." Judge Richard Montes apparently also found that any private writings used in the book were not reprinted unlawfully and that the statute of limitations on libel had expired. [August 1993][ELR 15:3:27]

Action involving allegedly unauthorized use of videotape of Rodney King beating is dismissed

A Federal District Court in Los Angeles has a lawsuit against four television networks and a television station alleging that the television parties violated George Holliday's copyright in his videotape of the beating of Rodney King by repeatedly broadcasting the tape without Holliday's consent.

Judge Irving Hill, according to news reports, determined that Holliday sold the videotape to station KTLA for $500; that Holliday granted each station permission to use the tape and did not restrict the stations' right to use the tape; that the fair use doctrine applied; and that the television parties had a First Amendment right to use the tape. [August 1993][ELR 15:3:27]

Creator of rock star "plaster casts" is awarded possession of replicas of original works

In the late 1960s and 1970, Cynthia Albritton, otherwise known as Cynthia Plaster Caster, made plaster casts of the penises of rock musicians and other men. Albritton stated that in 1971 she asked Herbert L. Cohen to store twenty-five plaster casts for her, and that Cohen refused her 1988 request to return the items. Cohen, with Albritton's permission, had made some bronze and some silver copies of the plaster casts.

According to news reports, a Los Angeles trial court has awarded Albritton custody of the 23 replica casts in the court's possession.

Cohen had claimed that Albritton made the plaster casts pursuant to an employment contract with Bizarre Productions, and that the casts belonged to Bizarre, a company once co-owned by Cohen.

Judge Lillian M. Stevens stated that Albritton owned the replicas since the reproductions were the "progeny" of the original casts. [August 1993][ELR 15:3:28]

National Endowment for the Arts settles lawsuit brought by performance artists

The National Endowment for the Arts has agreed to pay $252,000 to four artists whose grant applications were denied in 1990 (see ELR 14:3:3).

It has been reported that performance artists Karen Finley, Holly Hughes, John Fleck and Tim Miller will receive a total of $50,000 in damages and that the government also will pay $202,000 in attorneys' fees. The artists apparently will receive $6,000 each in compensatory damages based on the claim that the government violated their privacy by revealing details of their grant proposals to the press. And the settlement includes a payment to each artist equaling his or her 1990 grant recommendation.

In 1990, Congress amended the NEA's governing statute by, in part, adding a provision requiring that the NEA consider "general standards of decency and respect for the diverse beliefs and values of the American public" in making funding determinations. The settlement did not consider that part of the artists' lawsuit challenging the constitutionality of this provision. [August 1993][ELR 15:3:28]

Boston University owns material donated by Dr. Martin Luther King Jr.

A Federal District Court jury in Boston has rejected Coretta Scott King's action against Boston University seeking the return of about 83,000 letters, documents and manuscripts that Dr. Martin Luther King, Jr. had deposited with the school in 1964 and 1965.

It has been reported that the jury found that a July 1964 letter signed by Dr. King constituted a binding charitable pledge to the school. The letter stated that King retained ownership of the papers until he either designated them as gifts to Boston University or until his death. Mrs. King argued that the letter was not a contract nor a pledge but a statement of intention which was subject to change, and that Dr. King had decided against giving the material to the school. [August 1993][ELR 15:3:28]

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