LEGAL AFFAIRS

Agent or Manager?
There is a Difference . . . Isn't There?

by Don Biederman

The goal of an agent is the goal of a manager: Each functionary wants his/her clients to end up with artistically gratifying and remunerative work. However, the basic ways in which these two types of representatives work are -- at least theoretically -- very different: The job of an agent is to find work for the agent's clients. The job of a manager is to guide and develop the manager's clients' careers, so that the clients can obtain work.

That distinction should mark the end of the discussion. It doesn't.

A considerable hostility has prevailed between agents and managers for decades. In part it has to do with a certain overlap in their roles, and in part it has to do with the legal vulnerability which afflicts managers. Additionally, the agents believe that if they are to be subjected to a thoroughgoing license qualification and maintenance procedure, managers should be, too. A manager's primary role is to advance and develop his clients' careers by advising his clients with respect to artistic matters such as the choice of material, public appearances (and public personae, e.g., "birddogging" the promotion staff of the client's record company to make sure that proper marketing and promotion takes place). The agent, on the other hand, is engaged for the purpose of securing work. However, a conscientious agent, realizing that not all employment is equally beneficial to her

clients, will also devote her energies to the development of her clients' careers, actively seeking out new opportunities to showcase her client's talents and advising her clients (where circumstances permit) to turn down projects which would not serve to advance their careers. In this respect, agents and managers behave rather similarly.n1

However, applicable statutes treat them very differently, although the distinction has been smudged a bit in the last ten years. Moreover, recent cases indicate on the one hand that the distinction may be much less of a cut-and-dried issue in California than was formerly the case and, on the other, that where a manager is found to have acted as an unlicensed agent, the manager may be liable for forfeitures far in excess of what many attorneys believed the Waters Amendment intended.

Statutory regulation

California and New York have regulated agents for many years, and the provisions of the New York General Business Law n2 and the California Labor Code n3 set up highly detailed licensing and enforcement procedures governing the conduct of talent agencies. This oversight begins with the establishment of minimum standards of competency n4 and good character n5 as conditions precedent to licensing, continues with provisions for oversight with respect to the nature and/or location of the premises in which an agent may conduct business n6, the forms of agreement which may be utilized n7 and the fees which may be charged n8, and continues with detailed provisions concerning the disposition of grievances between agents and their clients n9.

There are no similar legislative enactments dealing specifically with respect to managers. The New York

statute does contain a specific exception from the regulatory scheme where one is engaged in "the business of managing . . . artists . . . where [the conduct of such management business] only incidentally involves the seeking of employment therefor" n10. The California statute contains no comparable exception. However, pursuant to an amendment to the Talent Agency Act carried by Assemblywoman Maxine Waters in 1982 n11, a manager (or other representative) is not considered an agent by reason of "procuring, offering or promising to procure recording contracts" n12 and may "act in conjunction with, and at the request of, a licensed talent agency in the negotiation of an employment agreement" n13. These two provisions (along with a couple of others) have done much to ease the discomfiture of managers in California, since they deal with the two areas which have traditionally caused managers the most trouble.

The history of litigation in this area demonstrates that a "true" manager can function with impunity, and that extremely negative results can befall a manager who is found to have acted as an unlicensed agent.

Case law

First of all, it is important to understand that a person who performs the function of an agent is subject to the statutory scheme regardless of whether that person has obtained a license. This was made clear in California in the landmark case of Buchwald v. Superior Court n14, and in New York in Pine v. Laine. n15 On the other hand, as demonstrated in New York by Mandel v. Leibman n16 and in California by Raden v. Laurie n17, an individual who has truly limited his/her activities to "career development" will not be subject to the talent agency laws.

Secondly, it is important to be aware of the potentially draconian sanctions which may befall a person who falls afoul of the regulatory scheme. In New York, most violations of the applicable statute are misdemeanors n18, carrying the possibility of a fine and/or jail time, as well as the nullification of the applicable agreement. While the California statute provides expressly that criminal penalties are not applicable to violations n19, the civil remedies are no less drastic. In addition, since the initial determination will be made by the Labor Commissioner, whose basic mission is the protection of the rights of employees n20, a manager accused of performing as an unlicensed agent needs to be very sure that she has stayed on the right side of the line. In California, the issue of whether or not a manager has acted as an unlicensed agent will be decided in a hearing before the Labor Commissioner, whose decision is then subject to a trial de novo in the Superior Court n21. Presumably,

all bets are off at that point and the Court is free to make an entirely new determination. n22 In New York, on the other hand, the Commissioner does not adjudicate complaints against unlicensed talent agents; in New York the Commissioner only acts with respect to licensed agents, and there the Commissioner's decision is subject to review in what is known as an "Article 78 proceeding" n23 the normal "substantial evidence" rule for review of administrative agency determinations will apply. n24

Where an unlicensed agency is found, the Commissioner will customarily declare the underlying agreement void, and may in addition require the forfeiture of all compensation derived by the unlicensed agent thereunder. This was the result in Pryor v. Franklin n25 and, to a more limited degree, in Hall v. X Management, Inc. n26.

On the other hand, especially since the Waters Amendment, a manager who has functioned in the traditional manager role would appear to have little to fear from a proceeding before the Labor Commissioner. Thus, in Barr v. Rothberg n27, the manager was held not to have functioned as an agent where she was merely part of a team of representatives who participated in negotiations on behalf of the artist and where her participation had to do with "the achievement of the goals [Barr] desired", i.e., career development, rather than procuring the deal itself.

So we're all clear, right? The manager engages in career direction, the agent in obtaining employment.

Oh?

See Section 1700.4 (a) of the Talent Agencies Act, which provides, in part:

"Talent agencies may, in addition [to procuring, offering, promising, or attempting to procure employment],

counsel or direct artists in the development of their professional careers."

Barr v. Rothberg n28 indicates that the Labor Commission believes that the converse is also true, namely, that where the manager's principal thrust is career direction, incidental participation in negotiations conducted by licensed representatives (in which the manager restricts her input to "creative issues" rather than economic issues) will not cause the manager to fall afoul of the Talent Agency Act. This result would indicate a somewhat more tolerant attitude on the part of the Commission toward manager involvement in employment negotiations than had formerly been thought to be the case. Previously, if an artist complained to the Labor Commission, the hearing would essentially involve two questions: (1) Did the manager promise, offer, seek to or secure employment for the artist? (2) If so, did the manager have a talent agent's license? If the answers were "Yes" and

"No," the manager was out of luck. Now it seems as though the Commissioner has adopted a policy of looking at the totality of the manager's activity, a sort of center-of-gravity test.

Barr v. Rothberg was of course confined to a single fact setting involving one client. However, the Court of Appeals' opinion in Wachs v. Curry n29 indicates that future cases may involve a review of the overall business operations of an alleged unlicensed manager:

"We conclude from the [Talent Agencies] Act's obvious purpose to protect artists seeking employment and from its 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 function compared to the agent's counseling function taken as a whole. If the agent's employment function constitutes a significant portion of the agent's business as a whole then he or she is subject to the

licensing requirement of the Act even if, with respect to a particular client, procurement of employment was only an incidental part of the agent's overall duties. On the other hand, 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 requirements 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. What constitutes a 'significant part' of the agent's business is an element of degree we need not decide in this case." n30

Thus, in future Barr-type situations, it appears that the adjudicator will be required to consider not just the degree to which procuring employment is involved with respect to one particular client, but also the significance of employment procurement activities with respect to the totality of the manager's business. n31 While some

managers may be uncomfortable with this, in most cases the Barr outcome is the likely result where an agent and/or an attorney routinely handles the economic aspects of negotiations for the manager's client roster while the manager restricts the bulk of his/her active negotiation input to creative issues.

However, not all of the recent decisions afford comfort to managers. In Hall v. X Management n32, the Commissioner stated that so long as a manager had acted as an unlicensed agent within the one-year limitations period preceding the bringing of the petition by the client artist, the unlicensed agent's management agreement could be declared void ab initio, with attendant forfeiture of commissions from inception. n33 This result came as a surprise to many lawyers who had assumed that commissions for periods prior to the one-year limitations period would not be affected.

Therefore, given the often unstable dynamics of the manager/client relationship, it seems safe to assume that these recent decisions -- cutting both ways as they do -- will not reduce significantly the volume of litigation between these constituencies.

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NOTES

1. Indeed, for a time, the two functions were legislatively interlinked. In 1943, Statutes 1326, Ch. 329, added the following definition of "artist manager" to the Employment Agencies Act:

"A person who engages in the occupation of advising, counseling or directing artists in the development or advancement of their professional careers and who procures, offers, promises or attempts to procure employment or engagements of an artist only in connection with and as part of the duties and obligations of such person under a contract with such artist by which such person contracts to render services of the nature above mentioned to such artist."

For the subsequent history of this provision, see Pages 7-9 of the Report of the California Entertainment Commission of December 2, 1985.

2. N.Y. General Business Law sections 170 et seq. ("GBL")

3. California Labor Code sections 1700 et seq. ("LC")

4. Sec. 174 subd. 2 of the GBL requires "at least two years experience as a placement employee, vocational counsellor or in related activities, or other satisfactory

business experience which similarly tend to establish the competence of such individual". Although the LC does not include an equivalent express requirement, a prospective agent's application must disclose "the business or occupation engaged in by the applicant for at least two years immediately preceding the date of application" (section 1700.6(c)), and the Commissioner has the power to "cause an investigation to be made as to the character and responsibility of the applicant" (section 1700.7) and "upon proper notice and hearing may refuse to grant a license" (GBL section 174 contains similar provisions, except that investigation is mandatory (section 174. subd.1)

5. In California, an applicant must submit affidavits "by at least two reputable residents, who have known, or been associated with, the applicant for two years . . . that the applicant is a person of good moral character or,

in the case of a corporation, has a reputation for fair dealing." LC section 1700.6(d).

6. GBL sections 174 subd. 1, 176, 187 (8); LC section 1700.13

7. GBL section 173 subd. 2.b. (the Commissioner approves any forms "which fairly and clearly represent contractual terms and conditions" between agent and client); LC section 1700.23 (the Commissioner's approval "shall not be withheld as to any proposed form of contract unless [it] is unfair, unjust and oppressive to the artist").

8. GBL section 185 subd. 8 fixes an agent's fee at 10% of compensation generally, 20% for opera and concert engagements; LC section 17001.24 does not prescribe a statutory fee schedule, but requires agents' fee schedules to be filed with the Commissioner (who, as noted, has the power to disapprove forms of contract which are unfair, unjust and oppressive). California

agency fees are generally set at 10%. Managers, by contrast, generally seek fees in the 15% - 25% range.

9. Complaints against licensed New York agents are referred to the appropriate Commissioner, who is empowered to hold a formal hearing, and has the power to suspend or revoke an agent's license and/or levy a fine not to exceed $500, and whose decision is subject to review by the Supreme Court pursuant to Article 78 of the Civil Practice Law & Rules (GBL section 189). In California, all disputes are referred to the Labor Commissioner, who holds a formal hearing, and whose decision is subject to a trial de novo in the Superior Court. LC section 1700.44. However, under circumstances detailed in section 1700.45, private arbitration is available as a substitute for this procedure.

10. GBL section 171 subd. 8.

11. California Statutes of 1982, ch. 682.

12. LC section 1700.4 (a).

13. LC section 1700.44 (d).
14. 62 Cal. Reptr. 364 (Ct. App. 1st Dist. 1967).
15. 321 N.Y.S.2d 303 (1st Dept. 1971).
16. 303 N.Y. 88 (1951).
17. 262 P.2d 61 (Cal. 1953).
18. GBL section 190.
19. LC section 1700.44 (c).
20. Section 50.5 of the Labor Code provides that "one of the functions of the Department of Industrial Relations is to foster, promote, and develop the welfare of the wage earners of California, to improve their working conditions, and to advance their opportunities for profitable employment." The Labor Commissioner is the chief of the Division of Labor Law Enforcement. section 82 (b)
21. LC section 1700.44 (a).
22. However, it is "generally the case that courts give considerable weight to administrative agency rulings."

Chester L. Migden, "Arsenio Hall Case: The Novel Aspect," 14/5 Ent.L.Reptr. 3 (October 1992).

23. GBL section 189 subd. 5.

24. Since revocation of a license by an administrative agency is a quasi-judicial act, Matter of 125 Bar Corp. v. State Liquor Authority, 24 N.Y.2d 174 (1969), the "substantial evidence" test applies, Matter of Older v. Board of Education, 27 N.Y.2d 333, 337 (1941). In New York, complaints against unlicensed agents are not heard by the Commissioner; such complaints must be dealt with in the courts from inception.

25. Case No. TAC 17 MP 114 (1982).

26. TAC 19-90 (1991).

27. TAC 14-90 (1992).

28. Note 27, supra.

29. 13 Cal.App.4th 616 (1993).

30. Id. at p. 628.

31. The preceding discussion is based upon a remark by Chester L. Migden, Executive Director of the Association of Talent Agents, during a colloquy with H. Thomas Cadell, Jr., Chief Counsel, Division of Labor Standards Enforcement, California State Department of Industrial Relations (who successfully represented the Commissioner in Wachs v. Curry), in the course of the 1993 USC/Beverly Hills Bar Association Entertainment Law Institute program on April 24, 1993. The author gratefully acknowledges Mr. Migden as the sole source of this observation.

32. Note 26, supra.

33. However, despite the breadth of the Labor Commissioner's pronouncement on this point (TAC No. 19-90 at p. 37), the Labor Commissioner required X Management to return only the commissions earned during the one-year limitations period. Id. at p. 38. This, despite specific findings that Mr. Wachs of X

Management had engaged in "self-dealing, deceptions, dishonesty and lack of professionalism in dealing with Mr. Hall [and] willful violations of the [Talent Agencies] Act". Id. at p. 45.
[ELR 15:9:3]

Revising the "Jump Ship" Clause . . . Revisited: "Superstar Insurance" Question Lingers

by William I. Hochberg

Last month's Legal Affairs article focused on two newly-enacted statutes dealing with the circumstances under which California courts may issue injunctions to prevent the breach of personal services contracts. [Revising the "Jump Ship" Clause: How California Legislators and the Music Industry Raised the Ante for Record

Companies Seeking Injunctions Against Defecting Artists. (ELR 15:8:3)] The statutes in question are Section 3423 of the California Civil Code and Section 526 of the California Code of Civil Procedure.

Due to a debate over the meaning of a portion of those statutes, there is disagreement about the amounts that should appear in the "Clause B `Superstar Insurance'" table that accompanied last month's article, for Contract Years 4 through 7. (The table appears at ELR 15:8:6.)

The debate arises from an ambiguity in the language of Civil Code section 3423(e)(2)(B) (and parallel language in C.C.P. section 526(b)(5)(B)(ii)) which states, in pertinent part, that an artist may be enjoined by a company which did not meet annual contractual payment requirements if the company makes a lump sum payment which is "at least 10 times the applicable aggregate minimum amount specified in clauses (I) and (II) of subparagraph (A) through and including the contract year during

which the injunctive relief is sought." (Emphasis added.) This reference to a "minimum" amount specified in clauses (I) "and" (II) is ambiguous, because "minimum compensation" is expressed exclusively in clause (I) which deals with contractual guarantees. Clause (II) deals with contingent royalties, not minimum amounts. Moreover, the sums referred to in clause (II) are expressly described as "over and above the minimum contractual compensation" stated in clause (I).

Therefore, some readers view Civil Code section 3423(e)(2)(B) (and C.C.P. section 526(b)(5)(B)(ii)) to be internally inconsistent because it appears to include those sums stated in clause (II) within the tenfold calculation of the clause (I) "minimum"; and these readers interpret the section as requiring a tenfold payment of the minimum amounts specified in clause (I) only. However, others interpret the statute as including both clauses (I) and (II) within the tenfold calculation.

Here is the language of amended California Civil Code section 3423:

An injunction may not be granted:. . .

(e) To prevent the breach of a contract the performance of which would not be specifically enforced, other than a contract in writing for the rendition of personal services from one to another where the promised service is of a special, unique, unusual, extraordinary, or intellectual character, which gives it peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in an action at law, and where the compensation for the personal services is as follows:

(1) As to contracts entered into on or before December 31, 1993, the minimum compensation provided in the contract for the personal services shall be at the rate of six thousand dollars ($6,000) per annum.

(2) As to contracts entered into on or after January 1, 1994, the criteria of subparagraph (A) OR (B), as follows, are satisfied:

(A) The compensation is as follows:

(I) The minimum compensation provided in the contract shall be at the rate of nine thousand dollars ($9,000) per annum for the first year of the contract, twelve thousand dollars ($12,000) per annum for the second year of the contract, and fifteen thousand dollars ($15,000) per annum for the third to seventh years, inclusive, of the contract.

(II) In addition, after the third year of the contract, there shall actually have been paid for the services through and including the contract year during which the injunctive relief is sought, over and above the minimum contractual compensation specified in clause (I), the amount of fifteen thousand dollars ($15,000) per annum during the fourth and fifth years of the contract,

and thirty thousand dollars ($30,000) per annum during the sixth and seventh years of the contract. As a condition to petitioning for an injunction, amounts payable under this clause may be paid at any time prior to seeking injunctive relief.

(B) The aggregate compensation actually received for the services provided under a contract that does not meet the criteria of subparagraph (A), is at least 10 times the applicable aggregate minimum amount specified in clauses (I) and (II) of subparagraph (A) through and including the contract year during which the injunctive relief is sought. As a condition to petitioning for an injunction, amounts payable under this subparagraph may be paid at any time prior to seeking injunctive relief.

(3) Compensation paid in any contract year in excess of the minimums specified in subparagraphs (A)

and (B) of paragraph (2) shall apply to reduce the compensation otherwise required to be paid under those provisions in any subsequent contract years. . . .

The "Clause B `Superstar Insurance'" table that was published last month reflected tenfold calculations that took into account only the "minimum compensation" specified in clause (I). The following table reflects tenfold calculations that take into account the "minimum compensation" specified in clause (I) plus the contingent royalties specified in clause (II).

Clause B "Superstar Insurance"

Contract Year	Ten-fold Lump Sum		Prior year(s) Aggregate		Total Sum to be paid for injunction
1	$ 90,000	PLUS	0	=	$ 90,000
2	$120,000	PLUS	$ 90,000	=	$ 210,000
3	$150,000	PLUS	$ 210,000	=	$ 360,000
4	$300,000	PLUS	$ 360,000	=	$ 660,000
5	$300,000	PLUS	$ 660,000	=	$ 960,000
6	$450,000	PLUS	$ 960,000	=	$1,410,000
7	$450,000	PLUS	$1,410,000	=	$1,860,000

[ELR 15:9:7]

RECENT CASES

New York Daily News columnist is enjoined from writing for the New York Post

A New York trial court has granted the New York Daily News an injunction barring Michael McAlary from working as a writer or editor for the New York Post or any other newspaper or magazine in the New York metropolitan area.

According to Acting Judge Herman Cahn, McAlary, in early 1993, left the New York Post, where he was employed as a columnist, and entered an employment agreement with the Daily News for a two year term. The newspaper hired McAlary as an Associate Editor/Columnist, and, in addition to his salary, agreed to pay McAlary a $50,000 signing bonus. The agreement, in part, prohibited McAlary from writing for any

other newspaper or magazine in the United States or Canada without the Daily News' prior written permission.

In August 1993, McAlary informed the Daily News that he planned to return to the New York Post.

Judge Cahn first rejected McAlary's argument that the Daily News had "unclean hands" because the newspaper allegedly had repeatedly induced employees of the New York Post to leave their employer.

The court then noted that an injunction may be warranted "to prevent an employee who refuses to render services that are unique and extraordinary to an employer in violation of an existing contract from furnishing those services to another person for the duration of the contract." In addition to the fact that McAlary had acknowledged in the employment agreement that his services were unique, the Daily News presented evidence that McAlary was one of the most widely-read

and most highly paid columnists in the city. Judge Cahn commented that it is the "novelty of expression, this product of the creative mind, this embellishment of skeleton 'ideas' that give rise to a writer's uniqueness. [McAlary] unquestionably possesses such ability, and his great ability has been so widely recognized as to give credence to the claim of uniqueness."

In all, the Daily News established that McAlary was unique, and that the newspaper might suffer irreparable harm if the writer were permitted to work for a competitor.

The balance of the equities favored the Daily News, stated Judge Cahn because even if the court enjoined McAlary from writing for other newspapers or magazines, the writer could return to work for the Daily News, or work for the New York Post's parent company. News America Publishing, Inc., at the

compensation levels set forth in his employment contract with the New York Post.

The court restricted its grant of injunctive relief to McAlary's activities, but adverted to the principle that no person with knowledge of an injunction, even if not a party, may aid or cooperate with a party in doing the prohibited act.

Judge Cahn concluded by noting that although the parties planned to arbitrate their dispute, the Daily News, without preliminary relief, would be harmed by McAlary's continued violation of the agreement. The court therefore announced that the injunction would remain in effect pending arbitration.

The Daily News v. McAlary, New York Law Journal, p. 25, col. 6 (N.Y.Cnty., Sep. 16, 1993) [ELR 15:9:9]

Ruling that injured stunt double on "Miami Vice" may recover for alleged gross negligence of special effects expert is reversed

Ernest Robinson, a stunt double for the character Tubbs on the television show "Miami Vice," was severely injured when J.B.Jones, the show's special effects expert, prematurely detonated a "simulation" explosion. The scene, as described by Florida appellate court Judge Ferguson (in a dissenting opinion), called for the characters Tubbs and Crockett to discover a bomb planted on a body hidden in a closet and then to escape by jumping through a breakaway "candy glass" window as the building exploded behind them.

Jones was instructed to push the plunger to ignite the special effect after Robinson had cleared the window by about eighteen inches. During the take, Jones focused on the first man to clear the window, and detonated the

special effect before Robinson was clear of danger. Robinson, who suffered serious injuries, filed an action against Jones, alleging gross negligence.

The appellate court found that the trial court should have granted Jones' motion for a directed verdict, stating that as a matter of law, Jones' conduct did not constitute the gross negligence required to permit recovery under Florida law; the court reversed the judgment entered on the jury verdict for Robinson, and remanded the matter with directions to enter judgment for Jones.

Judge Ferguson noted that Jones had admitted that he never actually saw Robinson come through the window, and stated that Jones' conduct "considering the high degree of manifest danger, fell far below that required of one with his special skill." The jury fairly found, in the dissent's view, that Jones had performed a voluntary or conscious act or omission that a person with his expertise should have known would cause serious injury or

death, and "the majority's reversal of that factual finding [was] simple meddling."

Jones v. Robinson, 618 S.2d 279, 1993 Fla.App.LEXIS 4147 (Fla.App. 1993) [ELR 15:9:9]

Music company may obtain damages from insurer for failure to defend copyright infringement claim

Killer Music, Inc., doing business as HLC Partnership, agreed to sell jingles produced by an individual, identified only as Pfeifer, to radio and television stations and to film studios. Killer Music agreed to pay Pfeifer for each jingle sold, and to pay Pfeifer for his performances on certain songs when the songs were sold.

As described by Federal Court of Appeals Judge Beezer, upon the expiration of the parties' contract in

1988, Killer Music compiled and sold a music library which included Pfeifer songs which had not been sold during the contract period. The company did not credit or compensate Pfeifer.

Pfeifer sued Killer Music alleging various claims, including copyright infringement and unfair competition. The company was insured under policy written by Zurich Insurance Co. (U.S.Branch); the policy covered "advertising injury," which was defined to include injury from copyright infringement. The policy excluded coverage for advertising injury "arising out of breach of contract."

When Killer Music called its insurance broker concerning Pfeifer's lawsuit, the broker, who "may or may not have contacted persons at Zurich to confer about the policy coverage," advised the company that it was not covered. Killer Music did not present a written notice of

claim to Zurich or to the insurance broker and did not transmit any court documents to either insurance party.

Killer Music settled with Pfeifer soon after the suit was filed. Under the settlement, Pfeifer, in exchange for a $175,000 settlement, transferred to Killer Music his rights to the songs which had been used in the music library.

Killer Music then sought recovery of its defense costs in the lawsuit and indemnification from Zurich. The insurer filed an action for a declaratory judgment that it had no duty to defend or indemnify. Killer Music counterclaimed and asserted that Zurich breached its duty of good faith.

A Federal District Court granted Zurich's motions for summary judgment on both its claim and the counterclaim.

On appeal, Judge Beezer noted that although Zurich contended that Pfeifer's copyright infringement claim

arose out of a breach of contract and was not covered, there was at least a "potential of liability" such that the insurer had a duty to defend Killer Music in the action brought by Pfeifer.

Zurich also argued that it was not required to defend Killer Music because coverage was excluded by operation of California Insurance Code section 533. The statute provides that an insurer is not liable for a loss caused by the willful act of the insured. According to Zurich, Pfeifer claimed that Killer Music engaged in intentional misconduct, a "willful act." Killer Music argued that the use of Pfeifer's music in the music library was inadvertent.

Judge Beezer observed that Killer Music's actions were not proven to be "willful" as a matter of law; the company president declared that he did not know that any of Pfeifer's work was being used in the music library and that he did not intend to use the work without

authorization. Copyright infringement is not an activity that is "willful" per se, stated Judge Beezer.

In all, the possibility that section 553 might operate to exclude coverage did not excuse the initial decision to deny coverage, and the District Court erred in granting Zurich's motion for summary judgment on the basis of section 553.

Judge Beezer next found that the lack of written notice did not excuse Zurich's refusal to defend. The insurer's agent apparently had actual notice and, without requesting a copy of the complaint, decided not to defend on the basis of lack of coverage, not inadequate notice.

The court recognized that the settlement agreement represented, in part, an exchange of cash consideration for the rights to Pfeifer's songs, "not simply compensation for damages from copyright infringement," and that Zurich had no control over the terms of the settlement agreement. The court remanded the matter for further

consideration of the issue of the amount of a reasonable settlement in good faith, noting that on remand, Zurich would have an opportunity to demonstrate that some portion, if not all, of the settlement amount, would be allocable to the value of the songs which Killer Music received.

Zurich, by breaching its duty to defend, also would be liable for attorneys' fees as provided in the policy or as "incurred in good faith, and in the exercise of a reasonable discretion" in defending the action. The insurer was not liable for fees incurred by Killer Music in bringing the action in the District Court.

Judge Beezer concluded by finding that there was no evidence of bad faith by Zurich. Although the insurer breached its duty to defend, Killer Music failed to follow explicit policy conditions requiring written notice. The fact that Zurich brought a declaratory judgment action to determine its liability for coverage was not bad

faith, and the District Court did not err in granting Zurich's motion for summary judgment on the bad faith counterclaim.

Zurich Insurance Co. v. Killer Music, Inc., 998 F.2d 674; 1993 U.S.App.LEXIS 16191 (9th Cir. 1993) [ELR 15:9:10]

Ruling that nonrecourse notes used to purchase certain film rights would be disregarded for tax purposes is upheld

Guy B. Bailey, Jr. and other individuals were limited partners in Vista Company and Persky-Bright Associates, two partnerships that invested in feature films. Persky-Bright purchased the rights to the Columbia Pictures film "Summer Wishes, Winter Dreams," and Vista

invested in the films "Shampoo," "Breakout," "Funny Lady," and "Bite the Bullet;" the partnerships then licensed the films' distribution rights back to Columbia.

A June 1974 amended purchase agreement granted Persky-Bright all "right, title and interest" in "Summer Wishes, Winter Dreams" in exchange for $2 million, which, according to Federal Court of Appeals Judge Kearse, was 133 percent of the amount that Columbia warranted as the minimum production cost of the film; the completed production cost of the film actually was about $1.9 million. Persky-Bright agreed to make three cash payments extending over a one year period totalling $150,000, plus a nonrecourse promissory note for $1.85 million secured by a lien on the film and its proceeds. The partnership agreed to prepay $225,000 in interest. The promissory note was payable ten years from the date of the agreement and bore specified interest.

The amended distribution agreement granted Columbia the exclusive right to distribute the film for ten years, with an option to extend the term in perpetuity by paying an advance of the greater of $15,000 or the "fair market value" of the extension. Columbia would receive a percentage of the film's gross receipts as its distribution fee, and was entitled to recover certain of its costs from the film's gross receipts. Persky-Bright would receive 25 percent of the film's net proceeds; Columbia would receive the remaining 75 per cent as payment on the promissory note. After the note's principal and accrued interest were fully paid, Persky-Bright would receive 100 percent of the film's net proceeds.

Vista entered into similar transactions with respect to the four Columbia films in which it invested.

At the time of the trial, Vista had paid its note on "Shampoo" in full and was receiving 100 percent of the current profits from the film. The other four films had

failed to earn enough to pay off their notes. The investors claimed that Columbia failed to properly account for profits and that the earnings of the films would pay the notes in full and produce substantial profits for the partnerships.

The investors reported their shares of the partnerships' income and losses, which included deductions for depreciation of the films and for interest paid on the nonrecourse notes.

The Internal Revenue Service disallowed these deductions and assessed tax deficiencies for the year 1973-1976.

The Tax Court ruled that the investors were not entitled to depreciation deductions on the films themselves because the partnerships had not acquired ownership of the films, but that the investors could take depreciation deductions on their contract rights to receive portions of the films' proceeds. The court held that the nonrecourse

notes did not represent genuine debt and ruled that the value of the notes should be excluded from the depreciable bases of the investors' contract rights, and that the investors' interest payments on the notes were not deductible.

The Federal Court of Appeals, in 1990 (ELR 12:7:11), affirmed the rulings that the partnerships were not the owners of the films and that the investors were not entitled to depreciation deductions on the films themselves. The court also affirmed the ruling that the investors were entitled to such deductions on their contract rights in the films, but noted that the Tax Court had made no finding as to the value of those rights.

The court then found that the Tax Court could not properly refuse to recognize the nonrecourse notes as genuine debt simply on the ground that the notes were payable out of the films' exploitation proceeds. The matter was remanded to the Tax Court for consideration of

the value of the asset purchased, so as to compare its value at the time of purchase with the debt incurred as part of the purchase price.

On remand, the Tax Court again ruled that the nonrecourse notes did not represent genuine debt. The court found that the value of the partnerships' contract rights to a share of the films' earnings was not identical to the value of the films themselves, and should be estimated at fifty percent of each film's market value. Since the partnerships' rights in a given film were found to be worth no more than 48-56 percent of the face value of the corresponding nonrecourse note, the court concluded, according to Judge Kearse, that there was not a reasonable relationship between the value of the securing assets and the amount of nonrecourse debt.

The Tax Court again determined that the transactions were structured so that the partnerships lacked

incentives for the investors to pay a given note out of personal assets.

In affirming the Tax Court's rulings, Judge Kearse recalled that nonrecourse debt may constitute part of a taxpayer's basis in property when the fair market value of the property securing the debt reasonably approximates the principal amount of the debt. The investors conceded that the Tax Court did not err in finding that the fair market of the films themselves was equal to the cost of their production. But the partnerships did not own the films themselves. And, as to the films at issue, the value of the "net income" paid to the partnerships would not be an adequate measure of the fair market value of the films, stated the court, because Columbia retained the right to receive a large percentage of the films' gross receipts, over and above unreimbursed distribution costs, as "distribution fees." The fact that Columbia retained this significant economic interest in the

films meant that the partnerships' right to receive the films' remaining net income was necessarily worth less than the films themselves.

It also was noted that the partnerships' rights at the conclusion of the initial ten year period were "circumscribed." If the partnerships failed to pay off a film's note in ten years, Columbia had the right to terminate the partnerships' interest in the film. The studio had an option to retain its distribution rights by paying the partnerships an advance, which would be recouped out of the net income payable to the partnerships. Thus, the partnerships had the right only to receive an advance from Columbia for the films' perpetual distribution rights.

The evidence supported the Tax Court's finding that the fair market value of the partnerships' contract rights was significantly less than the fair market value of the films themselves.

In all, there was no clear error in the Tax Court's finding that the partnerships lacked incentives to pay off the nonrecourse notes out of personal assets, concluded Judge Kearse, in agreeing with the determination that the nonrecourse debt therefore should be disregarded for tax purposes.

Bailey v. Commissioner of Internal Revenue, 993 F.2d 288; 1993 U.S.App.LEXIS 8629 (2d Cir. 1993) [ELR 15:9:11]

Disallowance of business deductions and investment tax credit for master recording leasing programs is upheld

Frank C. Pasternak and other individuals invested in master recording leasing programs conducted by limited

partnerships known as Pop Phonomasters, Ltd., Soul Phonomasters, Ltd., New American Phonomasters, Ltd., and Rock Kandy Phonomasters, Ltd. which acquired the master recordings of certain artists. The promoters of the limited partnerships then set up co-tenancies to lease the master recordings from the limited partnerships; the co-tenancies were expected to press, distribute and market albums derived from the master recordings.

There were about 45 investors in each co-tenancy. The leases granted the lessee-investors the exclusive right to exploit the recordings in the United States for a three year term and required a fixed rental payment.

The Phonomasters promoters paid $10,000 for the songs of L.V. Johnson and Monk Higgins, and $50,000 for the songs of Sterling Harrison, and then valued the master recordings of each artist at about $3.4 million. The promoters valued Bonnie Pointer master recordings at about $6.1 million.

On their tax returns for 1981 and 1982, the amount of the business expense deductions and investment tax credits taken by each investor resulted in savings of at least $1.50 in taxes for every dollar invested.

The Commissioner of Internal Revenue disallowed the claimed deductions and investment tax credits arising from the investments in the leasing programs on the grounds that the transactions had no economic substance and were entered into solely to obtain the expected tax benefits. It was determined that the investors were liable for various deficiencies and additions to tax.

The Tax Court agreed with evidence presented by the Commissioner indicating that the fair market value of each artist's master recordings ranged from $1,000 to $20,000; held that the Phonomasters leasing programs or co-tenancies lacked economic substance; and sustained the Commissioner's disallowance of deductions and investment tax credits and the assessment of tax

penalties. With respect to the Rock Kandy master recordings, the Tax Court found that Pasternak failed to establish that any amount was paid for the recordings in 1982 or that master recordings sufficient to comprise an album of Bonnie Pointer songs actually existed on December 31, 1982. With respect to the 1981 recordings leased by the Soul, Pop and New America co-tenancies, the Tax Court's determination was based, in part, on the "vast discrepancy" between the actual purchase prices and the alleged fair market values on which the claimed investment tax credits were based.

A Federal Court of Appeals has upheld the Tax Court's decision. Senior Judge Contie stated that the Tax Court correctly found that the 1981 transactions lacked economic substance because they had no practical economic effect other than the creation of tax losses. It also was found that the failure of Pasternak, the "co-tenancy operator," to maintain records and to carry out the terms

of the lease agreement, was consistent with the tax-motivated nature of the transactions.

There also was evidence, stated the court, that the 1981 transactions were marketed as tax shelters whose promised tax-savings guaranteed economic gain to the participants, even if the co-tenancies sold no recordings. In all, the deductions and tax credits based on the transactions were properly disallowed.

The court concluded by finding that the Tax Court correctly sustained the imposition of the negligence penalty, the addition of tax, and liability for an increased rate of interest.

Pasternak v. Commissioner of Internal Revenue, 990 F.2d 893; 1993 U.S.App.LEXIS 7290 (6th Cir. 1993) [ELR 15:9:12]

Iowa Supreme Court issues rulings in dispute between radio performers and agent

Robert Cook and Brent Webster, playing the parts of "old timers" known as "Willard & Rafert," performed in several commercials produced by Joseph Pundzak. In 1979, Pundzak, Inc., an advertising agency owned by Pundzak, agreed to be the exclusive agent for Cook and Webster as "Willard & Rafert," and to use its "best efforts" to promote the characters. The agreement provided that either party could terminate the agency relationship on sixty days' notice.

Cook and Webster terminated the agreement in February 1990. When Pundzak sued the performers for breach of the agreement, Cook and Webster responded that Pundzak had not used his best efforts to promote them. There was evidence, stated Iowa Supreme Court Judge Larson, that the performers' income decreased in the late

1980s, and that Pundzak intentionally withheld Cook and Webster's services from potential clients in order to favor another Pundzak client.

Pundzak initially argued, unsuccessfully, that termination was the sole remedy for the alleged breach of the agreement.

It appeared to the court that the jury based its award of damages on substantial evidence that Pundzak's failure to use his best efforts was the proximate cause of damages.

The jury granted damages to Cook and Webster of $60,000 for breach of the best efforts clause, and an additional $37,200, representing the difference between the fees the performers received for certain advertising spots and the amount they claimed was due them under their arrangement with Pundzak.

Judge Larson agreed with Pundzak that the awards were duplicative, and ordered the judgment reduced, on

remand, by $37,200. The damages were reduced an additional $7050, the amount Cook and Webster received as a settlement from a third party for their claim alleging the unauthorized use of certain Willard & Rafert material.

The court, rather than the jury, considered the disputed ownership rights in Willard & Rafert. Judge Larson noted that there was no evidence that Pundzak created the "persona" of Willard & Rafert or that Pundzak was the "user" of the Willard & Rafert format. All of the intellectual property which embodied the Willard & Rafert concept was fixed in the medium of sound tapes, observed Judge Larson. The material was subject to the copyright laws, and the authors of the work were Cook and Webster, not Pundzak, declared the court, in ruling that the evidence did not support the trial court's conclusion that Pundzak should be a twenty-five percent owner of the Willard & Rafert rights.

The court concluded by affirming the denial of attorneys' fees sought by Cook and Webster, and by finding that the trial court did not err in refusing to enter judgment against Pundzak personally on the breach of contract verdict.

Pundzak, Inc. v. Cook, 500 N.W.2d 424, 1993 Iowa Sup.LEXIS 121 (Iowa 1993) [ELR 15:9:13]

National Public Radio prevails in libel action brought by Secret Service agent mistakenly referred to as homosexual

Larry Buendorf has been the Special-Agent-in-Charge of the Secret Service detail which protects former President Gerald Ford. In April 1992, during a broadcast of "Weekend Edition" on National Public Radio, Daniel

Schorr referred to Buendorf as the individual who saved President Ford's life during an assassination attempt; Schorr mistakenly commented that Buendorf subsequently was exposed as being a homosexual.

There were two assassination attempts on President Ford in September 1975. In the first incident, Buendorf grabbed a gun from Lynnette "Squeaky" Fromme and detained her. In the second incident, a bystander named Oliver Sipple pushed an assailant's arm and deflected a bullet away from President Ford. Several newspapers later identified Sipple as a homosexual.

When Buendorf sued National Public Radio for libel and invasion of privacy, the broadcaster apologized and corrected the error.

A Federal District Court in Washington, D.C. has granted National Public Radio's motion for summary judgment.

After pointing out that Schorr's statements regarding Buendorf's sexual preference were false, Judge June L. Green found that Buendorf was a public official for the purpose of the instant proceeding. Buendorf argued that the challenged statements were not related sufficiently to his official conduct to trigger the application of the New York Times rule. The court observed that although the subject matter of the false statement involved a personal matter, the Supreme Court and lower courts have construed New York Times Co. v. Sullivan, 376 U.S. 254 (1964) to apply to almost any comment regarding a public official. Judge Green found that the statement was sufficiently related to Buendorf's official conduct.

The court next determined that Schorr made the challenged statement without knowing that it was false. The broadcasting parties could have been "more diligent" in their research, but their error did not rise to the level of "reckless disregard for the truth," and there was no

showing of clear and convincing evidence to support a jury finding of actual malice, concluded the court.

Buendorf v. National Public Radio, 822 F.Supp. 6; 1993 U.S.Dist.LEXIS 7073 (D.D.C. 1993) 13

Dismissal of defamation claim brought by former New York Times reporter is upheld

In the book entitled "Presidents' Secret Wars: CIA and Pentagon Covert Operations Since World War II," author John Prados described the events which restored the Shah of Iran to power in 1953. Prados referred to an incident during which then New York Times reporter Kennett Love allegedly provided significant information to pro-Shah armed forces.

Love sued various parties, included William Morrow and Co., Inc. the publisher of the book, claiming that the suggestion that Love actively and knowingly aided a covert operation purportedly conducted by the CIA constituted libel.

In 1990, a New York trial court found that Morrow did not act in a grossly irresponsible manner in publishing the statement (ELR 12:9:8).

A New York appellate court has affirmed the trial court decision. The court noted that Prados had relied on a 1960 term paper written by Love in graduate school, as quoted by author Jonathan Kwitny in the book "Endless Enemies" and in a 1980 issue of CounterSpy magazine, as the source for the statement. Love never denied the accuracy of the term paper's contents.

A comparison of the disputed language used by Prados with Love's own words in his term paper demonstrated for the court the "substantial truth" of Prados' words.

It also was found that the coup in Iran and the American involvement in the coup were "within the sphere of legitimate public concern." And Morrow did not act in a grossly irresponsible manner given that Love's own words were the source of the complained-of statement.

Morrow was entitled to rely on Prados' status and reputation as an author in making the decision to publish, without violating the applicable standard of care, continued the court. In all, Morrow, under the circumstances, acted in a reasonable and responsible manner with "due consideration for the standards of information gathering and dissemination" in reaching its decision to publish Prados' book.

The trial court also should have dismissed the complaint on the basis of the statute of limitations defense raised by Morrow, concluded the court.

Love v. William Morrow and Co., Inc., 597 N.Y.S.2d 424, 1993 N.Y.App.Div.LEXIS 4539 (N.Y.App. 1993) [ELR 15:9:14]

NBA licensee's letter concerning distributor is not defamatory and does not violate the Lanham Act

American Needle & Novelty, Inc. manufactured headwear featuring sports team logos or insignia. The company was a licensee of Major League Baseball, the National Football League and the National Hockey League, and, in 1991, entered into a ten year distributorship agreement with Drew Pearson Marketing, Inc., a licensee of the National Basketball League, to purchase and distribute NBA licensed products.

In September 1992, Drew Pearson notified American Needle of the termination of the agreement and sent a copy of the termination letter to officials of the NBA.

American Needle, claiming that the letter contained false and defamatory statements regarding American Needle's business methods, sued Drew Pearson for libel and the violation of section 43(a)(2) of the Lanham Act.

Federal District Court Judge Charles R. Norgle, Sr. determined that the letter did not constitute a serious charge of incapacity or misconduct, and did not accuse American Needle of fraud or mismanagement or impugn the company's business integrity. The letter was reasonably capable of innocent construction, stated the court; the language contained therein was not so obviously and naturally harmful that proof of special damages was unnecessary and American Needle did not present a claim of libel per se.

American Needle also failed to show any extrinsic facts or innuendo which would render the otherwise non-defamatory letter libelous and actionable, and did not assert any special damages, stated the court, in dismissing the company's defamation claim.

With respect to American Needle's Lanham Act claim, Judge Norgle found that the letter was "an isolated individualized written statement" to a non-consuming licensor about American Needle's alleged breach of the agreement, and did not constitute "advertising" or "promotion" under Section 43(a)(2).

American Needle & Novelty, Inc. v. Drew Pearson Marketing, Inc., 820 F.Supp. 1072; 1993 U.S.Dist.LEXIS 5671 (N.D.Ill. 1993) [ELR 15:9:14]

Basketball coach again prevails in dispute involving tape recorded conversation with student athlete

As reported at ELR 14:12:7, Deon Thomas was a student at the University of Illinois and a member of the school's men's basketball team. Bruce Pearl, an assistant basketball coach at the University of Iowa tried to recruit Thomas to attend that school. Pearl spoke with Thomas on the telephone and recorded their conversation. Thomas apparently did not know that Pearl was recording the conversation and did not consent to the recording.

Pearl disclosed the tapes of the conversation to the National Collegiate Athletic Association, and, according to Thomas, also disclosed them to officials at the University of Illinois. The NCAA, on the basis of the tape recorded conversation, conducted an investigation of recruiting violations on the part of the University of

Illinois. As a result of the investigation, the NCAA banned Illinois from the 1991 NCAA tournament, and imposed other restrictions on scholarships, travel, and recruiting.

Thomas sued Pearl alleging the violation of the Illinois Eavesdropping Statute and the federal wiretapping statute found in the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. sections 2510-2520. Pearl removed the lawsuit to the Federal District Court, which granted Pearl's motion for summary judgment.

A Federal Court of Appeals has affirmed the District Court decision although on different grounds. Judge Cummings disagreed with the District Court's finding that Pearl, as an assistant basketball coach at a state university, acted "under color of law" when he taped conversations with Thomas and with Thomas' friends and relatives. Although it might be found that Pearl acted under color of law if Thomas were alleging that the coach

violated his constitutional rights in a section 1983 action, Thomas claimed that Pearl violated section 2511 of the federal wiretapping act. Congress has not said whether color of law means the same thing in section 2511 as it does in section 1983, noted Judge Cummings, who also observed that broadly reading color of law as equivalent to state action would hinder, rather than further, the essential purpose of the wiretapping act: to protect individuals from invasions of privacy.

Equating "color of law" and state action would grant every employee of federal, state and local government "a free pass to record conversations without the second party's consent," stated Judge Cummings. The court, although declining to limit the "under color of law" language in section 2511 to law enforcement officers acting within the scope of their authority, declared that "there must be some logical and reasonable connection

between the government worker's job description and eavesdropping."

Judge Cummings then pointed out that a second provision of section 2511 would relieve any eavesdropper from liability who does not surreptitiously record conversations "for the purpose of committing any criminal or tortious act" in violation of law, where at least one party to the conversation consents. Thomas would have to show that Pearl either intended to break the law or commit a tort against him in order to prove a violation of the statute. Judge Cummings, again using a slightly different analysis, agreed with the District Court that Thomas failed to establish either point.

Thomas also did not show that Pearl's conduct constituted an invasion of privacy or defamation, ruled the court; therefore, because Thomas could not prove that Pearl intended to commit a tort against him, Pearl was exempt from liability under the federal act.

The court concluded by affirming the District Court finding, with respect to Illinois law, that the Illinois Supreme Court has held that eavesdropping does not occur when the person recording the conversation is either a party to the conversation or known by the participants to the conversation to be present.

Thomas v. Pearl, 998 F.2d 447; 1993 U.S.App.LEXIS 16200 (7th Cir. 1993) [ELR 15:9:15]

Court reverses NFL Retirement Plan's award of lower level of disability benefits to former player

As reported at ELR 15:2:19, Donald Brumm played football for two different National Football League teams between 1963 and 1972. While playing football, Brumm sustained many knee and back injuries. In 1977,

Brumm was injured while driving a truck, but he continued to work in various jobs until December 1984 when he apparently no longer could work because of constant back pain.

In May 1985, Brumm requested benefits from the Bert Bell NFL Retirement Plan. Section 5.1 of the Plan provides for two levels of total and permanent disability payments: a player is eligible for Level 1 benefits ($4000 per month) if "totally and permanently disabled" due to "a football injury incurred while an Active Player." A player receives Level 2 benefits ($750 per month) if his "total and permanent disability results from other than a football injury." Section 5.2 of the Plan states that a participant is "totally and permanently disabled" if he "has become totally disabled to the extent that he is prevented from or unable to engage in any occupation or employment for remuneration or profit..."

The Plan's retirement board, based on a medical report indicating that Brumm was not totally and permanently disabled, denied Brumm's disability claim. Brumm provided the Plan with more evidence to support his claim, and the board arranged for a neutral psychological examination. A psychiatrist indicated that Brumm was disabled from engaging "in any occupation for remuneration or profit," due to a combination of depressive disorder and back pain and that the disability resulted from an injury caused by a "football-related activity."

In early 1987, the board notified Brumm that he would be considered totally and permanently disabled as defined by the Plan and approved disability benefits effective December 1, 1986 through March 1, 1987; the board subsequently approved the continuation of benefits of $750 per month.

When Brumm sued the Plan under the Employee Retirement Income Security Act, challenging the amount of his benefits, a Federal District Court noted that in a separate matter, an arbitrator had determined that a player would be eligible for Level 1 payments if the player incurred a disability resulting from one identifiable injury and was totally and permanently disabled within a reasonable time after leaving football. The arbitrator also had stated that lower payments would be provided for players who were totally and permanently disabled, but whose disability resulted from a number of injuries, rather than one identifiable football injury.

The District Court found that the Plan's decision to deny Level 1 benefits to Brumm was supported by substantial evidence and granted the Plan's motion for summary judgment.

A Federal Court of Appeals has reversed the District Court decision, based on the finding that the Board's

presumed interpretation of Section 5.1 was unreasonable and constituted an arbitrary and capricious denial of benefits.

Judge Morris Sheppard Arnold first noted that the Board did not provide Brumm with adequate notice, as required by ERISA, regarding its denial of Level 1 benefits.

Judge Arnold recalled that in negotiations preceding the adoption of the relevant language, the players proposed that Level 1 benefits would be awarded for disability related to football and Level 2 benefits would be awarded for disability resulting from any non-football incident or illness. The owners proposed that the higher level of benefits should be awarded only if the injury caused the player to be totally and permanently disabled at the time of the injury. The court found it impossible to determine what the parties finally agreed to as the

appropriate distinction between Level 1 and Level 2 benefits.

However, it did not appear to Judge Arnold that the board's interpretation of Section 5.1 was consistent with Plan goals or that the summary plan description for the Bert Bell NFL Retirement Plan complied with ERISA's requirement that it be sufficiently accurate and comprehensive to reasonably apprise participants and beneficiaries of rights and obligations of the requirements of the full plan.

The court concluded that the interpretation applied by the board in Brumm's case, "if not flatly contrary to the language of the Plan, represent[ed] at the least a startling construction." The board's construction of Section 5.1 was unreasonable, declared the court in reversing and remanding the matter to the District Court with instructions to compute and award benefits consistent with the court's opinion.

Brumm v. Bert Bell NFL Retirement Plan, 995 F.2d 1433, 1993 U.S.App.LEXIS 14208 (8th Cir. 1993) [ELR 15:9:16]

Decision approving settlement of football players' antitrust class action against NFL is published

In September 1992, Reggie White and four other football players sued the National Football League and its member clubs. The players challenged various NFL rules, including the right of first refusal/compensation component of Plan B, the college draft, the NFL Player Contract and the preseason pay rules.

The antitrust class action, which was filed less than two weeks after a Federal District Court jury rendered its verdict in McNeil v. National Football League, 790

F.Supp. 871 (D.Minn. 1992; ELR 15:2:20), sought a preliminary injunction that would have barred the NFL parties from enforcing the right of first refusal/compensation rules of Plan B, or imposing any other player reservation system, on veteran NFL players whose contracts were to expire on February 1, 1993.

In late February 1993, the players and the clubs entered into a stipulation and settlement agreement which was designed to end the instant action and related litigation. The terms of the settlement were reported at ELR 14:9:19.

Judge Doty's decision approving the settlement has been published. It should be noted that Judge Doty pointed out that the parties reached a tentative agreement to settle the instant action before the court entered final judgment in McNeil; thus, neither the liability nor damages issues in McNeil were finally resolved.

A number of individual player lawsuits, funded by the National Football League Players Association, predated the filing of the White class action and challenged the Plan B rules and other alleged unlawful practices by the NFL relating to the terms and conditions of player employment. The court stated that the cases would be settled separately and that the players therein would not participate in the class settlement fund to the extent that their claims in such cases were coextensive with claims that they might have made in the White class action. The total consideration to be paid by the NFL parties for the settlement of those preexisting cases was set at about $19 million.

White v. National Football League, 822 F.Supp. 1389, 1993 U.S.Dist.LEXIS 7421 (D.Minn. 1993) [ELR 15:9:17]

Home Shopping Club, owner of "Essence of Time" trademark obtains injunction barring distribution of "Timeless Essence" skin cream

In 1991, Home Shopping Club acquired all rights to the "Essence of Time" trademark; the trademark had been registered for a skin cream and was used for other skin products.

In 1992, Charles of the Ritz Group began to market a skin cream called "Timeless Essence."

A Federal District Court in New York, in response to Home Shopping Club's trademark infringement action, has granted the company a preliminary injunction barring Charles of the Ritz from continuing to use the "Timeless Essence" mark.

Judge Haight first found that the "Essence of Time" trademark was suggestive, but had only moderate strength and was not entitled to the fullest protection

available under the law. The court then found that "Essence of Time" and "Timeless Essence" obviously were similar names; that the products were highly similar, although "Timeless Essence" cost about twice as much as "Essence of Time;" that the consumers of the competing skin creams were relatively unsophisticated casual purchasers, prone to impulse buying; and that there was significant evidence of actual confusion on the part of individuals in the trade and actual consumers; all of these factors favored Home Shopping Club.

Home Shopping Club did not prove that Charles of the Ritz acted in bad faith, but did prove the likelihood of consumer confusion as to the sponsorship of the competing products; the likelihood of confusion gave rise to a presumption of irreparable harm to Home Shopping Club, and the court, accordingly, granted the company a preliminary injunction.

Home Shopping Club, Inc. v. Charles of the Ritz Group, Inc., 820 F.Supp. 763, 1993 U.S.Dist.LEXIS 6194 (S.D.N.Y. 1993) [ELR 15:9:17]

Federal Communications Commission's denial of full integration credit to television station license applicant is upheld

As reported at ELR 13:9:15, North Bay Television and Marin TV Services Partners both applied for a license to build a UHF television station to serve Novato, California. Marin's two general partners had the authority to control the station, while its limited partner, Broadcasting Enterprises, Inc., provided financing. The general partners were both female local residents and one of them was black.

The Federal Communications Commission denied Marin full integration credit, noting, in part, that a partner in the law firm that represented Marin before the Commission also was an officer and director of Broadcasting Enterprises. The Commission, upon finding that Broadcasting Enterprises apparently held a ninety percent equity interest and was not truly passive, awarded the license to North Bay.

A Federal Court of Appeals found that the Commission failed to adequately explain its reason for denying Marin full integration credit - there was conflicting precedent on whether the provision of legal services would constitute "material involvement" so as to negate a limited partner's claimed passive status.

On remand, the Commission stated that the provision of legal services is material involvement.

The Court of Appeals, accordingly, has affirmed the licensing of North Bay. Marin unsuccessfully argued that

the Broadcasting Enterprises officer/director, while acting in that capacity, did not perform any legal services for Marin. The court also rejected the argument that the legal services ban was unfairly applied retroactively to the cross-representation in the instant matter. Marin and its principals were on notice that the attorney's dual status might threaten Marin's integration status, and, in deciding to proceed with the cross-representation, "they did so at their peril and cannot claim unfairness now," concluded the court.

Marin TV Services Partners, Ltd. v. Federal Communications Commission, 993 F.2d 261, 1993 U.S.App.LEXIS 12581 (D.D.C. 1993) [ELR 15:9:17]

Cable Company may amend complaint against installer of "second" outlets for home reception of programming

As reported at ELR 15:5:15, Manhattan Cable Television alleged that The Cable Doctor, Inc. installed, for a fee, "second" outlets for the reception of programming in the homes of Manhattan Cable customers. Manhattan Cable's services included providing cable programming for one television set, and, for an additional fee, providing cable programming for additional televisions at the subscriber's home.

A Federal District Court in New York granted a motion to dismiss Manhattan Cable's complaint, finding that Cable Doctor's conduct was not within the scope of section 605(a) of the Communications Act of 1934 or section 553(a)(1) of the Cable Communications Policy Act of 1984.

In June 1993, Federal District Court Judge Lasker noted that on October 5, 1992, three days prior to the decision dismissing Manhattan Cable's complaint, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992. Manhattan Cable, citing the statute, brought a motion for relief. The court granted the company leave to file an amended complaint, but denied its motion for a preliminary injunction.

Judge Lasker stated that the new federal legislation established, contrary to the court's earlier opinion, that the unauthorized installation of second outlet service was within the scope of section 553 and that Cable Doctor's installation of the second outlet service was prohibited under that provision in relation to section 543(b)(3) of the statute.

It was found that Manhattan Cable's proposed amended complaint also set forth a valid state law claim for "Intentional Interference with and Procurement of

Breach of Contract" on the basis of the contracts between Manhattan Cable and its subscribers which provide that Manhattan Cable customers "shall not interfere with, alter, or remove" any Manhattan Cable equipment or permit anyone else to do so.

Judge Lasker stated that although Manhattan Cable demonstrated a likelihood that it would succeed on the merits of its claims under both the Cable Act and state law, a preliminary injunction was not warranted because the company did not establish that it was likely to suffer possible irreparable harm pending a final determination of the case.

Manhattan Cable Television, Inc. v. The Cable Doctor, Inc., 824 F.Supp. 34, 1993 U.S.Dist.LEXIS 34 (S.D.N.Y.1993) [ELR 15:9:18]

Court upholds convictions of fraud in sale of art

Center Art Galleries-Hawaii, Inc., its president and majority stockholder, William D. Mett, and its vice-president and director, Marvin L. Wiseman, were convicted of mail and wire fraud in violation of 18 U.S.C. section 1341 in connection with the sale of art attributed to Salvador Dali and other artists. A Federal Court of Appeals has affirmed the convictions, in a memorandum opinion bearing a notice stating that "This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except as provided by the 9th Circuit."

The Center Art parties, who were indicted more than ten years after a state investigation began, unsuccessfully argued that "extraordinary preindictment delay" prejudiced their Fifth Amendment due process rights.

Also rejected was a claim that the grand jury's exposure to adverse publicity prejudiced their decision to indict.

With respect to the argument that the Dali artwork was seized illegally and was introduced at trial to the prejudice of the Center Art parties, the court agreed with the District Court ruling that the warrants contained sufficient particularity and that there was probable cause to seize the specified works.

After rejecting other challenges to the evidence, the court considered the Center Art parties' contention that the indictment charged them with misrepresenting the value of the artwork by alleging that the "fair market value" of the artwork was significantly less than Center Art represented. The Center Art parties claimed that they made representations in appraisals only for insurance purposes; that there was insufficient evidence of fraudulent misrepresentation; and that an expression of

opinion as to the artworks' value was not actionable as a false representation of material fact.

The court determined that a rational trier of fact could have concluded that the purported misrepresentations related to material facts. It also was noted that there was evidence that the artwork was not authentic and that the Center Art parties, who were extremely sophisticated in the art world, "knew that it was not, [so that] the appraisals could not have been a reasonably based opinion of the artwork's value."

The Center Art parties challenged the indictment's use of the word "original," as in "original lithograph" and "original etching," to refer specifically to a lithograph or etching "drawn by the hand of the artist to whom the work is ascribed." The record contained evidence, stated the court, that the Center Art parties intended their clients to understand "original" as the government defined the term, rather than including a work where the artist

may have participated in the production of photomechanically reproduced products.

The indictment had charged that the Center Art parties marketed purported original limited edition lithographs and etchings that were misrepresented as having been authored, produced and signed by Salvador Dali, although the works were photomechanical reproductions of some genuine and some fake Dali originals. A rational juror, with evidence that certain artwork was represented as "original," stated the court, could have found that the Center Art parties knew they were deceiving clients by selling photomechanical reproductions as originals.

Judge Reinhardt concurred in the affirmance of the convictions, but questioned the discussion of the definition of original art. Judge Reinhardt observed that lithographs and etchings are not drawn by the hand of the artist, but are based upon a plate or a stone that is. But

the misdefinition of "original" did not create a "fatal variance" between the indictment and the charges of which the Center Art parties were convicted, agreed Judge Reinhardt. The indictment charged in detail that the Center Art parties made multiple knowingly false representations regarding the art they sold in order to obtain a price substantially in excess of its true value. The jury instructions did not mention the term "original," and there was sufficient evidence from which a rational trier of fact could have found that the essential elements of the crimes with which the Center Art parties were charged were proven beyond a reasonable doubt. Although there was an insubstantial variance between the indictment and what was proven at trial, the Center Arts parties were properly convicted of the fraudulent schemes of which the indictment put them on notice, stated Judge Reinhardt.

United States v. Wiseman, United States v. Center Art Galleries-Hawaii, Inc., United States v. Mett, 1993 U.S.App.LEXIS 8787 (9th Cir. 1993) [ELR 15:9:18]

Street vending ordinance is ruled unconstitutional

A Eugene, Oregon ordinance made it an offense to "set up or operate a vehicle, stand or place for the display or sale of merchandise, or sell, vend, or display for sale an article in the streets or on the sidewalks...or in any other place where such activity causes congregation and congestion of people or vehicles on the streets or sidewalks." The ordinance established licensing procedures for sidewalk vending, but provided that licenses would be issued only for the sale of food, beverage, flowers or balloons.

David Henry Miller was convicted of violating the ordinance by selling "joke books" on a city sidewalk.

An Oregon appellate court reversed Miller's convictions, ruling that the ordinance unconstitutionally restricted protected expression.

Chief Judge Richardson noted that the ordinance did not prohibit sales that might be "equally offensive to the city's regulatory objective of assuring that the streets and sidewalks are available for their principal purposes." Although noting that the dissent was correct in its premise that different activities may be regulated differently under Article I, section 8, Judge Richardson pointed out that the ordinance did not do so - "rather, it regulate[d] different exercises of the same commercial and communicative activity differently, on the basis of what is sold and communicated. That content-based regulation is what Article I, section 8, prohibits above all else...It

cannot be relied on by the city to save its ordinance as one that merely regulates the effects of speech."

Judge Edmonds, in dissent, expressed the view that the majority's conclusion "strips bare the city's ability to control commercial activity in its streets and on its sidewalks." According to Judge Edmonds, the ordinance did not regulate the content of speech, but the places in which commercial speech could occur. The dissent questioned the majority's perception that the ordinance was content-based in that it prohibited some selling activities and prohibited all others. The ordinance did not single out the content of joke books as its objective, stated Judge Edmonds, but prohibited all selling activities in certain places. The exceptions to the prohibition did not make the ordinance overbroad since the city had the authority to declare all selling activities on its streets and sidewalks unlawful. And "the activity of selling books in the middle of the street or on the sidewalk is

not the same activity as the selling of the excepted commodities and may create different hazards for the public contrary to the majority's suggestion." The majority's disagreement with the scope of the exceptions did not make the ordinance unconstitutional because of overbreadth, declared Judge Edmonds, who would have held that the ordinance was not an unreasonable restriction on the freedom of commercial expression.

City of Eugene v. Miller, 119 Ore.App. 293; 851 P.2d 1142; 1993 Ore.App.LEXIS 590 (Ore.App. 1993) [ELR 15:9:19]

Court rules on jury instructions in dispute over gambling losses incurred while patron allegedly was intoxicated

When the Sands Casino sued Leonard H. Tose to recover alleged gambling debts, Tose filed a counterclaim seeking to recover gambling losses incurred at the Sands while he was allegedly "obviously and visibly intoxicated."

The casino sought to have the jury charged that Tose's voluntary intoxication was contributory negligence, and that any liability on the part of the casino should be reduced to the extent that this negligence contributed to Tose's losses. The casino also requested the court to instruct the jury that Tose could recover only for those losses which were causally related to the casino's permitting Tose to gamble while drunk.

A Federal District Court in New Jersey apparently issued an oral opinion in February 1993 refusing to charge the jury on either of these issues. In a footnote comment, it was noted that in March 1993, the jury was charged in accordance with the court's oral opinion and was

instructed to make separate findings of liability for each of seven dates on which Tose allegedly gambled while visibly intoxicated and lost money. The jury returned with a verdict of no cause of action for four of the days, and the court entered judgment in favor of the casino on the dates for which a verdict was returned. The jury was unable to reach a unanimous verdict as to the remaining three dates, and granted the casino's motion for a mistrial as to the claims on the remaining dates.

In the court's April 1993 opinion, which was intended to be consistent with the March oral opinion concerning the jury charge, Judge Irenas reviewed the doctrines of comparative and contributory negligence and stated that "the crucial question in the instant case is whether the State of New Jersey imposes on a gambling casino patron a duty to protect herself from the financial injury which might occur if she gambles while her mental facilities are impaired by alcohol."

Judge Irenas, after careful consideration, determined that New Jersey's restrictions on gambling were intended to protect both the individual gambler, and society, from the harms of gambling. Since drinking will often impair cognitive functioning, an individual who drinks while gambling may be unable to take those actions which are necessary to minimize loss, observed the court.

The New Jersey legislature, however, has not indicated an intention to impose on a gambler the duty to avoid becoming intoxicated while gambling, declared the court. Although casinos may not serve alcohol to a visibly and obviously intoxicated patron, there is no regulation which forbids the casino or the patron from gambling while in this condition.

The court concluded that it could not find that New Jersey would apply a comparative negligence standard to a person who drinks, gambles and loses. The public

policies of the state, continued Judge Irenas, "condone, and in certain ways even encourage, drinking, gambling, and losing in a licensed casino," and the court, accordingly, would not instruct the jury on comparative negligence.

The court also declined to issue a jury instruction on proximate cause, i.e., whether the casino's act of permitting Tose to gamble while visibly and obviously intoxicated was the proximate cause of Tose's financial losses.

The court found, as a matter of law, that, if proven, the casino's negligent conduct was a cause-in-fact of Tose's injury. As a matter of policy, stated Judge Irenas, it was impossible to allocate how much of any losses incurred would be specifically attributable to the casino's actions, for "one cannot make any reasonable calculation of what losses a sober gambler would have incurred compared to a drunken gambler, and it would be senseless to instruct the jury to do so." Thus, any and all losses

incurred while Tose was allowed to gamble while drunk would be considered proximately caused by the casino's negligence, as a matter of law.

Tose v. Greate Bay Hotel and Casino Inc., 819 F.Supp. 1312, 1993 U.S.Dist.LEXIS 4943 (D.N.J.1993) [ELR 15:9:20]

Arizona Supreme Court reinstates award of attorneys' fees to newspapers denied access to police reports

In April 1987, the Phoenix Police Chief, along with Maricopa County Attorney Tom Collins announced grand jury indictments of several then-current and former members of the Phoenix Suns basketball team, as

well as other individuals. The indictments arose out of an investigation of illegal drugs and gambling.

Reporters for two newspapers requested access to the Phoenix police department investigative reports. The county attorney's office subsequently served the police department with a subpoena ordering the surrender of the reports. The department delivered to the county attorney the original and all existing copies of the documents and then denied the reporters' requests on the ground that it no longer possessed any reports.

The reporters, citing the Arizona Public Records Law, asked Collins for access to the documents. When Collins refused, the newspapers filed a lawsuit seeking the release of the documents. A trial judge who had entered a "gag order" in the related criminal cases ruled that the order was not intended to interfere with the newspapers' action and indicated Collins and Ortega could not use

the order "as a shield to hide behind" in the special action.

The court ordered Collins to release a copy of the report to the newspapers, stating that the government parties did not show specific instances of harm in this case from the disclosure of particular portions of the report.

Collins did not release the report and sought review in an appellate court. After about two months, Collins notified the court that the criminal proceedings were completed. The court then declared the special action moot, vacated the stay of the trial court proceedings, declined jurisdiction and ordered the matter returned to the trial court.

In January 1988, Collins released a redacted version of the report to the newspapers and presented a complete copy to the court for an in camera inspection. The court denied the newspapers' requests for any of the redacted portions, or anything related to the grand jury

proceedings, concluding that the redacted records were sufficient to satisfy the newspapers' original demands.

The newspapers filed a motion for attorneys' fees and costs under a statute authorizing an award of fees to a person wrongfully denied access to public records if the custodian of the records acted in bad faith or in an arbitrary or capricious manner. The court granted the motion and awarded the newspapers $30,000 in attorneys' fees, ruling that Collins' failure to produce a redacted version of the report until after the completion of the criminal proceedings was wrongful, arbitrary and capricious; the judge did not find bad faith.

An appellate court reversed the trial court ruling.

The Arizona Supreme Court, in reversing the appellate court decision, stated that Collins, as a public official had the burden of overcoming the legal presumption favoring disclosure. According to Judge Zlaket, Collins argued "in global generalities of the possible harm that

might result from the release of police records." But Collins did not attempt to specifically demonstrate how the production of the documents would violate rights of privacy or confidentiality or would be "detrimental to the best interest of the state." And turning over the public records to reporters, without comment, would not necessarily be an "extrajudicial statement" relating to a criminal case, noted Judge Zlaket.

It appeared to the court that there was "ample basis" for the trial court's conclusion that Collins wrongfully denied the newspapers access to the police reports, or at least portions of them, and in so doing, acted in an arbitrary and capricious manner. Collins "decided on his own what to release and when to release it, even to the court. He neither produced the records for an in camera review, nor offered a redacted version to the court or media until after the criminal trial was over. Having set himself up as sole judge and jury, Collins took the

chance that his decision would be viewed as arbitrary and capricious. He cannot now complain."

Cox Arizona Publications, Inc. v. Collins, 852 P.2d 1194, 1993 Ariz.LEXIS 34 (Ariz.1993) [ELR 15:9:21]

Cable company, as debtor in possession, may assume franchise agreement; company also prevails in enjoining city from operating competing cable service

The City of Jamestown, Tennessee, in March 1977, granted Clarence Harding the exclusive right to operate a cable television system within the city. In its ordinance enacting the grant into law, the city stated that its prior approval was required of any assignment or transfer of the cable franchise. In June 1988, the city consented to the assignment of the franchise to James Cable Partners

and the company's assignment of the franchise to a bank as security for a loan by which James Cable purchased the franchise.

In June 1991, James Cable filed a voluntary petition under Chapter 11 of the Bankruptcy Code. The company filed a plan for reorganization, under which it sought to assume the cable franchise agreement as an executory contract.

The United States Bankruptcy Court for the Middle District of Georgia overruled the city's objection to James Cable's assumption of the franchise agreement.

A Federal District Court in Georgia noted that the city argued that section 365(c) of the Bankruptcy Code would prevent James Cable from assuming the franchise agreement without the city's consent. The statute applies to the assumption and/or assignment of contracts that were executory at the time at which a debtor filed its bankruptcy petition.

Chief Judge Wilbur D. Owens, Jr. found that the application of section 365(c) was not limited to personal service contracts, and that the franchise agreement at issue was within the scope of the statute. It then was observed that the bankruptcy court had held that where a debtor in possession seeks only to assume the contract and not to assign it to a third party, section 365(c) does not apply. Judge Owens agreed with the bankruptcy court, stating that "as no real transfer occurs when a debtor in possession 'steps into the shoes' of the debtor, it makes no sense to prohibit the debtor in possession from 'assuming' an executory contract from itself."

The appropriate test for determining the applicability of the statute, in the court's view, would be to ask whether the entity seeking to assume the executory contract is someone other than the debtor or debtor in possession. In this case, James Cable, the debtor in possession, sought to assume an executory contract and section

365(c) did not prohibit the assumption, concluded the court.

In a separate proceeding in a Federal District Court in Tennessee, James Cable sued for declaratory relief and to enjoin the city from operating a competing cable service within the city. The company previously had brought a Tennessee state court action against the city. After lengthy proceedings, the trial court eventually granted an injunction against the city and Jamestown, although not removing its cable television plant and equipment, ceased operating its cable system.

In October 1992, the United States Congress enacted the Cable Television Consumer Protection and Competition Act of 1992. Jamestown argued that section 7(a) of the statute retroactively rescinded James Cable's exclusivity and nullified the Tennessee court judgment that Jamestown could not operate a competing cable system.

Senior Federal District Court Judge Martin noted that

neither the terms of the statute nor its legislative history indicated any intent to make the statute retroactive. Stating that the general rule is that congressional enactments and administrative rules are not construed to have retroactive effect unless their language requires it, the court declared that it was "compelled" to find that the statute had no retroactive effect. Thus, James Cable's exclusive franchise agreement was valid, effective, and enforceable, and the court, accordingly, enjoined the city, until March 2002, from operating a cable television system contrary to the exclusive franchise granted to James Cable.

In re James Cable Partners, 154 Bankr. 813, 1993 U.S.Dist.LEXIS 7745 (M.D.Ga. 1993); James Cable Partners, L.P. v. City of Jamestown, Tennessee, 822 F.Supp. 476, 1993 U.S.Dist.LEXIS 7037 (M.D.Tenn. 1993) [ELR 15:9:21]

Briefly Noted:

"Pele" License.

Leros Ltd. owns the right to use and license the "features" of Edson Arantes do Nascimento, also known as Pele. Leros granted Focus Communications a license to use Pele's features in connection with the production and distribution of twelve films on the history of soccer.

Leros claimed that Focus failed to make the required payments under the contract; that Leros, after the requisite notice of breach and opportunity to cure, terminated the agreement; and that Focus no longer had the right to exhibit any films containing Pele's features or to use Pele's features to promote the films. Focus allegedly had

allowed Fox Lorber to use Pele's features in connection with the sale and exhibition of the films.

In response to Leros' action alleging breach of contract and other claims, a Federal District Court in New York has denied a motion by two of the parties to dismiss for lack of personal jurisdiction. Judge Charles M. Metzner noted that Leros cited an advertisement placed by Fox Lorber in Variety; the advertisement contained Pele's name and picture and promoted the films in issue. This fact constituted a prima facie showing that Focus Worldwide and one of the company's directors may have committed tortious acts in New York sufficient to support personal jurisdiction under the state's long-arm statute.

Do Nascimento v. Fox Lorber Associates Inc., 1993 U.S.Dist.LEXIS 7050 (S.D.N.Y. 1993) [ELR 15:9:22]

"Olympian Golde" Mark.

Midwest Tennis & Track, Co. applied to register the mark "Olympian Golde" for an "athletic track and field surfacing system." The Trademark Examining Attorney refused registration on the basis that under the statute codifying Section 110 of the Amateur Sports Act of 1978, the mark would constitute a prohibited simulation of the word "Olympic." Registration also was refused on the ground that the mark might falsely suggest a connection with the United States Olympic Committee.

The Trademark Trial and Appeal Board has reversed the Examining Attorney's rulings.

The Board, in finding that Midwest's use of "Olympian Golde" was not unlawful, noted that the relevant statute solely provided remedial rights to the United States Olympic Committee by means of a civil action; the statute did not make the use of the terms cited therein

unlawful. And Midwest pointed out that its mark was not a combination of the cited terms.

The Board then expressed the view that "Olympian Golde" was not a close approximation of the name or identity of the United States Olympic Committee. Given the variations in possible meaning or connotation for the term, the Board declined to find that "Olympian Golde" referred "uniquely and unmistakably" to the Committee.

In re Midwest Tennis & Track, Co., 1993 TTAB LEXIS 27 (Trademark Trial and Appeal Board, Aug. 27, 1993) [ELR 15:9:22]

Florida Marlins Franchise.

A New York trial court denied the Greater Miami Baseball Club Limited Partnership's motion for a

preliminary injunction restraining Florida Marlins Baseball Limited from participating in the major league expansion draft and from occupying their Florida territory until the Marlins paid compensation to Greater Miami. The court granted Florida Marlins' motion to compel arbitration, under the Professional Baseball Agreement, to determine the amount of "just and reasonable" compensation the Marlins would be required to pay for acquiring Greater Miami's baseball franchise territory.

An appellate court has affirmed the trial court's decision.

Greater Miami Baseball Club Limited Partnership v. National League of Professional Baseball Clubs, 598 N.Y.S.2d 183, 1993 N.Y.App.Div.LEXIS 5093 (N.Y.App. 1993) [ELR 15:9:23]

Football Season Tickets.

Michael Mansdorf, a ten year season ticket holder for the New York Giants football team, purchased twenty season tickets to the Giants home games for the 1992 season.

In March 1993, the Giants' ticket manager notified Mansdorf that the team had received a complaint from an individual alleging that he purchased Giants football tickets, assigned to Mansdorf's account, at a price in excess of their face value. Mansdorf denied the charge, but the team refused to renew his season tickets.

A New York trial court noted that a ticket to enter a place of public amusement "is merely a license, revocable at the will of the proprietor, without cause, so long as the revocation is not based upon a discriminatory reason infringing upon a person's civil rights." Judge Crane also pointed out that the Giants' renewal subscription

application, sent to Mansdorf each year, stated that the renewal privilege was extended at the option of the Giants and was subject to revocation at any time. Each ticket also contained certain conditions, including the notification that the ticket was a revocable license.

Mansdorf did not have a right to the tickets, or any right to have his subscription renewed, ruled the court. Mansdorf did not allege any discriminatory intent of the Giants in refusing to renew the ticket subscription, and the Giants' conduct did not violate Mansdorf's rights and was not a deceptive act or practice in violation of New York law.

Mansdorf v. N.Y.Football Giants, Inc., New York Law Journal, p. 29, col. 2 (N.Y.Cnty., Oct. 28, 1993) [ELR 15:9:23]

Female Umpire Matter.

In considering Pamela Postema's employment discrimination claim under Title VII of the Civil Rights Act of 1964, Federal District Court Judge Robert P. Patterson ruled, in part, that the Civil Rights Act of 1991 would apply retroactively to provide Postema with the right to trial by jury and the right to seek compensatory and punitive damages upon establishing intentional employment discrimination by various professional baseball organizations (ELR 15:1:20). Postema's claims arose more than two years before the effective date of the 1991 Act.

A Federal Court of Appeals, hearing an interlocutory appeal in the matter, noted that the court, in reviewing another order certified for interlocutory appeal by Judge Patterson at the same time as the instant order, had held that the jury trial and damages provisions of the 1991

Act were not retroactive. The court therefore reversed the order of the District Court and remanded the case for further proceedings.

Postema v. National League of Professional Baseball Clubs, 998 F.2d 60, 1993 U.S.App. LEXIS 15504 (2d Cir. 1993) [ELR 15:9:23]

Broadcast Indecency.

In February 1989, National Public Radio's news show "All Things Considered" reported on the trial of John Gotti, the alleged leader, as described by Federal Court of Appeals Judge D.H.Ginsburg, of an organized crime syndicate in New York. The report featured a tape recording of a wiretapped telephone conversation between Gotti and an associate. In the excerpt broadcast by the

radio station, Gotti used variations of "the f___ word" ten times. The station did not substitute bleeps for any or all of these references.

Peter Branton filed a complaint with the Mass Media Bureau of the Federal Communications Commission. The Bureau concluded that the broadcast material was not "actionably indecent" and did not provide the legal basis for further Commission action.

The Commission, in a letter ruling, affirmed the Bureau's decision, stating that the Gotti tape was part of a "bona fide" news story and noted its reluctance "to intervene in the editorial judgments of broadcast licensees on how best to present serious public affairs programming to their listeners."

The Court of Appeals ruled that Branton lacked standing to seek review of the Commission's no-action letter. It was noted that Branton argued that he was injured because he was subjected to indecent language over the

airwaves. An offense to one's sensibilities may constitute an injury, but in this case the purported injury to Branton did not establish his standing; Branton, rather than seeking damages or other relief for the alleged harm, requested the imposition of a sanction. The possibility that Branton might again be exposed to a broadcast indecency lacked the required imminence of harm to establish a case or controversy under Article III, stated the court.

Branton also failed to establish the causation and redressability requirements for obtaining relief, declared Judge Ginsburg, who commented that it was speculative as to whether a reversal of the agency's decision "would serve at all to protect [Branton] from future exposure to broadcast indecency."

Branton v. Federal Communications Commission, 993 F.2d 906, 1993 U.S.App. LEXIS 12801 (D.D.C. 1993) [ELR 15:9:23]

Forfeiture of Property.

John Skidmore, Jr. and John Skidmore, Sr. each were charged with one count of selling an unlawful electronic device which permitted the illegal interception of premium television channels in violation of 18 U.S.C. section 2512 (1)(b). The Skidmores agreed to plead guilty in return for the government's agreement not to bring any additional charges against them. The plea agreement required the Skidmores to forfeit equipment and other items seized during the execution of certain search warrants. The District Court, at sentencing, ordered the

United States to return the Skidmores' property, despite the plea agreement.

A Federal Court of Appeals has reversed the District Court's modification of the plea agreement.

Judge Boyce F. Martin, Jr. stated that the District Court improperly modified the agreement by excising the forfeiture provision, and found that the "unusual circumstances" of the case warranted the relief of ordering specific performance of the agreement, including the forfeiture provision. The District Court had no authority to enforce only selected provisions of the agreement, observed Judge Martin, in vacating the judgment of the District Court insofar as the judgment ordered the United States to return the property to the Skidmores and ordered the District Court to reenter judgment consistent with the terms of the plea agreement.

United States v. Skidmore, 998 F.2d 372, 1993 U.S.App. LEXIS 16912 (6th Cir. 1993) [ELR 15:9:24]

Breach of Contract.

Don Janicek and his corporation, Ol' Don, Inc. sued KIKK Radio and its parent company, Viacom International, for breach of contract, negligence and gross negligence.

The January 1989 contract at issue, the latest in a series of one-year renewals dating back for about fifteen years, was for radio advertisements on KIKK during its midday program. Janicek would call in to the station and engage in a one minute discussion about his record business with the station's disc jockey. In August 1989, the commercials were terminated; the parties disagreed as to who terminated the contract.

Janicek claimed that as a result of the termination of the commercials, he suffered mental, emotional and physical distress and a heart attack, as well as damage to his reputation.

The trial court granted KIKK's motion for summary judgment with respect to the tort claims, severed the contract action, and stayed the contract action pending the appeal of the tort action.

In affirming the trial court's decision, the appellate court stated that it did not appear that KIKK's liability in this matter "could originate from anywhere other than its contract with Don Janicek." Since there was no breach of any implied duty in law independent of the contract, the trial court did not err in dismissing Janicek's tort claims, concluded the court.

Janicek v. KIKK Inc., 853 S.W.2d 780, 1993 Tex. App.LEXIS 1116 (Tex.App. 1993) [ELR 15:9:24]

WASHINGTON MONITOR

National Labor Relations Board considers dispute over union security clause in agreement between Screen Actors Guild and AMPTP

The Screen Actors Guild is a party to three agreements, including one with the Alliance of Motion Picture and Television Producers. The agreements all contain a union security clause requiring a performer to become a union member in good standing on or after the thirtieth day after his/her first employment as a performer.

A charging party claimed that in view of the decision in Electrical Workers IUE, Local 444 (Paramax Systems), 311 NLRB No. 105 (May 28, 1993), the union and the employers unlawfully maintained the union security

clause, and violated the National Labor Relations Act by including in the agreements a liquidated damages provision for breaches of the clause.

The Office of General Counsel of the National Labor Relations Board has dismissed the "membership in good standing" and "liquidated damages" allegations of the charges.

It was noted that in Paramax Systems, the Board did not find that the union security clause conditioning employment on union membership was facially unlawful; the Board stated that requiring employees to be "members of the Union in good standing" did not overtly require employees to sustain obligations other than those lawfully imposed under section 8(a)(3), but could be interpreted as requiring that Paramax employees merely tender initiation fees and dues.

However, the Board further found that the clause challenged in Paramax was facially ambiguous; the clause

was susceptible of either a lawful or unlawful construction in that it might require more from unit employees than the requirements imposed by the Act. Since the union security clause was ambiguous, the Board held that the union breached its duty of fair representation and violated section 8(b)(1)(A) by maintaining the clause without notifying employees that they need only tender required initiation fees and dues.

In the instant matter, the union security provision conditioned employment on union membership in good standing. Again, the clause was not facially unlawful, stated the Office of General Counsel. And providing that an employer would not violate the contract by refusing to terminate an employee who was not a member in good standing if the employer "has reasonable grounds for believing that...such performer's membership in the union was terminated for reasons other than the failure of the performer to tender the periodic dues and the

initiation fee uniformly required as a condition of acquiring or retaining membership in the Union.." was ruled equivalent to informing employees of their rights and obligations. Since the union maintained a union security clause that sufficiently informed employees of their rights, the clause was not ambiguous and the union did not breach its duty of fair representation.

National Labor Relations Board, Office of General Counsel, 1993 NLRB GCM LEXIS 41 [ELR 15:9:25]

Copyright Royalty Tribunal announces cost of living adjustment of mechanical royalty rate

The Copyright Royalty Tribunal has announced an adjustment of the mechanical royalty rate based on the change in the Consumer Price Index from September,

1991 to September, 1993. For every phonorecord made and distributed on or after January 1, 1994, the royalty payable with respect to each work embodied in the phonorecord will be 6.61 cents or 1.3 cents per minute of playing time or fraction thereof, whichever amount is larger.

Cost of Living Adjustment of the Mechanical Royalty Rate, Copyright Royalty Tribunal, 58 FR 58282 (Nov. 1, 1993) [ELR 15:9:25]

Refusal to register "Olympic Champion" for athletic clothing is upheld

Kayser-Roth Corporation applied to register the mark "Olympic Champion" for various items of athletic clothing. The Trademark Trial and Appeal Board first found,

contrary to the Examining Attorney, that the company's use of the mark on socks would be a lawful use under the provisions of the 1950 Act incorporating the United States Olympic Association and was not made unlawful when the Act was amended.

The Board, after considering the rights granted to the United States Olympic Committee under the Amateur Sports Act of 1978, determined that the examination for purposes of registration of an application involving a mark or marks protected by the Act "must be conducted in the same manner as it would be in the case of any other mark."

The Examining Attorney refused registration under section 2(a) of the Trademark Act on the ground that Olympic Champion falsely suggested a connection with the United State Olympic Committee.

The Board expressed the view that the mark was not a close approximation of the name or identity of the

United States Olympic Committee; that it did not appear that the mark referred "uniquely and unmistakably" to the Committee; and that the Examining Attorney did not establish that the mark created a false suggestion of a connection with the Committee.

However, the Board found that there was a likelihood of confusion between Olympic Champion and the Committee's marks as used on the similar goods of the parties. The Board, noting that the Committee had registered the marks Olympic, United States Olympic Committee and USA Olympics and that the word Olympic had the same suggestive significance in both parties' marks, therefore affirmed the refusal to register under section 2(d).

In re Kayser-Roth Corporation, 1993 TTAB LEXIS 26 (Trademark Trial and Appeal Board, Aug. 17, 1993) [ELR 15:9:25]

Florists' association may not register the mark "This Bud's For You"

The Trademark Trial and Appeal Board has refused an application by The Florists Association of Greater Cleveland, Inc. to register the mark "This Bud's for You" for fresh-cut flowers.

Anheuser-Busch, Inc., in its notice of opposition, claimed that for many years and prior to the association's date of first use, the brewer used the marks "Budweiser," "Bud," and "This Bud's for You" for beer; that the brewer licensed the use of the marks for a variety of goods; and that the association's mark so resembled Anheuser-Busch's mark as to be likely to cause confusion.

After the pleadings were filed in the matter, the Board suspended proceedings pending the outcome of a civil action brought by Anheuser-Busch in a Federal District Court in Ohio. The court denied the brewer's motion for a preliminary injunction (ELR 7:11:11). According to the Board, the court stated that the association may have intended to capitalize on the familiarity of the slogan, but did not intend to deceive consumers into believing that Anheuser-Busch was marketing flowers. The action eventually was dismissed with prejudice by stipulation.

The Board agreed with Anheuser-Busch that the association's initial use of the slogan was not a trademark use because the slogan, which included the words "and 11 more rose buds" did not serve to identify the association members' flowers. A subsequent use of the slogan (without the additional words) on streamers displayed by association florists was a trademark use, stated the

Board, since the display identified flowers in members' stores.

However, Anheuser-Busch's argument that the slogan was not used in commerce was "well taken," according to the Board, noting, in part, that it was not shown that the slogan was used in connection with wire service orders or that sales of goods affecting commerce were made under the mark.

With respect to the question of ownership, the Board determined that use by member retailers did not inure to the benefit of the association and commented that if the association should succeed on the merits of the case on appeal, the Board would recommend that the matter be remanded to the Examining Attorney to consider the issue of whether the association should have filed an application to register the phrase as a collective mark.

The Board next agreed with Anheuser-Busch that confusion was likely, "in view of the fame of its slogan,"

and in view of the evidence concerning the use, licensing and promotion of the slogan. After reviewing a survey conducted on behalf of Anheuser-Busch, the Board stated that "purchasers seeing [the association's] flowers offered for sale under this slogan are likely to believe that the flowers are being offered under the sponsorship of [Anheuser-Busch]." Thus, confusion was likely, concluded the Board, in refusing the association's application.

Anheuser-Busch, Incorporated v. The Florists Association of Greater Cleveland, Inc., 1993 TTAB LEXIS 28 (Trademark Trial and Appeal Board, Oct. 13, 1993) [ELR 15:9:26]

Publisher may register trademark in "Medicine" as title for a medical journal

The Trademark Trial and Appeal Board has reversed a Trademark Senior Attorney's refusal of Waverly, Inc.'s application to register "Medicine" as the title of a medical journal.

The Senior Attorney refused the application on the ground that the phrase was generic and therefore, that there would be no amount of evidence of acquired distinctiveness which could demonstrate registrability. It was stated, however, that in the event the term "Medicine" was not generic for journals, then Waverly, by virtue of seventy years of substantially exclusive and continuous use and public recognition of "Medicine" as a mark for its journal, had submitted sufficient evidence to show acquired distinctiveness.

The Board, with respect to the "critical issue" of whether members of the relevant public refer to the class of medical journals as "medicine," agreed with Waverly

that the evidence (particularly letters from prospective purchasers or readers) tended to show that purchasers perceived "Medicine" as a trademark which was distinctive of Waverly's publication. It did not appear that the public primarily used or understood the term "medicine" to refer to the class of publications known as "medical journals." And the fact that the journal was directed to "a relatively small, highly sophisticated audience" supported the proposition that relevant purchasers were likely to view "Medicine" as a trademark and not as a generic term for medical journals.

After considering the "commercial realities of the publishing business in the medical field" and balancing the interests of subscribers and competing publishers, the Board concluded that Waverly's use of the word "Medicine" for a medical journal was not generic, but was a highly descriptive term which had acquired

distinctiveness as applied to Waverly's product, and therefore was registrable.

In re Waverly, Inc., 1993 TTAB LEXIS 18 (Trademark Trial and Appeal Board, June 10, 1993) [ELR 15:9:26]

Home shopping stations qualify as local commercial stations for cable carriage

The Federal Communications Commission, as part of its implementation of the Cable Television Consumer Protection and Competition Act of 1992, determined that stations that are predominantly used for the transmission of sales presentations or program length commercials ("home shopping stations") are operating in the public interest and are qualified as local commercial television stations for the purposes of cable carriage.

The Commission found that the home shopping stations have significant viewership; that the existing renewal system adequately considers competing demands for the spectrum used by the stations; and that the stations provide competition to nonbroadcast services supplying similar programming.

Commissioner Andrew C. Barrett, in a separate statement, noted that broadcast stations must comply with the Commission's standards on political and emergency broadcasting, children's programming, and indecency standards, as well as presenting public affairs programming responsive to community issues. Commissioner Barrett stated that the record indicated that home shopping stations have met the Commission's general public interest standards, and that the format of the stations would not preclude them "from adequately addressing the needs and interests of their communities of license." Furthermore, the record demonstrated a public interest

value of home shopping stations in generating financing for small and marginal stations.

In a dissenting statement, Commissioner Ervin S. Duggan expressed the view that the Commission engaged in a "minimalist" definition of the public interest standard, and questioned "a regulatory philosophy that seems no longer to care about quality."

Home Shopping Stations Qualified as Local Commercial Stations for Cable Carriage, Federal Communications Commission, 1993 FCC LEXIS 3414 (July 2, 1993) [ELR 15:9:27]

IN THE NEWS

Jury awards $300,000 to writer on claim involving Walt Disney Co. film "Honey, I Blew Up the Kid"

A Los Angeles trial court jury has awarded $300,000 to Paul Alter who claimed that his treatment "Now, That's a Baby" was the basis for the Walt Disney Co. film "Honey, I Blew Up the Kid."

Alter stated that he submitted his treatment to a then-Disney executive in 1980, but that the company rejected the work. Disney pointed out that the executive had left the studio prior to the 1992 release of the film, and that the film was written after the success "Honey, I Shrunk the Kids."

According to news reports, the jurors agreed that Alter expected to be paid if Disney used the treatment. [February 1994][ELR 15:9:28]

Films altered for home viewing will contain notification labels, announces Motion Picture Association

The Motion Picture Association of America has announced that the association's members, along with several other film producers, voluntarily have agreed to inform consumers if a film being shown on television, cable or videocassette has been modified from its original version.

According to news reports, films that have been "panned and scanned," i.e., that have been cut to fit into a television screen, will contain labels reading: "This film has been modified from its original version. It has been formatted to fit your TV." If a film has been panned and scanned, edited and time compressed or expanded, the label will read; "This film has been modified from its original version. It has been formatted to fit your TV, and edited for content and to run in the time allotted." An additional label, added to colorized film,

will state: "This is a colorized version of the original black-and-white film."

The Directors Guild, Writers Guild, American Society of Cinematographers and the International Photographers Guild, although expressing support of labeling, questioned the association's plan, noting that the labels will not announce whether the director, screenwriter and cinematographer has consented to any changes, and will not disclose the extent of any editing. [February 1994][ELR 15:9:28]

Billy Joel and former law firm settle dispute

Billy Joel has settled a $90 million fraud and breach of contract action against his former lawyer, Allen J. Grubman, according to news reports. The terms of the

settlement were not announced, but the parties apparently have agreed to withdraw their claims against each other.

Joel had sued Grubman, the law firm Grubman, Indursky, Schindler & Goldstein, and law firm partners Arthur I. Indursky and Paul D. Schindler, claiming that the law firm, which represented Joel throughout the 1980s, defrauded him in its dealings with the performer's former manager, Frank Weber. Grubman and the other parties denied all the allegations in the complaint.

In 1989, Joel had filed a similar lawsuit against Weber, his former brother-in-law. Joel's attorney stated that the performer was awarded about $2 million in judgments against Weber, but that the manager paid only a part of that amount prior to filing for bankruptcy. [February 1994][ELR 15:9:28]

DEPARTMENTS

In the Law Reviews:

Does a Song by Any Other Name Still Sound as Sweet? Digital Sampling and Its Copyright Implications by Randy S. Kravis, 43 The American University Law Review 231 (1993)

Casting Call at Forest Lawn: The Digital Resurrection of Deceased Entertainers - A 21st Century Challenge for Intellectual Property by Joseph J. Beard, 8 High Technology Journal 101 (1993)

Toy Designer License Agreement Annotated by Charles W. Grimes and Gregory J. Battersby, 13/8 The Licensing Journal 3 (1993)

Collegiate Licensing at the Crossroads by Jack Revoyr, 13/9 The Licensing Journal 11 (1993)

Simon & Schuster, Inc. v. Members of the New York State Crime Board - "Crime Goes Hollywood" - The Striking Down of the "Son of Sam" Statute by Benedict J. Caiola and Esther Oz, 14 Whittier Law Review 859 (1993)

Constitutional Law - Striking a Needed Balance Between the Rights of Publishers and the Interests of the Public. Braun v. Soldier of Fortune Magazine, Inc. by John Peel, 15 University of Arkansas at Little Rock Law Journal 787 (1993)

Work for Hire Revisited: Aymes v. Bonelli by Sue Ganske Mota, 12 Computer/Law Journal 17 (1993)

Toward a Restrictive View of Copyright Protection for Nonliteral Elements of Computer Programs: Recent Developments in the Federal Courts by W.H. Baird Garrett, 79 Virginia Law Review 2091 (1993)
[ELR 15:9:30]