RECENT CASES

Universal and Disney lose Betamax case ; home video recording held not to infringe copyrights

Three years ago, Universal City Studios and Walt Disney Productions filed suit in Federal District Court in Los Angeles against Sony Corporation, its advertising agency, several retailers who carry its Betamax video recorder, and an individual Betamax owner, alleging that the recording of programming produced by Universal and Disney constituted an infringement of their copyrights. Universal and Disney also alleged that Sony, its advertising agency, and Betamax retailers were either direct or contributory infringers, or were vicariously liable for the copying done by Betamax owners in their homes, and that the retailers had infringed their copyrights when they recorded Universal and Disney programs during in-store demonstrations of Betamax recorders. Universal and Disney also contended that the defendants had interfered with their business relations and had unfairly competed with them, and that they would suffer great monetary damage if this alleged infringement were allowed to continue.

The defendants denied that home video recording for home use constituted copyright infringement, and also denied that Sony, its advertising agency, and retailers could be liable for infringement, either directly or vicariously, for recording done by Betamax owners in their own homes.

On October 2, 1979, after a five-week trial conducted earlier this year, Federal District Judge Warren J. Ferguson filed a 102-page opinion in which he held that neither the Copyright Act of 1909 nor the revised Act of 1976 enable copyright owners to prevent an individual from recording programs off-the-air in that individual's home for private, non-commercial use. The court specifically stated that it was not deciding whether tape duplication, pay television recording, or recording for use outside the home is also permissible. The court also held that: even if the Copyright Act did prohibit home-use recording, Sony, its advertising agency and Betamax retailers would not be liable directly, contributorily or vicariously for recording done by Betamax owners in their homes; the retailers did not infringe Universal's and Disney's copyrights when they recorded portions of their programs during in-store demonstrations; even if home-use recording were an infringement of copyright, and the defendants were liable therefor, the court could not grant the injunction requested by Universal and Disney; and none of the defendants unfairly competed with Universal and Disney or interfered with their advantageous business relations.

The court found that home-use recording was not an infringement of copyright, because the legislative history of the 1976 Act (including the legislative history of the 1971 Sound Recording Amendment which was merged into the 1976 Act) convinced the court that Congress intended not to prohibit homeuse recording. According to the court, the "legislative history shows that, in balance, Congress did not find that protection of copyright holders' rights over reproduction of their works was worth the privacy and enforcement problems which restraint of home use recording would create."

The court also found that home-use recording was a "fair use," under both the 1909 Act and the 1976 Act, and thus is not an infringement for that reason as well. The "fair use" doctrine permits reasonable uses of copyrighted material without the owner's consent. In this case, the court found home-use recording to be reasonable, because it is non-commercial, and because the court found that it does not reduce the market for Universal's and Disney's programs. (The "harm" issue was one that was vigorously debated during the course of the trial. Universal and Disney maintained that harm to their copyrights would not only be a probable effect of Betamax usage, but an imminent effect. Nevertheless, Universal and Disney admitted that no actual harm has occurred to date, and their expert witnesses admitted that they knew neither the year in which the predicted harm would occur nor the number of Betamax purchases which would cause the harm.)

In conclusion, the court said "This litigation leaves many issues undecided," and that "the full resolution of these issues is 'preeminently a problem for Congress.'" Though it ruled against Universal and Sony, the court specifically noted that it did not minimize their concerns. Said the court, "The new technology of videotape recording does bring uncertainty and change which, quite naturally, induce fear. History, however, shows that this fear may be misplaced. . . Television production by plaintiffs today is more profitable than it has ever been, and, in five weeks of trial, there was no concrete evidence to suggest that the Betamax will change the studios' financial picture."

Universal and Disney have announced their intention to appeal.

Universal City Studios, Inc. v. Sony Corporation of America, 480 F. Supp. 429, CCH Copyright Law Reports, Para. 25,106 (C.D.Cal. 1979) [ELR 1:11:1]

Arbitrator rules that Steve McQueen did not perform services as a Director in violation of DGA Basic Agreement during filming of movie Horn

Arbitrator Martin Gang has ruled that Steve McQueen and his corporation, Solar Productions, Inc., did not violate the Basic Agreement of the Directors Guild of America in connection with services performed by McQueen on the motion picture "Horn."

McQueen is the Executive Producer and star of the picture (which is being produced by Solar), and has creative and business control over the production. James Guercio, the first director of the picture, was terminated and William Wiard was hired as director. The DGA contended that Solar actually had replaced Guercio with both Wiard and McQueen and that McQueen's performance of directing services violated Sections 7-101, 7-203 and 7-1401 of the DGA Basic Agreement. Those sections provide that no one may direct a motion picture except the Director assigned to it; that there may be only one Director assigned to direct a motion picture at any given time; and that no person assigned to or performing in a particular motion picture before a Director is replaced may replace that Director.

Testimony indicated that Wiard performed as the director and that although McQueen offered suggestions to Wiard, Wiard's functions as a director were not infringed upon. Wiard designed the shots, instructed the cameraman as to camera position, participated in selecting the lens, instructed the crew as to property, special effects, equipment and layout and design of sets, and instructed actors on the interpretation of roles, staging of scenes and movements before the camera.

The arbitrator therefore found that from the time of his hiring until the completion of the film, Wiard alone acted as director and there was no violation of the Basic Agreement.

In the Matter of the Arbitration between the Directory Guild of America, Inc. and Solar Productions, Inc., Before the Arbitration Tribunal of the Directors Guild of America, Inc., Case No. 00286 (July 17, 1979) [ELR 1:11:2]

Universal s movie The Hindenburg did not infringe copyright to book, because only facts and ideas were similar

In 1937, the German dirigible Hindenburg exploded while docking in New Jersey. An official investigation was conducted which concluded that the most likely explanation for the explosion was that hydrogen leaked from the gas bag and was ignited by a spark. However, sabotage was also considered to be a possible cause.

In 1962, A. A. Hoehling wrote a book entitled “Who Destroyed the Hindenburg” which sought to prove that the explosion was in I fact the result of sabotage.

Thereafter, Michael Mooney wrote a somewhat fictionalized book about the occurrence, entitled "The Hindenburg," in which Mooney adopted the sabotage theory as true. Universal's movie "The Hindenburg" was based on Mooney's book and also assumed that the explosion was the result of sabotage.

Hoehling asserted that there were 266 similarities between his book and Mooney's book, and 75 similarities between his book and Universal's movie. As a result, he filed a copyright infringement and unjust enrichment suit against Universal and Mooney in Federal District Court in New York city.

Universal and Mooney contended that the only similarities between the works were historical facts and the idea concerning the identity of the saboteur and the method the saboteur used to cause the explosion; and that neither historical facts nor ideas are copyrightable. Hoehling, on the other hand, contended that the similarities included similarity of expression, and that the expression of historical facts is copyrightable.

The court reviewed all of the alleged similarities and concluded that some were not similar at all, that others dealt only with the theory of the sabotage, and that the rest were similarities of facts. Such similarities of expression as did exist were quotations from the record of the official investigation or other third sources.

Accordingly, the court granted motions for summary judgment made by Universal and Mooney on Hoehling's copyright claim. The court also granted Universal and Mooney summary judgment on Hoehling's unjust enrichment claim, on the grounds that unjust enrichment claims are preempted in cases of this kind by the Copyright Act (citing the Sears and Compco cases, 376 U.S. 225 & 234 (1964)).

In the course of its opinion dismissing Hoehling's copyright infringement claims, the court expressly disagreed with an earlier case in which Universal was also a defendant, Miller v. Universal City Studios, 460 F.Supp.984 (S.D.Fla. 1978). In that case, a jury returned a $200,000 verdict against Universal and ABC, finding that the movie “The Longest Night” infringed the copyright to a book written by Gene Miller entitled “83 Hours Till Dawn.” In that case, as in “The Hindenburg” case, most if not all of the similarities were factual ones. Nevertheless, the Federal District Judge in Florida who presided over the jury trial denied the defendants’ motion for a new trial, because, he said, “The law is clear that research can be copyrightable . . . The court views the labor and expense of the research involved in the obtaining of those uncopyrightable facts to be intellectually distinct from those facts and more similar to the expression of the facts than to the facts themselves. . . In the age of television `docudrama’ to hold other than research is copyrightable is to violate the spirit of the copyright law and to provide to those persons and corporations lacking in requisite diligence and ingenuity a license to steal." Miller v. Universal City Studios has been appealed to the Court of Appeals, where it is now pending.

Hoehling v. Universal City Studios, CCH Copyright Law Reports, Para. 25,096 (S. D. N. Y. 1979) [ELR 1:11:2]

Federal Court of Appeals affirms injunction obtained by Dallas Cowboys Cheerleaders prohibiting distribution of parody poster

In 1977, five members of the Dallas Cowboys Cheerleaders posed for a poster, more than threequarters of a million copies of which were sold by December of 1979 at an average retail price of $2.50. The Texas Cowgirls are a group of former Dallas Cowboys Cheerleaders. Five Texas Cowgirls posed for a poster mimicking the Cowboys Cheerleaders poster. In the Texas Cowgirls poster, however, the halter tops of the Cowgirls uniforms are unbuttoned, leaving their breasts exposed.

In December of 1978, the Dallas Cowboys Cheerleaders filed suit against the Texas Cowgirls and the manufacturer and distributor of the Cowgirls poster, alleging that the Cowgirls poster constituted copyright and service mark infringement and unfair competition.

A Federal District Court granted the Cheerleaders a preliminary injunction, finding it probable that the Cowgirls poster was a copyright infringement, that it constituted a false representation in violation of the Trademark Act, and that it constituted unfair competition. The District Court also found that there was a likelihood of confusion in the minds of the public between the two posters, and that distribution of the Cowgirls poster would cause the Cowboys Cheerleaders irreparable harm.

A Federal Court of Appeals has affirmed the preliminary injunction, despite the Cowgirls' contention that the injunction violated their First Amendment rights and that their poster was a parody of the Cheerleaders' poster and thus protected under the doctrine of "fair use."

The Court of Appeals held that First Amendment values were not the only ones at stake in the case, and that the Constitution also gave Congress the right to protect authors from exploitation by others, as Congress did in the Copyright Act. "The first amendment is not a license to trammel on legally recognized rights in intellectual property," the court said. The court found it obvious that the Cowgirls poster was intended to imitate the

Cheerleaders poster, "so it could derive parasitic value from it."

Furthermore, said the Court of Appeals, not all parodies and satires are protected as a fair use. Two parodies that were not protected under the fair use doctrine, the court pointed out, were Jack Benny's parody of the movie "Gaslight" (Benny v. Loew's, 239 F.2d 532 (9th Cir. 1956), affd., 356 U.S. 43 (1958)), and the "Air Pirates" parody of Disney characters (Walt Disney Prod v. Air Pirates, 581 F.2d 751 (9th Cir. 1978)).

The line between fair use and infringement is not always easy to divine, the Court of Appeals said. The court noted that the Cowgirls may have established a fair use defense, had they proceeded to trial where they could have developed their proof. Instead, said the Court of Appeals, the Cowgirls rushed to appeal. On appeal, the court explained, its function was not to try the case, but merely to determine whether the District Court abused its discretion. In this case, the Court of Appeal found no abuse of discretion, and thus affirmed the preliminary injunction.

Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184 (5th Cir. 1979) [ELR 1:11:3]

Breach of contract and emotional distress judgment in favor of Don Chuy against the Philadelphia Eagles is affirmed by appellate court

In June of 1969, Don Chuy signed three National Football League Standard Player Contract forms with the Philadelphia Eagles for the 1969, 1970 and 1971 seasons. In November of 1969, Chuy injured his shoulder in a game, and an examination during his hospitalization revealed a blood clot in his lung, which ended his professional football career.

A Philadelphia sports writer telephoned the Eagles' team physician for further information on Chuy's medical condition, and was incorrectly told that Chuy had a different and fatal disease. Chuy read the article, became apprehensive, broke down emotionally, and, frightened by the prospect of imminent death, refused to submit, for several months, to medical tests recommended by his personal physician which would have shown he did not have the fatal disease.

The Eagles refused to pay Chuy for the remaining two years of what he asserted was a three-year contract, and eventually Chuy sued the Eagles and the National Football League for antitrust violations, breach of contract intentional infliction of emotional distress, and defamation. A Federal District Court in Philadelphia dismissed his antitrust claim, and that dismissal was not appealed.

Chuy v. Philadelphia Eagles, 407 F.Supp. 717 (E.D.Pa. 1976). Thereafter, Chuy's remaining claims were tried by a jury which returned a verdict in his favor on the breach of contract and emotional distress claims, and against him on his defamation claim. The District Court then entered judgment in Chuy's favor for his 1970 and 1971 salaries on his breach of contract claim and for $10,000 in compensatory damages and more than $60,000 in punitive damages on his emotional distress claim. A Federal Court of Appeals has affirmed on all counts.

In defense to Chuy's breach of contract claim, the Eagles contended that the three Standard Player Contract forms he had signed were three separate, consecutive, one-year contracts, and that insofar as the 1970 and 1971 contracts were concerned, Chuy had failed to satisfy the provision requiring him to establish that he was in excellent physical condition. The Eagles thus argued that Chuy was entitled to receive the balance of his 1969 salary only.

Chuy, on the other hand, argued that the contract forms provided that if he were injured during the "term of this contract," he would be paid the balance of the salary called for during the "term of this contract," and that the three forms he had signed together constituted a contract having a three-year term. The District Court concluded that the forms were ambiguous, and thus permitted the jury to decide whether Chuy had entered into one three-year contract (as he contended) or three one-year contracts (as the Eagles contended).

The jury agreed with Chuy; and the Court of Appeals agreed that because the three forms had overlapping terms, they were ambiguous, and the District Court had been correct in permitting the jury to decide. The Court of Appeals also reviewed the evidence itself and found there to be sufficient evidence from which the jury could have concluded that Chuy and the Eagles had intended that Chuy be compensated for three years in the event he were injured while playing football.

The Court of Appeals also affirmed the jury's verdict that the Eagles' team doctor had intentionally or recklessly caused Chuy emotional distress when the doctor incorrectly told the press that Chuy had a fatal disease. The Eagles were held liable for the doctor's statement, because the Eagles had the right to control his statements to the press.

Finally, the Court of Appeals affirmed the jury's verdict against Chuy and in favor of the Eagles in connection with the defamation claim. It did so, because the illness which the Eagles' team doctor had incorrectly told the press Chuy had was not a "loathsome disease," nor was it contagious or the result of socially repugnant conduct. Accordingly, the statement that Chuy had such a disease, while untrue, was not defamatory.

Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265 (3d Cir. 1979) [ELR 1:11:4]

California Supreme Court to hear libel and privacy lawsuit against Vincent Bugliosi filed by man mentioned in Helter Skelter

Helter Skelter, Vincent Bugliosi's book about the Manson case, mentioned a young community health worker named James Forsher in connection with the disappearance of Ronald Hughes, a Manson case defense attorney who was later found dead. As a result, Forsher sued Bugliosi and his publishers for libel and invasion of privacy. The trial court dismissed the case, but the California Court of Appeal reversed, holding that Forsher's complaint stated causes of action for both libel and invasion of privacy. The California Supreme Court has now agreed to hear the case, however, thereby automatically vacating the opinion of the Court of Appeal.

The book's offending passages depicted Forsher and a companion going to Sespe Hot Springs with Hughes the weekend he disappeared. According to the Court of Appeal, the passages may have been libelous, because they "insinuated" that Forsher may have been involved in the alleged murder of Hughes. The particular legal issue involved is whether Forsher alleged the insinuation by pleading facts which were not in the book. If the insinuation had been established by pleading such extrinsic facts (known as "innuendo"), then Forsher would not have stated a cause of action for libel, because he alleged no special damages. (Under California law, general damages may be recovered only when the libel is apparent without reference to extrinsic facts.)

In this case, the Court of Appeal held that the complained of passages were libelous on their face and required no pleading or proof of special damages. While the defendants argued that Forsher had used innuendo in pleading his libel action, the court found that Forsher had merely included allegations in his complaint "to explain the context" of the book's passages in which he was named and "to point out the defamatory implications of the passages." For anyone who had read the entire 600 page book, these explanations were not necessary, the Court of Appeal said.

The Court of Appeal also found that Forsher had stated a cause of action for invasion of privacy. While Forsher conceded that the facts surrounding Hughes' disappearance and death were constitutionally protected because they were newsworthy, he based his privacy claim on the publication of his true name and identity in connection with those facts, citing the California Supreme Court's decision in Briscoe v. Reader's Digest Association, 4 Cal.3d 529 (1971). Briscoe distinguished between crimes long past and recent crimes. Reports of recent crimes and the names of suspects are protected under the First Amendment. Where the crime occurred in the past, however, Briscoe distinguished between the facts of the crime and the identity of the actor. "Once legal proceedings have terminated, and a suspect or offender has been released, identification of the individual will not usually aid the administration of justice," the California Supreme Court said in that case.

Bugliosi and his co-defendants relied on a decision of the United States Supreme Court, Cox Broadcasting v. Cohn, 420 U.S. 469 (1975), which held that the existence of a First Amendment privilege was based on whether public documents identified the actor.

Applying both Cox and Briscoe to Forsher's invasion of privacy claim, the California Court of Appeal concluded that reports of recent crimes should be privileged whether or not the information was on public record.

(Forsher's identity had never been placed in public documents, but had appeared only in local news reports.) Thus, the Court of Appeal concluded that if the Manson case were considered contemporaneous with the publication of Forsher's name and identity in Helter Skelter, the publication would be privileged. In determining whether the Manson case was "contemporaneous" for the purposes of Forsher's privacy claim, the Court of Appeal stated that two factors should be considered by the trial court: the nature of the crime, and the extent of the role played by the person claiming invasion of his privacy.

Whether the trial court ever gets the case again will of course depend on the ruling of the California Supreme Court.

Forsher v. Bugliosi, 93 Cal.App.3d 475 (1979); hearing granted by California Supreme Court [ELR 1:11:4]

Home Box Office obtains permanent injunctions prohibiting former affiliates from intercepting its television program transmissions

In March of 1979, a Federal District Court in New York issued a preliminary injunction barring Pay TV of Greater New York, Inc., a former Home Box Office affiliate, from intercepting HBO television program transmissions. (ELR 1:5:2) The legal basis for the preliminary injunction was Section 605 of the Communications Act of 1934 which prohibits any person not entitled to intercept or receive radio communications from doing so and from using such communications for his own benefit. After the preliminary Injunction was issued, Home Box Office moved for partial summary judgment and a permanent injunction; and the court has granted HBO's motion.

Pay TV of Greater New York contended that HBO had used it to test the market until HBO could bring a subsidiary into the business, and that HBO had conspired with others in violation of the Sherman Act to that end Pay TV also contended that an affiliation agreement between it and HBO should be implied from their conduct, and that the implied agreement provided for a five-year term with "reasonable" compensation to HBO.

The court rejected both of those contentions, however. It was particularly critical of the "implied agreement" argument, calling it "absurd" and "wholly irrational." Thecourt found that Pay TV had shown nothing from which any rational inference could be drawn that the parties had agreed upon an affiliation agreement, but that even if they had, the five-year term would have made such an agreement unenforceable under the

Statute of Frauds because it could not have been performed within one year.

As a result, the court granted HBO a permanent injunction, based both on Section 605 of the Communications Act and on the Copyright Act, prohibiting Pay TV from intercepting or in any way using HBO's program service and from retransmitting any of HBO's works which were copyrighted and registered as of the date the injunction was issued. The court specifically declined to consider whether, under the Copyright Act, it could enjoin retransmission of works not then copyrighted but expected to be in the future.

In a similar but otherwise unrelated lawsuit, another Federal District Court in New York permanently enjoined Orth-O-Vision, Inc., also a former HBO affiliate, from intercepting and retransmitting HBO program transmissions. Though decided after the decisions in the Pay TV case, the court in the Orth-0-Vision case did not base its ruling on Section 605 of the Communications Act. This court concluded that HBO transmissions may be broadcasts intended for the public, and thus outside the protection afforded by Section 605. This court also rejected HBO's contentions that Orth-0-Vision's interception of its transmissions constituted unfair competition and violations of a New York statute which makes it unlawful for a person to obtain telecommunications service intending to avoid payment for it. The court held that the unfair competition theory had been preempted by the Copyright Act. And it ruled that it could not grant summary judgment on the New York statute claim, because it is a criminal statute and had never been construed to create a private cause of action, and because Orth-O-Vision contended it did not intend to avoid payment for HBO's transmissions, it merely intended to defer making payment for them.

The court did find, however, that Orth-O-Vision's secondary transmissions of HBO's programs constituted infringements of HBO's copyrights, and it issued a permanent injunction on those grounds. Although Orth-O-Vision argued that the injunction should be limited to the 12 copyrighted works it had already retransmitted to its subscribers, the court ruled, "Where, as here, liability has been determined adversely to the infringer, there has been a history of continuing infringement and a significant threat of future infringement remains . . ., the court determines that it is well within its equitable powers to enjoin infringement of future registered works." Thus the court did so, enjoining Orth-O-Vision's infringement of all of HBO's present and future copyrighted works.

Home Box Office, Inc. v. Pay TV of Greater New York, Inc., CCH Copyright Law Reports, Para. 25,089 (E.D.N.Y. 1979); Orth-O-Vision,lnc. v. Home Box

0ffice, CCH Copyright Law Reports, Para. 25,093 (S.D.N.Y. 1979) [ELR 1:11:6]

Briefly Noted:

Tortious Conduct.

A restaurant owner claimed that television newsmen had fraudulently obtained his consent to accompany a state inspector on an examination of the restaurant, and that a subsequent broadcast describing the results of the examination caused a loss of patronage. The Kansas Court of Appeals has held that compensatory damages may be recovered for injury resulting from the publication of information acquired by tortious conduct, and punitive damages may also be recovered "if the tortious conduct constitutes fraud or a willful, wanton, or malicious invasion of the injured party's rights." However, in this case, the jury finding that the plaintiffs were not entitled to recover compensatory damages for trespass was upheld by the court.

Belluomo v. KAKE TV & Radio, Inc., 596 P.2d 832 (Kan.App. 1979) [ELR 1:11:6]

Racing Regulations.

The New York Supreme Court, Appellate Division, has held that proper notice was not given by the State Racing and Wagering Board of an alleged violation of a Harness Rule involving the claiming of a horse by an unqualified person. (The notice given made no reference to the Rule in question.) The court confirmed a finding that another Harness Rule had been violated but annulled the Board's order of a 15-day suspension and remanded the matter for reconsideration of the appropriate punishment.

With v. Sarafan, 418 N.Y.S.2d 13 (1979) [ELR 1:11:7]

Tax.

The Supreme Court of Utah has denied taxexempt status to an athletic and recreational facilities complex. The facility was not the property of the city (in which case an exemption would have been available) even though the city had sponsored the record title holder's issuance of bonds for the facility's benefit. And, according to the court, although the facility's owner was a non-profit corporation, its activities were undertaken with a profit motive and not with a gift or charitable impulse.

Thus, the tax exemption provided under the Utah Constitution for property used exclusively for charitable purposes also would not apply.

Salt Lake County v. Tax Commission, 596 P.2d 641 (Utah 1979) [ELR 1:11:7]

Employment Discrimination.

A Federal District Court in Maryland has held that the National Duckpin Bowling Congress — a nonprofit corporation that promulgates rules and regulations for duckpin bowlers, monitors duckpin tournaments and tours, qualifies tournament or tour directors for employment, and generally regulates sanctioned duckpin bowling events — was neither an "employer" nor an "employment agency" under Title VII of the Civil

Rights Act of 1964 which prohibits employment discrimination. The only employers subject to Title VII are those that have 15 or more employees; the NDBC had only 5, and the court refused to consider it a "joint employer" along with its many tournament sponsors. The court also held that its role in the accreditation and appointment of tour directors did not make it an "employment agency." Accordingly, the court dismissed an employment discrimination suit filed by a woman whom the NDBC had declined to appoint as a Tour or Tournament Director.

Bonomo v. National Duckpin Bowling Congress, Inc., 469 F.Supp. 467 (D.Md. 1979) [ELR 1:11:7]

NEW LEGISLATION AND REGULATIONS

Internal Revenue Service rules that motion pictures financed in part with nonrecourse loans from the Small Business Administration are not entitled to investment tax credit on the portions so financed

The I.R.S. has ruled that a Small Business Investment Company that finances motion pictures produced by unrelated businesses is not entitled to the investment tax credit on portions of films funded with the proceeds of loans from the Small Business Administration.

The SBIC in question, a limited partnership, proposed to invest in four independent production companies in exchange for contractual interests in the exploitation of the films that were to be produced. The SBIC intended to provide 50% of the production costs from its own funds and 50% from nonrecourse borrowings from the S.B.A.

The I.R.S. noted that a taxpayer's investment tax credit is limited by the taxpayer's "ownership interest" in a qualified film. "Ownership interest" is determined by the taxpayer's proportionate share of any loss which may be incurred with respect to the production costs of a film. Since a taxpayer's loss with respect to films is limited by the amount the taxpayer has "at risk," borrowed funds may be considered only to the extent the taxpayer is personally liable.

Accordingly, the SBIC could not take investment tax credit for the portion of the films financed with funds it borrowed on a nonrecourse basis from the S.B.A.

Rev. Rul 79-255, I.R.B. 1979-35,5; 79(10) CCH Standard Federal Tax Reporter, Para. 6788 [ELR 1:11:5]

DEPARTMENTS

Book Review:

The Law of Sports by John C. Weistart and Cym H. Lowell

Duke University law professor John Weistart and Atlanta lawyer Cym Lowell spent six years researching and writing their 1,035-page treatise, The Law of Sports. What is remarkable about their book is not that it took them 12 man-years to finish, but rather that only two people were able to finish it at all. For in fact there is no such thing as “sports law.” Instead, there is a sports “industry” which is affected by a very wide variety of laws, many of which are totally unrelated to one another.

One of the things which makes The Law of Sports remarkable, and which must have made its writing such an enormous task, is the breadth of the coverage it gives to several of these unrelated legal fields. For example, the book devotes a chapter each to labor, tax and tort law — chapters which are such complete overviews of these subjects that they amount to "nutshell" treatises in themselves. While this means that many pages of the book discuss legal principles that have yet to be applied to sports in particular, those principles which have been applied to sports are discussed in context, and their significance is more readily seen.

Labor, tax and tort law affect sports in rather particular ways: labor law in connection with collective bargaining between leagues and players associations; tax law in connection with income taxation of athletes and teams; and tort law in connection with assessing liability for injuries. Other subjects are not quite as neat in their application, however. Antitrust law, for example, is relevant to player allocation rules (such as the draft and option clauses), discipline, and ownership and movement of professional teams; while enforcement of player contracts requires an application not only of contract law, but also remedies, equity, and arbitration. As a result, in these areas, the authors were confronted with some difficult organizational decisions — decisions which others may have made differently.

The book's discussion of the interpretation and enforcement of professional player contracts is split into two chapters, one entitled "Legal Relationships in Professional Sports" (which discusses, among other things, contract interpretation, termination of contracts by teams, no-cut clauses, and trades) and another entitled "Enforcement of Professional Sports Contracts" (which treats enforcement of player contracts, defenses available to players, arbitration of contract disputes, and jurisdictional issues). While dividing such a large subject into two chapters was not at all unreasonable, the chapter entitled "Legal Relationships in Professional Sports" has mixed into it discussions concerning player agents, the relationships of teams within a league, and the role of the commissioner in league governance — subjects which are not related to enforcement and interpretation of player contracts.

Similarly, the book's discussion of player discipline is divided into two chapters. The contract law aspects of player discipline are discussed in the chapter entitled "Legal Relationships in Professional Sports," and the antitrust law aspects of player discipline are discussed in the chapter entitled "Antitrust Aspects of Sports Activities." The book's treatment of the legal issues involved in acquiring a professional team are also divided into these two chapters.

Fortunately, a detailed table of contents and a good index make it easy to locate the book's discussion of any subject, thus permitting the reader to reorganize the material while using the book, if the authors' organizational decisions are not the ones the reader would have made.

While the bulk of the book concerns legal issues that have arisen in the world of professional sports, the book treats amateur sports issues as well. A chapter entitled "Regulation of Amateur Athletics" discusses such disparate topics as the rights of amateur athletes, amateur standing, the athlete-coach relationship, participation in non-approved events, and rule-making and enforcing activities of amateur athletic organizations.

The book also contains a chapter entitled "Public Regulation of Sports Activities" which is a potpourri on such subjects as state athletic regulatory commissions, sex and race discrimination, gambling, and violence in sports.

Anyone interested in the legal aspects of sports will find this excellent book a valuable addition to his or her library.

The Law of Sports is published by Bobbs-Merrill, P.O. Box 7587, Charlottesville, Virginia 22906; Phone (804) 295-6171. [ELR 1:11:7]

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[ELR 1:11:8]