

## RECENT CASES

### **Magazine publisher s extensive prepublication use of the title New West established trademark ownership**

Extensive prepublication promotional activities for the magazine “New West” have been found sufficient to establish trademark and trade name ownership rights in the title even in the absence of an actual sale of the magazine, according to a Federal Court of Appeals in California.

In June of 1975, the NYM Company of California, Inc. began using the name “New West” for a proposed magazine. Working in conjunction with the publishers of “New York” magazine, a sample issue of “New West” and a direct mail solicitation were prepared. The

inaugural issue of “New West” was published on February 9, 1976.

In December of 1975, the promoters of the New West Corporation adopted the name “New West” for a proposed feature news magazine. The project was made public in January of 1976; at that time the president of NWC apparently was aware of the promotional campaign being conducted for the NYM magazine. A preview edition of NWC’s “New West” was dated February 5, 1976; this edition, intended primarily for potential advertisers, contained no paid advertising and no original feature articles. Publication had been timed so that the NWC magazine would be the first “New West” available to the public. Only one “regular” edition of the magazine appeared before publication was suspended.

The court held that NWC’s use of the title “New West” infringed NYM’s trademark and trade name and was likely to cause public confusion in violation of

Section 43 of the Lanham Act, 15 U.S.C. Section 1125. Section 1125 provides: “(a) Any person who shall use in connection with any goods or services . . . a false designation of origin, or any false description or representation, . . . and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause . . . the same to be . . . used in commerce . . . shall be liable to a civil action by any person who believes that lie is or is likely to be damaged by the use of any such false description or representation.”

Section 1125 does not require that a trademark be registered. (NYM had filed for registration in December of 1975 but the application was later opposed by NWC.) The Court found that NYM’s use of the title “New West” in its promotional displays and sales efforts constituted the requisite use in commerce.

The court pointed out that “mere advertising by itself may not establish priority of use.” However, the court determined that the totality of the activities engaged in by NYM, including the fact that over 13,500 subscriptions had been received by NYM prior to the appearance of NWC’s preview edition, sufficiently established public identification of the title “New West” with NYM, and a reasonable consumer might be confused as to the origin of the magazine “New West” if NWC continued to use the name. This could occur because of the close similarity of the logos of the two publications and the virtually identical product and market distribution area.“ The court therefore upheld an injunction barring NWC’s use of the title ”New West.“

The court modified the District Court opinion by denying attorneys fees to NYM. The Ninth Circuit had previously ruled that attorneys fees are not recoverable in trademark infringement cases under the Lanham Act.

Although California state law allows recovery of attorneys fees in competition cases (Cal. Bus. & Prof. Code Section 17082), the Ninth Circuit has limited the kind of cases to which Section 17082 can be applied.

New West Corporation v. NYM Company of California, Inc., 595 F.2d 1194 (9th Cir. 1979) [ELR 1:6:1]

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### **Unlicensed sale of films held to violate copyright law**

In an action brought by the copyright owners of certain films, the defendant, who copied and sold the films, has been found liable for copyright infringement and unfair competition by a Federal District Court in New York.

The plaintiffs distributed their copyrighted films via licensing agreements for limited periods of time and for limited purposes. They did not engage in the general

practice of selling the films, although on some occasions they had authorized the sale of short three to twenty minute segments of their films, primarily for home use. Although the court decided that the purchasers of such film segments could thereafter freely transfer the same, such a sale did not constitute a "first sale" of the entire film. The defendant had not met his burden of proving that there had been an authorized "first sale" of any of the films.

The defendant contended that he was a film collector and that his practice of regularly mailing brochures listing films for sale was a service to other collectors. The court rejected this argument, noting that the defendant's activities "went far beyond those of an amateur hobbyist."

The court ruled that the plaintiffs were entitled to injunctive relief, profits, statutory damages, full costs and reasonable attorneys fees.

Warner Bros., Inc. v. Kalish, 201 USPQ 768 (W.D.N.Y. 1978) [ELR 1:6:2]

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**Broadcaster did not infringe common law copyright in program idea submission or breach implied contract for use of idea**

In 1959, the plaintiff, John Szczesny, submitted to WGN Continental Broadcasting an idea for a television program consisting of filmed horse races and using numbered cards to determine home audience winners.” WGN acknowledged receipt of his submission but stated that no new program material was being solicited by the station. In 1967 the plaintiff viewed WGN’s program “Let’s Go To the Races,” which showed films of horse races. Viewers of the program could obtain and subsequently redeem coded winning tickets it a

sponsoring retailer for cash prizes. The plaintiff brought an action against WGN contending that “Let’s Go To The Races” infringed his common law copyright in his idea and that WGN had breached an implied contract for the use of the subject matter of that copyright. A jury finding that the program had been independently developed by WGN and was not based on the plaintiff’s idea has been affirmed by the Illinois Appellate Court in an opinion rendered in October 1977, but published only recently.

WGN presented evidence that an independent television producer who developed programs and sold them to stations, networks and advertisers began to develop the idea of a horse racing television show with an audience participation aspect as early as 1955, and no one at WGN spoke to the producer about the plaintiff’s idea. In addition, the producer, the sponsor of “Let’s Go To The Races” and the individuals at WGN involved with



the program denied any knowledge of the plaintiff's idea.

The court noted that the doctrine of common law copyright provides that "an idea is entitled to protection as a property right where the idea is novel or original" and "Where such a protectible property right is appropriated, a cause of action for common law copyright infringement based upon a tort theory or a quasi-contract theory arises. In order to recover plaintiff must prove copying. An inference of copying arises upon a showing of substantial similarity between plaintiffs work and defendant's work and access to plaintiff's work by defendant."

The court held that any inference of copying had been conclusively rebutted by proof that WGN had Independently developed the subject matter of the common law copyright.

In his appeal, the plaintiff alleged error in a jury instruction and two special interrogatories. The instruction at issue stated, “A contract for the use of an idea is not valid unless the idea as submitted was novel, original and concrete. . . . When I use the word novel in these instructions to refer to an idea, I mean that the idea did not previously exist.” The court noted that the plaintiff had not made timely objections to the instruction and special interrogatories, and held that his objections were waived. Nevertheless, the court stated that the instruction requiring novelty “represents the traditional view on the elements of an action for breach of an implied contract for the use of an idea protected by common law copyright.” The court pointed out, however, that this requirement had been rejected in California. *Blaustein v. Burton*, 9 Cal.App.3d 161 (1970).

The court also determined that the two special interrogatories, one directed to the novelty of the plaintiff’s

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idea submission and the other to whether WGN had used the contents of the plaintiff's letter in connection with its program, were properly directed to the ultimate facts of the case and the plaintiff had not established any prejudice resulting therefrom.

Szczesny v. W.G.N. Continental Broadcasting Corporation, 201 USPQ 703 (Ill.App. 1977) [ELR 1:6:2]

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**Florida Appellate Court holds that Ringling Brothers Circus must pay the full amount of property tax on property located in Florida on the lien date**

A Florida Appellate Court has held that Ringling Bros.-Barnum and Bailey Combined Shows, Inc. must pay property taxes on personal property utilized in and on railroad cars used to transport the circus. Ringling is

a Delaware corporation with a principal place of business in Washington, D.C. It has divided its circus into two units, which were designated the Red Unit and the Blue Unit. Each unit has its own equipment and animals, and tours separately throughout the United States and Canada utilizing railroad cars owned by Ringling. Generally each unit utilizes one show for a period of two years. Each unit spends some time in Venice, Florida, where the show is assembled and rehearsed, and maintenance is performed on the equipment. At the end of its tour each unit returns to the Venice facility. Each unit was present in Venice on January 1st, the lien date for the tax.

In 1971, the tax authorities assessed all of the tour and railroad property physically located at the Venice facility at 100% of its value. Ringling Brothers objected, and after a hearing the Board of Tax Adjustment apportioned the tax on the basis of the number of days that the

property was in Florida. In 1972, the full value of the property was taxed despite objection by Ringling. In the tax years 1973 through 1976 the Florida tax authorities continued to assess the tour and railroad property at 100% of its value. The Board reduced the assessments for 1975 and 1976 on the railroad property under a provision of the law allowing for a reduction for railroad property of a private car line. After exhausting its administrative remedies on these assessments, Ringling filed suit contending that it was not subject to tax at all and if it were subject to tax, the tax should be apportioned according to the number of days the property was located in Florida per year.

The trial court held that the property of Ringling was not “permanently located” in the State of Florida and that the tax must be apportioned by multiplying the assessed value by a fraction, the numerator of which was the number of days each item was present in Florida and

the denominator of which was the number of days in the year.

The property involved had not been subject to personal property taxation by any other state.

The Appellate Court reasoned that personal property is located at the domicile of its owner regardless of where it is physically located on the assessment date. Furthermore, a permanent domicile requires merely a location which is not temporary sitory. Based on this reasoning, the court held that the property was permanently located within Florida and was subject to personal property taxation. The court next held that although goods in interstate commerce may be taxed by state authorities, the tax must be apportioned so as to avoid an undue burden on interstate commerce. However, the court reasoned that Ringling's property had either not entered or had left the stream of interstate commerce and was, therefore, subject to full taxation.

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In *Ice Capades, Inc. v. County of Los Angeles*, 56 C.A.3d 745 (1976), a California court held that apportionment is required where the taxpayer was able to establish that another state could have levied a tax on the property.

*Mikos v. Ringling Bros.- Barnum and Bailey Combined Shows, Inc.*, 368 So.2d 884 (Fla.App. 1979) [ELR 1:6:3]

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**Road manager of rock band was entitled to disability benefits since band was employer under workers compensation statute**

Plaintiff Terrance Zak, the road manager of a rock and roll band, was entitled to workers' compensation benefits for injuries he suffered in a car accident while

returning from an engagement with the band, according to the Supreme Court of Minnesota. The court held that the subsequently dissolved band “Gypsy” was an employer under the workers’ compensation statute and upheld the decision of the workers’ compensation judge awarding disability benefits to the plaintiff.

The Minnesota state treasurer, as custodian of the compensation fund from which the benefits would be paid, contested the award. The treasurer contended that the plaintiff was not entitled to workers’ compensation benefits since he was employed by the five individual members of Gypsy and that because of “the ethereal nature of the group, the lack of an identifiable leader, and the manner by which employee was paid,” Gypsy was not an employer within the meaning of the workers’ compensation law. The plaintiff was paid by checks drawn from the private checking accounts of the members, not from the Gypsy account.



The relevant statute defines employer as “any person who employs another to perform a service for hire, and includes corporation, partnership, association, group of persons . . .” (Minn. St. 176.01 1, subd. 10). The court, in discussing the statutory requirement, pointed out that “a formal organization or a highly stratified structure is not in itself determinative of whether a group of persons may be viewed as an employer; the nature of the group must also be considered.”

According to the court, Gypsy was a self-sustaining entity and the fact that it lacked a formal structure and that its members shared management of the group did not preclude Gypsy from being an employer within the meaning of the statute.

The court also found that the plaintiff was entitled to receive benefits from a special state fund for injuries not compensated for by uninsured employers.

Zak v. Gypsy, 279 N.W.2d 60 (1979) [ELR 1:6:3]

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## **Unconstitutional seizure results in reversal of three separate obscenity decisions**

The U.S. Supreme Court has held that the presence of a Town Justice during a police search for and seizure of allegedly obscene materials did not validate a search warrant that failed to describe with particularity the items to be seized.

The warrant, issued by a Town Justice in New York State, was based on the affidavit of a police investigator who had purchased two movies at an adult bookstore. After viewing the movies, the Justice upheld the investigator's determination that there was reasonable cause to believe that the movies Violated state obscenity laws. The warrant therefore authorized a search of the

bookstore and the seizure of other copies of the two movies. However, the investigator's affidavit also stated that similar movies and printed matter could be found at the bookstore and requested the Justice to accompany the investigator in executing the search warrant in order to determine if any other items were subject to seizure. Although no items other than the two movies purchased by the investigator were listed or described on the warrant at the time it was signed, the warrant contained a recital authorizing the seizure of "[t]he following items which the Court independently (on examination) has determined to be possessed in violation of . . . Law."

Police and prosecutorial officials and the Town Justice conducted a six-hour search at the bookstore. The Town Justice, after briefly examining certain movies and printed material, ordered the seizure of approximately 850 items. These items were subsequently listed on the search warrant.

After obscenity charges were filed against the bookstore owner, he sought in a pretrial motion to suppress the introduction into evidence of the seized material, alleging that the search and seizure violated the First, Fourth and Fourteenth Amendments. (Although the bookstore owner entered a guilty plea upon denial of his motion, he was able to appeal the denial under New York law.) The Supreme Court described the search warrant and subsequent seizures as the type of activity “against which the Fourth Amendment was intended to protect.” The “sweeping open-ended” authorization of the warrant “left it entirely to the discretion of the officials conducting the search to decide what items were likely obscene.” The Court found that the Town Justice was not acting as a neutral and detached judicial officer when he participated in the “police operation” but rather seemed to be an “adjunct law enforcement officer.” The Court distinguished *Heller v. New York*, 413 U.S. 483

(1973), in which a judge viewed a movie in a theater as a paying patron and then issued a warrant for the seizure of the viewed movie for use as evidence. The warrant for the seizure of the one movie was upheld as constitutionally permissible so long as a prompt adversary hearing was held on the Issue of obscenity. The Court rejected the state's contention that the presence of the

the obscenity of the items seized.

In reversing the decision of the New York appellate court, the Supreme Court also rejected the state's contention that no warrant was needed since the bookstore owner displayed items to the general public and therefore had no expectation of privacy against government intrusion. The Court held that an invitation to the public to enter was not equivalent to consenting to a search and seizure that violated the Fourth Amendment. The Court pointed out that the bookstore clerk had not consented

to the search since, having been placed under arrest at the beginning of the search, he could not have been considered voluntarily cooperative.

The Court of Criminal Appeals of Texas has reversed the conviction of a seller of allegedly obscene materials due to the prejudicial effect of the admission into evidence of certain items seized during a warrantless search of an adult bookstore.

A police detective purchased an allegedly obscene magazine at the bookstore and after arresting appellant on the premises, proceeded to seize a total of 17 books, magazines and movies. The detective did not examine carefully the contents of any of the items seized and did not consult with a Justice of the Peace who was present during the search as to the obscenity of any of the items, including the purchased magazine. Although only the cover of the magazine was visible, the court found that the scenes of sexual contact depicted gave the detective

probable cause to believe that state obscenity laws had been violated and therefore, the warrantless arrest was valid. But the court held that the subsequent warrantless search exceeded constitutional bounds because there was no preseizure opportunity to determine obscenity.

According to the court, First Amendment considerations require that where seizure is sought of allegedly obscene materials, the judgment of the arresting officer alone is insufficient to justify issuance of a search warrant or a seizure without a warrant incident to an arrest. The procedure for determining probable cause must afford an opportunity for the judicial officer to “focus searchingly on the question of obscenity.” The Justice of the Peace had not made a determination of obscenity meeting this standard.

The Court then pointed out that the 17 items introduced in evidence remained in their original wrappings throughout the trial. The jury was instructed by the

judge not to remove the cellophane wrap on certain magazines when examining the items. The court noted that it was therefore impossible for the jury to determine whether the material “taken as a whole appealed to the prurient interest.” By viewing only the covers and not the contents, the jury could not determine whether any of the depictions of sexual contact were “harmless beyond a reasonable doubt.” Although the 17 items might otherwise have been admissible as circumstantial evidence to show the seller’s knowledge of the contents of the allegedly obscene magazine purchased by the detective, the court held that the failure to allow the jury to view any of the movies, magazines or books in their entirety constituted prejudicial error requiring reversal.

In the third decision, the Supreme Court of Missouri reversed judgments in two civil proceedings brought by the State of Missouri seeking forfeiture and destruction of allegedly obscene movies and magazines. Missouri

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statutes set forth a detailed procedure for conducting the requisite adversary hearing prior to the seizure of obscene material. The defendant had received notice of an adversary hearing and as a result was prohibited from removing any of the material at issue from a guarded warehouse — the material consisted of approximately 1,000 movies and 13,000 magazines.

The court held that the restraint of all copies of the movies and magazines between the time of notice of the hearing and the holding of the hearing (although the hearings were scheduled within ten days of the issuance of the notice) was a prior restraint and constitutionally impermissible under the First, Fourth and Fourteenth Amendments. The court noted that a prior restraint of one copy of each movie or magazine alleged to be obscene may be permissible but that more material had been held than was necessary to determine the question of probable obscenity.

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A concurring opinion discoursed on the need to recognize the right to privacy as well is the right to speak freely when considering obscenity matters.

Lo-Ji Sales, Inc. v. State of New York, Docket No. 78-511, June 11, 1979; Price v. State of Texas, 579 S.W.2d 492 (1979); State of Missouri v. All Star News Agency, Inc., 580 S.W.2d 245 (1979) [ELR 1:6:4]

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**Advertising discount practices held not to violate antitrust laws**

A book club's antitrust action against the New York Times, Time Incorporated, four leading advertising agencies and the American Association of Advertising Agencies, Inc. has been dismissed by a federal District Court in New York City. According to Ambook, Inc.,

the New York Times and Time Magazine had a policy under which advertising space would be made available to advertising agencies at a discount of 15%. This discount was allegedly available to advertisers dealing directly with publishers. The advertising agencies would charge their clients the full list price for the advertising; the 15% difference between the client's payment and the publication's advertising charge would be retained as compensation by the agency. Ambook contended that the defendants had entered into a combination and conspiracy to coerce advertisers such as Ambook to purchase the services of advertising agencies at an excessive rate.

In granting summary judgment to the defendants, the court extensively reviewed the background of the fee structure of the advertising industry. When the American Association of Advertising Agencies was organized in 1917, it attempted to standardize the already common

practice of percentage discounts from standard “rate card” rates, and eventually it was successful in establishing the 15% discount. But in 1956, as a result of a civil antitrust action instituted by the Department of Justice, consent judgments were entered enjoining the Association and other trade associations from engaging in any practice which prevented media from granting commissions to advertisers dealing directly or to house agencies. Among the prohibited practices were the practice of fixing the amount of commissions allowed to agencies or compensation received by the agencies from their clients, and the practice of giving rebates of the media discount to their clients.

Ambook contended that despite the consent decree, the defendants continued to violate Section 1 of the Sherman Act.

However, the court found that Ambook had failed to present any evidence that the defendants had prevented

advertising agencies from making independent compensation arrangements with their clients. A wide variety of such arrangements was shown by the defendants. The court pointed out that any similarity among such arrangements could be characterized as legal parallel conduct rather than a conspiracy.

The court also noted that Ambook's own advertising agency had not been named as a defendant in the action and that there was little evidence as to whether Ambook was "coerced" into dealing with its agency or whether the agency's compensation had been fixed by a combination or conspiracy. Testimony revealed that Ambook had never asked its agency to rebate any of the 15% discount allowed by the publishers. And in its one attempt to deal directly with a publisher, Ambook apparently had not provided Time with sufficient information to establish its right to the discounted rate structure. The court therefore held that there was no evidence which

would permit a finding of conspiracy by any defendant at any time after 1956.

Ambook Enterprises v., Time Inc., 464 F.Supp. 1127 (S.D.N.Y. 1979) [ELR 1:6:5]

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**National Hockey League bylaw making one-eyed player ineligible held not to violate antitrust laws; application of identical American Hockey League bylaw enjoined as violation of New York Human Rights Law**

Gregory Neeld, a one-eyed hockey player, claimed that an NHL bylaw denying eligibility to sight-impaired players was anti-competitive and constituted an illegal boycott. A Federal Court of Appeals in California has found that the primary purpose of the bylaw was to

promote safety, not to stifle competition, and has affirmed summary judgment on behalf of the NHL.

Neeld had argued that a specially built safety mask afforded him adequate protection from injuries. The court noted that the adequacy of the mask had no relevance to whether the NHL, bylaw violated antitrust laws. The court took judicial notice that ice hockey is a very rough physical contact sport and that the NHL, had a legitimate concern about injuries to Neeld or to other players if Neeld were permitted to play.

Neeld brought a similar action two years ago against the American Hockey League in a Federal District Court in New York. The AHL has a bylaw identical to that of the National Hockey League regarding the eligibility of sight-impaired players. In the New York action, Neeld contended that by denying him an opportunity to play hockey, the AHL violated federal civil rights laws and New York's Human Rights Law which prohibits

discrimination against the employment of disabled individuals.

The court held that Neeld had established a valid cause of action under New York law. The court noted that the AHL had not justified its bylaw as being a bona fide occupational qualification. And the court pointed out that “a person who is partially or totally blind has a constitutional right not to be discriminated against by an employer . . .”

The court also held, however, that Neeld had not established sufficient state involvement with the alleged discriminatory conduct on the part of the AHL in order to raise a claim under federal law. Although Neeld contended that eight of the nine AHL member teams played their home games in municipally owned facilities, the court stated that this fact alone would not support the requisite finding of state action.



The court concluded that denying Neeld an opportunity to play hockey would result in the possibility of irreparable harm to his athletic career. The court granted a preliminary injunction prohibiting the AHL from applying its bylaw to Neeld within the state of New York and prohibiting AHL members located within the state from applying the bylaw to Neeld.

Neeld v. National Hockey League, 594 F.2d 1297 (9th Cir. 1979); Neeld v. American Hockey League, 439 F.Supp.459, 15 EPD Para. 7904 and 16 EPD Para. 8183 (W.D.N.Y. 1977) [ELR 1:6:6]

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**Arbitration panel rules that for the purpose of Major League Baseball's maximum salary reduction provisions for unsigned players, certain bonuses may properly be considered part of salary**

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An arbitration panel has ruled that under Major League Baseball's maximum pay reduction provisions for unsigned players, Atlanta Braves' third baseman Bob Horner is entitled to 80% of not only his previous year's base pay, but also of certain bonuses. In so ruling, the arbitration panel rejected Horner's other contention that he was a free agent.

The dispute between Horner and the Atlanta Braves arose during negotiations for a 1979 contract. Horner was seeking a three-year pact worth \$1 million, while the Braves were offering \$75,000 for the single year 1979. Failing to come to terms with the club, Horner took the position that the minimum compensation that could be paid for 1979 under Major League Baseball's maximum salary reduction provisions was \$146,400, which was 80% of the \$183,000 that Horner claimed he had earned in 1979 including various bonuses. The Braves disagreed with this position. They contended that the

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maximum salary reduction provisions did not apply to bonuses, which, in Horner's case totalled \$161,000 for 1978. Nevertheless, the club tendered to Horner ii contract for \$146,400, but under protest and subject to adjustment following an arbitration hearing. When Horner refused to sign the contract, the Braves sent to him a letter which deemed his 1978 contract renewed in accordance with the terms of the 1979 contract that had been tendered.

These events precipitated the filing of three grievances, two by the Players Association on behalf of Horner and one by the Atlanta Braves. The arbitration panel rejected the Players Association's two grievances, both of which asserted that Horner was a free agent. The basis of the first grievance was that the Braves had tendered only a conditional contract (i.e., one under protest and subject to adjustment following an arbitration hearing). The panel noted that "the mere fact that compensation

provisions of a tendered contract may be subject to a condition does not automatically make the tender insufficient.” According to the panel, “[t]he test of this tender therefore is simply whether it was in such form that acceptance by Horner would have resulted in formation of a contract . . .” In answering this question in the affirmative, the arbitration panel ruled that the Braves had not failed to tender properly to Horner a new contract.

The basis of the Players Association’s second grievance was that the Braves had attempted to renew Horner’s 1978 pact in accordance with the terms of the allegedly improper 1979 offer. Because the panel found the 1979 offer to be deemed the renewal to be valid as well; therefore Horner was not a free agent.

The Atlanta Braves sought to resolve the question of Horner’s 1978 salary, to which the maximum 20% reduction applies. Horner’s 1978 contract included a \$21,000 basic pay rate, two \$75,000 bonuses, a \$5,000

payment for educational expenses, and an incentive bonus payment plan (which had earned Horner \$7,500 since he had made the Brave's Major League club). Concurrently with the signing of this 1978 contract with Horner, the Braves had also hired Horner's father as a scout for \$7,500. The arbitration panel ruled that Horner's 1978 salary for purposes of computing the maximum pay reduction allowable, consisted of the \$21,000 basic pay rate and the two \$75,000 bonuses, for a total of \$171,000. In support of the inclusion of the two \$75,000 bonuses, the panel cited a previous contract case (involving Tom House of the Seattle Mariners) in which American League President L.S. MacPhail, Jr., recognized that certain bonuses may properly be considered part of salary for purposes of the maximum salary cut. The panel also noted that the purpose of the maximum salary reduction provision is to protect the player

against a drastic reduction in his compensation from one year to the next.

The exclusion of the two \$75,000 bonuses, according to the panel, “would convert the provision from its intended protective shield for the Player into a negotiation tool for the Club.” In excluding the \$7,500 earned under the incentive bonus payment plan and the \$5,000 payment for educational expenses, the panel relied on the dictionary definition of “salary,” which emphasizes the basic features of definiteness and regularity. Since the incentive bonus payments depended on contingencies provided for in Horner’s first contract that could not possibly occur more than once and the \$5,000 payment was an expense reimbursement for a particular occasion, these payments, according to the panel, should not be considered part of Horner’s 1978 salary. The panel ruled that the \$7,500 paid to Horner’s father under a separate contract “clearly was not an amount payable to

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Horner pursuant to the terms of his contract, and could not part of his salary needing protection under the maximum cut.” Thus the arbitration panel ruled that Horner’s maximum salary reduction for 1979 should be 20% of \$171,000, that is, \$136,800.

In the Matter of the Arbitration Between Major League Baseball Player Relations Committee (Atlanta National League Baseball Club, Inc.) and Major League Baseball Players Association (James Robert Horner), Panel Decision No. 39, Grievance Nos. 78-28, 79-1, 79-4 (June 6, 1979) [ELR 1:6:6]

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**Briefly Noted:**

**Copyright.**

A Federal District Court has retained jurisdiction over a copyright infringement action although the defendants, who had filed petitions under Chapter XI of the Bankruptcy Act, contended that the Bankruptcy Court had exclusive jurisdiction over claims against the defendants' property. The court noted that copyright infringement, an intentional tort, would not be a provable claim in a Chapter XI proceeding. Thus, in order to provide a forum for the plaintiffs to assert their claim, the court denied the defendants' motion to dismiss or to stay its proceedings.

Broadcast Music, Inc. v. Leisure Properties, Inc., 201 USPQ 685 (N.D.Ohio 1978) [ELR 1:6:7]

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### **Invasion of Privacy.**

An appellate court has reduced the amount of damages awarded by a jury to the subject of a photograph used without consent by the defendant publisher in violation of Section 51 of New York's Civil Rights Law. Characterizing punitive damages in the amount of \$35,000 as "grossly excessive," the court reduced the amount to \$15,000.

Cohen v. Hallmark Cards, Inc., 415 N.Y.S.2d 657 (1979) [ELR 1:6:7]

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### **Tax.**

A legal secretary was denied a deduction representing the cost of writing and publishing a book of poetry where she failed to produce evidence showing an

intention to continue in the writing field for the purpose of producing income and a livelihood.

Lonnie Hawkins, Jr. v. Commissioner, T.C. Memo 1979-101, 38 T.C.M. 469 [ELR 1:6:7]

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## **DEPARTMENTS**

### **In the Law Reviews:**

Copyright: The Betamax Case, 10 University of Toledo Law Review 203-233 (Fall 1978)

Copyright Musical Compositions: “Public Performance for Profit” as Affected by the 1976 Act, 28 Drake Law Review 146-166 (1978-1979)

Media Conglomerates, Antitrust Law, and the Marketplace of Ideas, 9 Memphis State University Law Review 257-280 (Winter 1979)

Achieving Diversity in Media Ownership: Bakke and the FCC, 67 California Law Review 231-255 (January 1979)

FCC Content Regulation of Cable Pay-Television: The Threat of Pacifica, 9 Cumberland Law Review 811-929 (Winter 1979)

FCC Regulation of Cable Pay-Television, 54 New York University Law Review 204-236 (April 1979)

FTC Regulation of Television Advertising to Children: They Deserve A Break Today, 30 University of Florida Law Review 946-978 (Fall 1978)

A Litigation Strategy on Behalf of the Outstanding High School Female Athlete by Donna J. Hitchens, 8 Golden Gate University Law Review 423-442 (Spring 1979)

Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX, 88 Yale Law Journal 1254-1279 (May 1979)

Constitutional Fair Use, 20 William and Mary Law Review 85-123 (Fall 1978)

The Copyright Act of 1976: Its Effect on Higher Education's Use of Music by Leslie Reicin Stein, 6 Journal of Legislation 66-75 (1979)

Professional Sports Franchises and the Treatment of League Expansion Proceeds by William Reabe Jr., 57 Taxes 427 (July 1979) [ELR 1:6:8]

