NEW LEGISLATION AND REGULATIONS

Copyright Act is amended to provide greater protection to music publishers and sports broadcasters, to clarify copyright restoration provisions, and to authorize Copyright Office to raise fees to cover its costs

In the final weeks of its first session, the 105th Congress passed a bill to make what it called "technical amendments" to the Copyright Act. Indeed, some of the changes are merely technical. But many of the changes are enormously important, at least to the affected industries.

One of these important changes gives music publishers protection they badly needed in the wake of two judicial decisions that threatened to put countless songs in the public domain. Another gives sports teams, and others, greater protection against the unauthorized use of their live television broadcasts. Still another revises the copyright restoration provisions of the Act in essential ways. And one gives the Copyright Office the authority to raise its fees, in order to cover its costs of operation.

Music publishers

Insofar as music publishers are concerned, one of the changes made by Congress in the "technical amendments" bill was so important, it was worthy of a bill of its own. Indeed, in the beginning, when music publishers first went to Congress for relief, the bill that was introduced focused exclusively on their concern.

What concerned music publishers was the probability that countless songs from the pre-1978 era would be considered to be in the public domain, as a result of two recent judicial decisions. The decisions in question were those of the Ninth Circuit Court of Appeals in La Cienega Music v. ZZ Top (ELR 16:10:13) and of a federal District Court in Nashville in Mayhew v. Gusto Records, Inc. (reported in this issue at ELR 19:7:8).

These two cases held that the pre-1978 distribution of a recording of a song constituted a "publication" of that song. This holding was more significant than it may seem at first, because the Copyright Act of 1909 required "published" works to have proper copyright notices on them. Any work published without a copyright notice automatically fell into the public domain. Moreover, publication of a work (with notice) started the initial 28-year term of its copyright, thus requiring its copyright to be renewed 28 years later. The copyrights to works first published before 1964 had to be renewed, by filing renewal applications with the Copyright Office, or they too fell into the public domain once their initial 28-year terms expired.

Apparently, before 1978, it was unusual for recordings to have copyright notices on them. Moreover, when songs were released only on recordings - when no sheet music versions were published, for example - music publishers usually did not file copyright renewal applications with the Copyright Office.

These things were not done, because the music industry did not consider the distribution of recordings to constitute a "publication" of the recorded songs, for at least two reasons. First, in a case called Rosette v. Rainbo Record, the highly respected Second Circuit Court of Appeals held that the distribution of a recording did not publish the songs on it. And second, the Copyright Office itself also was of that view, and indicated as much in the instructions printed on copyright registration forms.

The Ninth Circuit's decision in La Cienega Music v. ZZ Top created a conflict with the Second Circuit's decision in Rosette v. Rainbo Record. But inexplicably, the United States Supreme Court denied La Cienega Music's petition for certiorari. Thus, the conflict remained in place. And it meant that in the Ninth Circuit (which includes California and other western states) and much if not all of the Sixth Circuit (which includes Tennessee, Michigan, Ohio and Kentucky), songs were injected into the public domain - even if they still would be protected in the Second Circuit (which includes New York, Connecticut and Vermont) and perhaps elsewhere. Music publishers reportedly estimated that they would have lost as much as $4 million in royalties immediately, and at least $1 million a year in the future, as a result of the La Cienega Music and Mayhew v. Gusto Records decisions.

This then was the state of affairs that music publishers presented to Congress, along with a requested solution. Congress responded by enacting the publishers' solution. Congress did so by amending the Copyright Act to provide (in a new section 303(b)) that "The distribution before January 1, 1978, of a phonorecord shall not for any purpose constitute publication of the musical work embodied therein." With that one sentence, Congress in effect overturned La Cienega Music v. ZZ Top and Mayhew v. Gusto Records, and it wrote the holding of Rosette v. Rainbo Music into the Copyright Act itself.

Editor's note: In general terms, the legal issue raised by the cases that led to this new provision is whether the distribution of a derivative work (which is what a recording is) constitutes a publication of the underlying work embodied in it (which is what a song is). This same general question has arisen in the movie industry. For movies, the question is whether the distribution of a movie constitutes a publication of the script from which a movie was made. Most recently, this very question was asked in the "Little Shop of Horrors" case - Shoptalk, Ltd. v. Concorde-New Horizons (ELR 17:12:4). There, a federal District Court held that the distribution of the movie version of "Little Shop of Horrors" did not publish the script from which it was made, and thus the screenwriter was entitled to continue to receive royalties from producers of a musical stage play, even after the movie's copyright expired. The court that reached this decision was in the Second Circuit, and so the result followed logically from a straightforward application of that Circuit's Rosette v. Rainbo Records decision. Presumably, however, the result in the "Little Shop of Horrors" case would have been different, had it been brought in the Ninth Circuit, which by that time had already decided La Cienega Music v. ZZ Top.

Ironically, if the "Little Shop of Horrors" case, or another like it, were brought in the Ninth Circuit today, the result would still be different. This is so because when Congress amended the Copyright Act to overturn La Cienega Music, it used language that refers only to "phonorecords" and the "musical works." Movies and screenplays, of course, are neither.

Sports broadcasters

Sports broadcasters were not in as dire straits as music publishers, but they too had concerns worthy of Congressional attention.

Most sports broadcasts are live. Copyright protection has traditionally been provided only to works that are "fixed" in some tangible medium. Videotape will do, to satisfy the fixation requirement. So to provide protection to sports and other live broadcasts, the

Copyright Act provides (in section 411(b)) that live broadcasts may by fixed (by videotaping, for example) when the broadcast takes place, and the copyright owner may thereafter sue for infringement, if the copyright owner satisfies a couple of conditions.

One of the necessary conditions requires the owner of the copyright in the broadcast to serve anticipated infringers with a notice identifying the time and source of the live broadcast. Until now, this notice had to be served at least 10 days in advance of the broadcast. For many sports events, it has been impossible to serve notice 10 days in advance, because the specific events to be broadcast are not known that far in advance. As a result, Congress has amended the Copyright Act to permit the necessary notice to be served as little as 48 hours in advance.

Editor's note: Reducing the deadline for serving the necessary notice to 48 hours should provide sports and other live broadcasters with significant additional protection against the unauthorized use of their events, though there was even more that Congress could have done, but didn't - quite possibly because it wasn't asked. The traditional notion that works must be "fixed" in order to be eligible for copyright protection comes from the Constitutional provision that gives Congress the power to enact copyright legislation in the first place. Article I Section 8 of the Constitution authorizes Congress to protect "writings" - a word that courts long along interpreted to require something tangible. However, in 1994, Congress added an entirely new section 1101 to the Copyright Act to provide copyright protection for live musical performances. (ELR 17:2:6) That section does not require live musical performances to be fixed at the time they occur, or ever, to be eligible for the protection it provides. Since live musical performances are not "writings" under even the broadest definition of that word, the Constitutional foundation for such protection apparently is the Commerce Clause, rather than Article I Section 8. If the Commerce Clause is sufficient to authorize Congress to protect live musical performances - and I can see no reason to think it's not - then the Commerce Clause also authorizes Congress to protect live broadcasts of sporting and other events. If Congress were so inclined, it could do so without requiring those broadcasts to be videotaped as the event takes place or ever, and - more importantly - Congress could entirely eliminate the requirement that anticipated infringers be served with notices in advance or at all.

Copyright restoration

In 1995, Congress added a new provision to the Copyright Act -codified at Section 104A - that restored copyright protection to certain works of foreign origin that had fallen into the public domain in the United States. (ELR 17:3:3) The copyright restoration provision of the legislation that produced section 104A was just a tiny part of a huge bill that implemented the GATT Uruguay Round Agreement. Congress decided to give "fast track" treatment to the entire bill. This meant that members only could vote "yes" or "no" on the bill as a whole; no amendments were permitted. This was, no doubt, necessary in order to get the GATT implementation bill enacted at all. As a consequence, however, the copyright restoration provisions - conceptually and practically, among the most significant amendments ever made to the Copyright Act - contained significant ambiguities. As a result, the effective date of copyright restoration, and the bill's effects on derivative works, both were unclear.

Congress has now corrected these ambiguities. Section 104A now specifies that January 1, 1996 was the date that copyrights were restored to eligible works (from those countries that adhered to the Berne Convention or were WTO members on that date). Also, it is now clear that section 104A does cover derivative works that are based on restored works from eligible foreign countries.

Copyright Office fees

The Copyright Act (section 708(b)) has been amended to authorize the Copyright Office to increase its fees in order to cover its operating costs. This amendment became necessary for two reasons.

First, although the Copyright Office has always charged fees for its services, its operating expenses in recent years have exceeded its receipts by some $10 million annually, and thus it has received that amount in annual appropriations. Private and internal management reviews have recommended that the Copyright Office become a "full-cost recovery" operation. Since these recommendations were consistent with budget deficit reduction, they were of course endorsed by Congress.

Second, when the Copyright Office was first authorized to increase its own fees in 1989, the legislation permitted it to do so only every 5 years. It did so in 1990 but not in 1995; and the 1989 legislation was ambiguous about whether the Office had to wait until the year 2000 to do so again, and about whether the next increase would be limited to an upward adjustment from the 1990 fees. Congress has now authorized the Office to increase its fees in any year (though not more often than once every 5 years), and to do so by whatever amount is necessary to cover its costs.

Technical amendments

Finally, the new legislation does make a number of changes that can be characterized as "technical." It corrects errors in the Satellite Home View Act of 1994 (which resulted from Congress' failure to take into account that it had replaced the Copyright Royalty Tribunal with Copyright Arbitration Royalty Panels the year before, and which mistakenly reversed rates set for satellite carriers back in 1992). It ensures that rates established in 1996 under the Digital Performance Rights in Sound Recordings Act will not lapse if the Copyright Arbitration Royalty Panel does not finish its rate-setting proceeding before December 1, 2000. It restores definitions of "jukebox" and "jukebox operator" which were mistakenly deleted when the old jukebox compulsory license was replaced with the current negotiated jukebox license. It clarifies provisions of the Copyright Act that concern the administration of the Copyright Arbitration Royalty Panels. It gives the Librarian of Congress flexibility in setting the negotiation period for the distribution of digital audio record technology royalties. And it makes assorted spelling, grammatical, capitalization and other corrections to the Act.

Public Law 105-80, H.R. 672, 105th Congress (1997) [ELR 19:7:4]

Congress passes No Electronic Theft Act; certain copyright infringements are now federal crimes, even if offenders do not infringe for commercial purposes or financial gain

Most copyright pirates are in it for the money. It can be more lucrative than legitimate licensed publishing, and it's not as dangerous as drug dealing.

But not all of those who reproduce and distribute copyrighted works without permission are motivated by money. Some are simply hobbyists who sincerely (if mistakenly) believe that software "yearns to be free." This seems to be especially true on the Internet, where many people fail to distinguish between what can be done, as a matter of electronics, and what ought to be done or not done, as a matter of law.

An MIT graduate student named David LaMacchia was one of those who was technically adept, but couldn't distinguish between "can" and "ought." He set up an electronic bulletin board (the precursor to today's World Wide Web sites) on which he encouraged like-minded souls to upload and download copyright-protected computer games and other software, without the consent of copyright owners. LaMacchia did not do this for commercial purposes or for financial gain. His activities did, however, cause financial harm to the owners of the copyrights to the games and software involved.

Because his activities constituted copyright infringement, the federal government prosecuted him, though it had to charge him with wire fraud rather than criminal copyright infringement. The government was unable to bring a criminal prosecution against LaMacchia, because at the time, criminal infringement required proof that the offender's infringing activities were for "purposes of commercial advantage or private financial gain." As it happened, the government's wire fraud case failed too, because the court concluded that Congress did not intend to protect copyrights under the federal wire fraud statute.

Congress has now plugged the loophole through which LaMacchia escaped criminal liability. Congress has done so by passing the No Electronic Theft (NET) Act. The NET Act amends the Copyright Act (section 506(a)) so that it now provides that criminal copyright infringement includes not only infringements committed for commercial advantage or private financial gain, but also the reproduction or distribution, by any means including electronic, of copyrighted works which have a total retail value of more than $1,000.

Criminal copyright infringement is now punishable by imprisonment for as long as a year if the infringed works have a retail value of more than $1,000 but less than $2,500, and as long as three years if they have a retail value of $2,500 or more. Second and subsequent convictions are punishable by imprisonment for as long as six years.

No Electronic Theft (NET) Act, H.R. 2265, 105th Congress (1997) [ELR 19:7:6]

RECENT CASES

Agreement granting MGM "perpetual" distribution rights to "King of Kings" did not expire at end of movie's first copyright term; federal District Court holds that agreement is valid for movie's renewal term too, even though agreement did not specifically refer to "renewal term"

Federal District Judge Barbara Jones has confirmed what most people in the movie business have long thought. A grant of "perpetual" distribution rights lasts forever; it does not expire 28 years after the movie was first released - not even if the movie is from the pre-1978 era, and thus its copyright is divided into an initial 28-year term and a separate 47-year renewal term.

Judge Jones made this ruling in a case that arose as a result of a dispute over whether Turner

Entertainment still has exclusive distribution rights to the 1961 movie "King of Kings," or whether instead Turner's rights expired when the movie's copyright was renewed by P.C. Films Corp. in 1989.

Both P.C. Films and Turner acquired their rights in "King of Kings" from others. The movie was produced by Samuel Bronston Productions with $4 million in financing provided by MGM. In return for its money, MGM acquired from Bronston the "perpetual" right to distribute the movie throughout most of the world, though Bronston retained the movie's copyright. Several years later, Bronston went bankrupt, and P.C. Films acquired Bronston's rights in the movie. Several years after that, Turner acquired MGM's library, including its distribution rights in "King of Kings."

P.C. Films renewed the movie's copyright in 1989, and then notified Turner that its seemingly "perpetual" right to distribute "King of Kings" expired when the movie's initial copyright term ended. This was so, P.C. Films argued, for two reasons. First, "copyright protection is necessarily limited in nature, and . . . a copyright proprietor can only contract with respect to what it owns." Second, the original grant of distribution rights to MGM did not use the phrase "renewal term," and thus the "well-established presumption against finding a conveyance of rights for the renewal period" means that renewal term rights were not granted in this case.

Judge Jones, however, was not persuaded. "Clearly, a copyright is different from a distribution license," she explained. "Accordingly, analysis of a copyright's duration should not necessarily apply when considering the duration of a distribution license." Rather, general principles of contract interpretation apply. In this case, Judge Jones concluded, the contract between Bronston and MGM was "plain and unambiguous in its provision of perpetual distribution rights." Moreover, even if it were ambiguous, the judge credited the testimony of MGM's former General Counsel, Benjamin Melniker, who reaffirmed that "the parties intended to convey perpetual rights."

Finally, Judge Jones noted that the result sought by P.C. Films would "work an injustice not only to the parties, but more generally to those contracting in the film distribution and financing industry." This was so, the judge explained, because the contract language used by Bronston and MGM to convey perpetual distribution rights was standard in the industry, as illustrated by three separate books: Donald Farber's Entertainment Industry Contracts Negotiating and Drafting Guide; Renee Harmon's The Beginning Filmmaker's Business Guide; and John Cones' Film Finance & Distribution.

P.C. Films Corp. v. Turner Entertainment Co., 954 F.Supp. 711, 1997 U.S.Dist.LEXIS 1204 (S.D.N.Y. 1997) [ELR 19:7:8]

Federal District Court in Nashville rules that several pre-1978 songs are in public domain, because recordings of some of them were sold to the public without copyright notices, and because copyrights to others were renewed too early

In a ruling that dramatizes the harshness of certain features of the old Copyright Act of 1909, a federal District Court in Nashville has ruled that six songs published by Mayhew Music Co. are now in the public domain, for two different reasons. It did so in a copyright infringement action brought by Mayhew against

Gusto Records and others, and thus the court granted the defendants' motion for partial summary judgment.

Four of the songs are in the public domain, the court ruled, because recordings of them were sold to the public during the 1950s and '60s, and those recordings did not contain copyright notices. The legal issue presented by this part of the case was whether the public sale of a recording constitutes "publication" of the recorded song, because if so, the Copyright Act of 1909 required the recordings to contain copyright notices.

This issue had been addressed in published but conflicting opinions by two appellate courts. In Rosette v. Rainbo Record Mfg. Corp., the Second Circuit adopted a Southern District of New York ruling which held that the release of a recording does not constitute "publication" of the recorded songs under the 1909 Act; and thus the songs on the recording do not lose their copyrights even though the recording did not contain copyright notices. On the other hand, in La Cienega Music v. ZZ Top, the Ninth Circuit Court of Appeals expressly declined to follow the Rosette v. Rainbow Record decision and held instead that the release of a recording does constitute a publication under the 1909 Act; and thus the songs on the recording do lose their copyrights if the recording fails to contain copyright notices (ELR 16:10:13).

The United States Supreme Court denied La Cienega Music's petition for certiorari, thus leaving the conflict between the Second and Ninth Circuits in place (ELR 17:6:27).

The federal District Court in Nashville decided to follow the Ninth Circuit's La Cienega Music decision, rather than the Second Circuit's Rosette v. Rainbow Record decision. It did so for two reasons: first, because it thought that "La Cienega is the better reasoned view"; and second, because an unpublished decision of the

Sixth Circuit Court of Appeals had earlier rejected Rosette as well, and Nashville is in the Sixth Circuit.

The Nashville court also held that two additional songs are in the public domain, because copyright renewal registrations for them were filed with the Copyright Office too early. The songs in question were first published on January 24, 1946, and copyright renewal registrations for them were filed on January 22, 1973 - three days before the 28th year of their initial copyright terms began on January 25th, 1973. Under the 1909 Act, copyright renewal registrations had to be filed "within one year prior to the expiration of the original term," and this meant that renewal registrations had to be filed "inside the relevant one year period, and not . . . before the commencement of such period," the court held. Thus since the "application for renewal was filed three days too early," it was "ineffective," thus putting those two songs "in the public domain."

Editor's note: La Cienega Music and this court's ruling on the issue of "publication by sale of a recording" have been effectively overturned by Public Law 105-80 - legislation signed by President Clinton on November 13, 1997. (See the "New Legislation and Regulations" section of this issue of the Entertainment Law Reporter for a report on this legislation. ELR 19:7:4)

Mayhew v. Gusto Records, Inc., 960 F.Supp. 1302, 1997 U.S.Dist.LEXIS 4747 (M.D.Tenn. 1997) [ELR 19:7:8]

Trial court grants judgment as a matter of law to boxer Mike Tyson, setting aside $4.4 million jury verdict won by trainer Kevin Rooney; judge rules that oral agreement to employ Rooney "for as long as Tyson fights professionally" was not for a definite term and thus could be terminated at will by either party

Mike Tyson has won - but only in the final round - a breach of contract lawsuit filed against him by his former trainer Kevin Rooney. Tyson's manager Cus D'Amato had promised Rooney that he would be Tyson's trainer "for as long as Tyson fights professionally." According to Rooney, this promise amounted to an oral contract which Tyson thereafter breached by using other trainers for seven bouts between 1989 and 1991.

Tyson stipulated that he earned $44 million for those seven fights. And apparently on the basis of

Rooney's testimony that he was to receive 10% of Tyson's earnings, the jury returned a $4.4 million verdict in Rooney's favor. But Judge Thomas McAvoy has granted Tyson's motion for judgment as a matter of law.

Judge McAvoy explained that in New York, employment is "at will" and may be terminated by either party "at any time," unless it is "for a period of time that is either definite or capable of being determined." Cases have held terms such as "permanent employment," "until retirement" or "long term" do not state a definite term. And Judge McAvoy held that the phrase "for as long as Tyson boxes professionally" does not state a term of definite duration either.

Thus, Rooney's employment was "at will" and could be terminated by Tyson at any time. For this reason, the judge said, Tyson's motion "must be granted."

Rooney v. Tyson, 956 F.Supp. 213, 1997 U.S.Dist. LEXIS 1853 (N.D.N.Y. 1997) [ELR 19:7:9]

City of Murfreesboro violated First Amendment rights of artist by removing her painting of a nude woman from the City Hall Rotunda, federal District Court rules

The City of Murfreesboro, Tennessee, violated the First Amendment rights of artist Maxine Henderson by removing her painting of a nude woman from the Rotunda of the Murfreesboro City Hall, Federal District Judge Thomas Higgins has ruled.

Henderson had been invited by the city's art committee to submit paintings for possible display in the Rotunda, and the committee decided to display all of the paintings she submitted, including one entitled "Gwen."

Judge Higgins described "Gwen" as an oil painting of "a seated white female, legs crossed at the knees, with her left arm draped across her chest. Neither her buttocks nor her genital area is visible. Approximately one half to three quarters of her left nipple is visible."

"Gwen" had been on display in the Rotunda for ten days when it was seen by a city employee who found it to be "pornographic" and "very offensive and degrading to [her] as a woman." As a result, the employee filed a sexual harassment complaint with the city. Although the city attorney did not think the painting would result in a successful Title VII suit against Murfreesboro, he did conclude that the painting violated the city's sexual harassment policy. As a result, the city attorney removed the painting from the Rotunda himself, thereby triggering a lawsuit by Henderson.

In a carefully reasoned opinion, Judge Higgins concluded that the Rotunda was a limited public forum, because the city had opened it for the display of certain works of art. Thus, any restrictions on artistic speech in the Rotunda had to be narrowly tailored to further an asserted governmental interest. In this case, the city asserted its interest was in eliminating sexual harassment in the workplace - an interest that the judge seemed to find legitimate. "The trouble lies not with the [city's] asserted interest in avoiding discriminatory conduct," Judge Higgins said, "but the manner in which it has chosen to further this interest."

At the time Henderson submitted her paintings, the city had written criteria for the selection of artworks to be displayed; but those criteria did not contain provisions for limiting the subject matter of eligible artworks. Thus, the city's "arbitrary decision to remove the painting . . . was nothing other than the subjective perceptions of municipal officials." This was fatal to the city's case, because, the judge said, "an action banning protected expression based on a standardless discretion cannot be upheld as constitutional."

After the dispute with Henderson arose, the city adopted a new policy for selecting artworks for the Rotunda, and the new policy prohibits the display of works that "infringe" the city's employment policies. Henderson challenged the constitutionality of that new policy as well, but Judge Higgins rejected the challenge. He did so, he explained, because "Gwen" had been selected and removed under the city's old policy, and Henderson had not yet been injured by the new policy. As a result, she did not have standing to challenge the new policy, the judge concluded.

Henderson v. City of Murfreesboro, Tenn., 960 F.Supp. 1292, 1997 U.S.Dist.LEXIS 4078 (M.D.Tenn. 1997) [ELR 19:7:10]

Detroit Tigers do not have to pay batboys minimum wages or overtime, federal District Court rules

The Detroit Tigers are not above the law, though they are outside a portion of it - the portion that requires most employers to pay minimum wages and overtime. Federal District Judge Avern Cohn has ruled that the Tigers do not have to pay their batboys minimum wages or overtime, because the Tigers are exempt from both the federal Fair Labor Standards Act and the Michigan Minimum Wage Law.

Federal law exempts amusement and recreational employers that do not operate for more than seven months a year, or whose average receipts for six months of a year are less than 33 1/3% of their receipts for the other six months a year. The Tigers showed that their receipts for six months during the off-season were less than 33 1/3% of the team's receipts during the season, so the Tigers qualified for the exemption from federal law on that ground.

Michigan state law has a similar exemption for amusement and recreational employers that do not operate for more than seven months a year. And Judge Cohn found that the Tigers qualified for that exemption, because the baseball season is only seven months long, and thus the Tigers do not operate for more than seven months.

In reaching his conclusion, Judge Cohn relied on a similar case, Jeffery v. Sarasota White Sox (ELR 17:11:11), where a federal Court of Appeals ruled that a minor league baseball team did not have to pay overtime to grounds keepers, because the team did not operate for more than seven months a year. However, in the Tigers case, Judge Cohn did reach a different conclusion than that reached in a case involving maintenance workers for the Cincinnati Reds and Cincinnati Bengals. In

Bridewell v. Cincinnati Reds, 68 F.3d 136 (6th Cir. 1995), cert. denied, 116 S.Ct. 1263 (1996), the maintenance workers were employed year-round, because they worked during the baseball and football seasons. And Justice Cohn distinguished the Tigers' batboys from the Cincinnati maintenance workers for that reason.

The Tigers are not altogether stingy with their batboys. Judge Cohn noted that they were paid $45 a day, and received free meals and soft drinks, free parking and game tickets, and one expense-paid road trip with the team during the season. Moreover, batboys also receive tips from the players which could amount to more than $1,500 in a season.

Adams v. Detroit Tigers, Inc., 961 F.Supp. 176, 1997 U.S.Dist.LEXIS 3416 (E.D.Mich. 1997) [ELR 19:7:10]

NFL player retirement plans are ordered to pay Walt Sweeney disability benefits at "football injury" rates, because he is permanently disabled as a result of drugs supplied to him by coaches and trainers

Walt Sweeney played in the NFL for 14 seasons, from 1963 to 1976, and is now permanently disabled as a result of football-related injuries he suffered during those years. That is the finding of federal District Judge Rudi Brewster, in a lawsuit brought by Sweeney against retirement plans established by the NFL in collective bargaining with the Players Association.

"Playing professional NFL football is a stressful, violent, painful and injury-riddled occupation that places extreme pressure on players to win," Judge Brewster found. While that finding is hardly remarkable, the judge also found that "From almost the start of his career, coaches and trainers with the San Diego Chargers and later the Washington Redskins recommended and supplied to Sweeney a plethora of prescription-strength controlled substances to increase his stamina, resistance to pain, and durability." The judge's decision is unusually blunt. "When the players go out on the grid iron they beat the hell out of each other," Judge Brewster said, and Sweeney was given "narcotics . . . to help him get over the pain and stiffness of his injuries, to get him on the playing field playing like a 19-year-old kid, [and] then . . . to calm [him] down and help [him] sleep."

Sweeney now "suffers from . . . drug addiction as a direct result of the indiscriminate administration of highly addictive drugs . . . by the Chargers and Redskins." As a result, Sweeney "is totally and permanently unable to engage in any occupation or employment." Moreover, Judge Brewster found, Sweeney's "total and permanent disability is directly related to, arising out of, and caused by NFL football activities."

Judge Brewster has therefore ordered the NFL's player retirement plans to pay Sweeney benefits at "football injury" rates. (According to news reports, those benefits amounted to $1.8 million.) Sweeney also was awarded attorneys fees of $185,000.

Sweeney v. Bert Bell NFL Player Retirement Plan, 961 F.Supp. 1381, 1997 U.S.Dist.LEXIS 5469 (S.D.Cal. 1997) [ELR 19:7:11]

Suit by successor of New Orleans rhythm-and-blues musician Henry Roeland Byrd against Bearsville Records, seeking possession of master tapes, should not have been dismissed as time barred, federal appellate court rules

"The late Henry Roeland Byrd . . . was an influential New Orleans rhythm-and-blues pianist and composer, and is widely regarded as one of the primary inspirations for the renaissance of New Orleans popular music. . . ."

So begins an opinion by federal Court of Appeals Judge Jacques Wiener in a case that thusfar turns on an exceedingly technical point of Louisiana law. The point involves how soon a suit to recover possession of personal property must be brought, in order to avoid being time-barred.

The issue has arisen because for twenty years or more, Bearsville Records has had possession of several master tapes of Byrd's performances. Moreover, some ten years ago or so, Bearsville licensed the masters to Rounder Records and Rhino Records, and both of those companies have released albums containing songs from those masters. In fact, the Rounder album earned Byrd a posthumous Grammy Award for the Best Traditional Blues Album of 1987.

Songbyrd, Inc., acquired the intellectual property rights of Byrd and his deceased widow, and sued Bearsville to recover possession of the masters. According to Songbyrd, the masters had been sent to Bearsville years ago "as demonstration tapes only, without any intent for [it] to possess [the] tapes as owners."

The suit was brought in federal District Court, which had jurisdiction because Bearsville is a New York company while Songbyrd is a Louisiana company, and thus there is diversity of citizenship. Applying Louisiana law, the District Court dismissed the case as time-barred. But the Court of Appeals has reversed.

In a decision that explores the unusual and complex nuances of Louisiana's civil (rather than common) law, Judge Wiener concluded that the District Court had misclassified the nature of Songbyrd's lawsuit, and thus had applied a shorter period of limitations than it should have. As a result, the case has been remanded for further proceedings.

Songbyrd, Inc. v. Bearsville Records, Inc., 104 F.3d 773, 1997 U.S.App.LEXIS 1762 (5th Cir. 1997) [ELR 19:7:11]

Handwritten notes of salary agreement between disc jockey and radio station were not an employment contract, because notes said nothing about duration, Florida appellate court rules

Rogelio Alfonso had been a disk jockey at a radio station in Florida for more than a decade, when the station changed its format and he was terminated, solely for that reason. Naturally, Alfonso was displeased with this development, especially because just over a year before he lost his job, he'd been offered a five-year contract by a competing station. When that opportunity arose, Alfonso negotiated a salary raise with the chairman of the company that owned the station he'd been working for, and Alfonso stayed on.

In response to his termination, Alfonso sued for breach of contract. The contract he relied on consisted of handwritten notes on the radio station owner's stationery, signed by the owner's chairman, confirming the agreement they had reached concerning Alfonso's salary raise.

At trial, Alfonso won. But his victory has been set aside by the Florida Court of Appeal. In a Per Curiam opinion, the appellate court has ruled that the Alfonso's employment relationship with his station was "terminable at will" and thus could not support a breach of contract action.

The handwritten notes on which Alfonso relied were not an enforceable contract, because an "essential term . . . was missing." The missing term concerned the duration of the purported written agreement. Alfonso argued that he understood his employment was to have lasted at least five years from the time he agreed to stay with the station he had been working for, rather than go to work for the competing station, because the competing station had offered him a five-year contract. Alfonso admitted, however, that there had been no agreement with his old station concerning the duration of his employment there, because duration was to have been the subject of further negotiations that never took place.

Since the handwritten notes said nothing about the duration of Alfonso's contract, the notes were "nothing more than `an agreement to agree' and unenforceable as a matter of law," the Court of Appeal held.

Spanish Broadcasting System of Fla. v. Alfonso, 689 So.2d 1092, 1997 Fla.App.LEXIS 219 (Fla.App. 1997) [ELR 19:7:12]

Trading card collage maker Dream Team Collectibles is entitled to trial in its "reverse confusion" trademark case complaining of NBA Properties' use of the phrase "Dream Team" to describe Olympics and World Championship teams

The cover of a 1991 issue of Sports Illustrated used the phrase "Dream Team" to describe five NBA players who were likely to be on the United States basketball team for the 1992 Olympics. The phrase was the idea of Jack McCallum, the author of the Sports Illustrated cover article. NBA Properties immediately recognized the licensing potential for the phrase, and instructed its outside trademark counsel to "follow up."

A trademark search revealed that a company called Dream Team Collectibles had already filed an application to register "Dream Team" as a trademark for "publications and printed materials." That company had been using "Dream Team" as a mark since 1986 on collages of sports trading cards. NBA Properties continued to use the "Dream Team" phrase nonetheless.

Dream Team Collectibles sued NBA Properties for trademark infringement, asserting the theory of "reverse confusion." NBA Properties counterclaimed, charging Dream Team Collectibles with selling counterfeit cards and seeking the cancellation of its trademark registration as a penalty. Both sides moved for summary judgment concerning selected issues. But federal District Judge Donald Stohr has ruled that a trial will be necessary with respect to most of them.

In defense of Dream Team Collectibles' "reverse confusion" claim, NBA Properties argued that its use of "Dream Team" is not infringing, because the media have made such extensive use of that phrase in connection with Olympic and World Championship basketball teams comprised of NBA players. This argument was based on Illinois High School Association v. GTE Vantage, Inc. (ELR 19:2:12) which held that an NCAA licensee could not be prevented from using the phrase "March Madness" in connection with a CD-ROM game based on the NCAA championship basketball tournament. The phrase "March Madness" actually was originated by the Illinois High School Association, though the media and the public have since used it extensively to refer to the NCAA tournament. A federal appellate court ruled against the Association's "reverse confusion" claim, saying that a "trademark owner is not allowed to withdraw from the public domain a name that the public is using to denote someone else's good or service, leaving that someone and his customers speechless."

Judge Stohr did not question the correctness of the "March Madness" ruling. But he did say that the "principles enunciated [in that case] do not entitle [NBA Properties] to summary judgment. In IHSA v. GTE it was undisputed that the media, not the NCAA, had created the public's association of the term March Madness with the NCAA basketball tournament. Here, a genuine issue of material fact as to whether [NBA Properties], not the media, are responsible for the public's association of the Dream Team mark with the [Olympic and World Championship] teams of NBA players."

Judge Stohr also ruled that genuine issues of material fact exist with respect to the likelihood of consumers being confused about whether NBA Properties was the source of Dream Team Collectibles' collages. Thus, the judge rejected NBA Properties' argument that summary judgment should be granted to it on that ground.

NBA Properties' counterclaimed against Dream Team Collectibles, in part because its collages do not contain a disclaimer or other explanation indicating that they are not licensed products. NBA Properties argued that trademark law requires "repackagers" to clearly indicate that their goods are repackaged. While many cases have in fact required repackagers to do just that, Judge Stohr held that those cases "do not support [NBA Properties'] contention that a repackager of trademarked goods has an absolute obligation to include a disclaimer or explanatory label on its product." The issue is whether consumers are likely to be confused, the judge explained. And in this case, "a reasonable jury could find that [Dream Team Collectibles'] `repackaging' of the trading cards, even without a disclaimer or explanatory label, is not likely to cause confusion."

Finally, NBA Properties sought cancellation of Dream Team Collectibles' trademark registration for "Dream Team" on the grounds that many of its collages were made with unlicensed color photocopies of trading cards, rather than real cards, and thus constituted "counterfeits" under copyright and trademark law. NBA Properties and Dream Team Collectibles both made summary judgment motions on this issue; and Judge Stohr granted Dream Team Collectibles' motion. The judge said that NBA Properties had cited no authority for the "proposition that cancellation of a mark is warranted when a party demonstrates some unlawful use of a mark by its owner who, for the most part, is using the mark lawfully."

Dream Team Collectibles v. NBA Properties, 958 F.Supp. 1401, 1997 U.S.Dist.LEXIS 4553 (E.D.Mo. 1997) [ELR 19:7:12]

Tommy Hilfiger's failure to do full trademark search before using "Star Class" as clothing

decoration was not evidence of bad faith, federal District Court rules

In a trademark infringement suit brought by the International Star Class Yacht Racing Association against clothing manufacturer Tommy Hilfiger, federal District Judge Robert Patterson has ruled - again - that Hilfiger's failure to do a full trademark search before using the words "Star Class" on a line of nautical clothing was not evidence of "bad faith." Thus the judge has again denied the Association's request for profits and attorneys' fees.

Following Judge Patterson's original ruling on this issue, the Second Circuit reversed and remanded the case for reconsideration. The appellate court emphasized that Hilfiger's own lawyer had advised the company to obtain a full trademark search, and said that

Hilfiger's failure to follow its lawyer's advice could constitute bad faith. (ELR 18:6:17)

On remand, Judge Patterson noted that since 1989, when the Trademark Office made its database of federally registered marks widely available, it has become less common for companies and lawfirms to conduct full trademark searches for unregistered as well as registered marks.

Moreover, the judge said, the letter to Hilfiger from its lawyer - on which the appellate court had placed so much weight - "need not be interpreted as advice to conduct a comprehensive trademark search before any use of `Star Class' but more as a `cover your backside' lawyer's disclaimer of responsibility, intended to protect the lawyer in the event of adverse consequences from the adoption of the mark, rather than to advise the client to conduct a full search before using and registering `Star Class' as a trademark."

Finally, Judge Patterson added, "since Hilfiger was only using `Star Class' as a decoration and not as a trademark, its subsequent use of `Star Class' without ordering a full search is not inconsistent with its attorney's advice and was consistent with common industry practice."

International Star Class Racing Association v. Tommy Hilfiger U.S.A., Inc., 959 F.Supp. 623, 1997 U.S.Dist. LEXIS 2358 (S.D.N.Y. 1997) [ELR 19:7:13]

Utah defeats claim by Ringling Bros.-Barnum & Bailey that state's "Greatest Snow on Earth" slogan dilutes circus' trademark "Greatest Show on Earth"

Ringling Bros.-Barnum & Bailey has suffered a serious setback in its legal campaign to prevent others from using slogans similar to its famous trademark, "The Greatest Show on Earth." Federal District Judge Thomas Ellis has dismissed the circus company's lawsuit against the state of Utah - a lawsuit triggered by the state's use of the slogan "The Greatest Snow on Earth" on license plates and tourism promotional materials.

Ringling has long had a vigorous trademark protection program, but until 1996, it was handicapped by the law's requirement that it prove a likelihood of consumer confusion in order for it to be able to get court orders prohibiting offending uses. That year, Congress amended the Lanham Act to add a cause of action for trademark "dilution." The new law permits owners of famous marks to get injunctions against others who use marks that dilute famous marks, "regardless of the presence or absence of . . . [a] likelihood of confusion."

Armed with this new law, Ringling sued Utah for dilution. The circus company was successful in an early stage of the case. Judge Ellis denied Utah's pre-trial motion to dismiss, rejecting the state's argument that the anti-dilution provisions of the Lanham Act apply only when the defendant's mark is identical to the plaintiff's (ELR 18:12:11). Though the judge decided that Ringling could proceed against Utah even though their marks are not identical, subsequent rulings in the case have favored the state.

Judge Ellis held that Ringling was not entitled to a jury trial, as it had requested. Thus, when the case went to trial, it was heard by the judge alone. At the trial's conclusion, the judge found that Ringling had satisfied two elements of its dilution claim - its mark is famous, and Utah adopted its offending mark after Ringling's mark became famous. But the judge ruled that Ringling had not satisfied the third essential element of its claim, because it had not proved that Utah's slogan actually dilutes Ringling's famous mark.

Dilution can be shown by tarnishment or blurring. Ringling did not claim that Utah's slogan tarnishes the circus company's trademark; but it did claim that its mark was blurred by the Utah slogan. Judge Ellis explained that "Dilution by blurring . . . occurs where consumers mistakenly associate the famous mark with goods and services of the junior mark. In this way, the power of the senior mark to identify and distinguish goods and services is diluted." Ringling offered survey evidence to support this type of blurring. It showed that within Utah, only 25% of those asked associated the incomplete phrase "The Greatest --- on Earth" with Ringling alone, as compared to 41% of those asked nationwide. According to Ringling, this showed that people in Utah associate the uses of Ringling's and

Utah's marks, thereby diluting "The Greatest Show on Earth."

However, Judge Ellis also ruled that " . . . no blurring occurs where consumers do not mistakenly associate or confuse the marks and the goods or services they seek to identify and distinguish." On this point, some of Ringling's survey evidence hurt, rather than helped. The judge noted that Ringling's survey showed that outside of Utah, the state's slogan is virtually unknown; and thus outside of Utah, the state's slogan has caused no dilution of Ringling's mark. Within Utah, 46% of those asked associated "The Greatest Show on Earth" with Ringling, as compared to only 41% elsewhere. "Thus, the power of Ringling's famous mark to identify and distinguish the Circus is as strong within Utah, where the junior mark is ubiquitous, as it is outside of Utah, where the junior mark is essentially unknown.

This is strong evidence of the absence of dilution, not the presence of it."

The judge also applied a multi-factor test for evaluating dilution on the basis of circumstantial (rather than survey) evidence. But he found no dilution on the basis of this test as well.

Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Division of Travel Development, 955 F.Supp. 598, 1997 U.S.Dist.LEXIS 1798 (E.D.Va. 1997), 955 F.Supp. 605, 1997 U.S.Dist.LEXIS 2116 (E.D.Va. 1997) [ELR 19:7:14]

Owner of copyright to telecast of Roberto Duran vs. Macho Camacho boxing match is awarded $84,000

in action against six bars and pubs that exhibited fight to customers without licenses

The championship boxing match between Roberto Duran and Macho Camacho was of enormous interest to fight fans around the world, including those in Puerto Rico. TVKO, Inc., obtained exclusive cable TV rights to the fight for that country, and licensed viewers to watch it. However, at least six bars and pubs exhibited the match to their customers without a license - and were sued by TVKO for copyright infringement, as a result.

When the offending bars and pubs failed to answer TVKO's federal court complaint, their default was entered. And now, District Judge Jaime Pieras has awarded TVKO a judgment against them. The amount of the judgment awarded against each depended on the size of the facility where the match was shown, the number of customers who viewed it, and whether the bar or pub charged admission. The individual amounts awarded ranged from a low of $10,000 to a high of $22,000, and the total came to $84,0000.

Video Cafe, Inc. v. De Tal, 961 F.Supp. 23, 1997 U.S.Dist.LEXIS 4276 (D.P.R. 1997) [ELR 19:7:14]

Court dismisses lawsuit against infomercial producer, golf instructor, Kenny Rogers and Pat Summerall, filed by inventor who claimed that

infomercial and videotapes improperly used inventor's ideas for playing better golf

Kenny Rogers and Pat Summerall have said that their golf games improved as a result of advice given by golfing instructor Wally Armstrong in videotapes sold by American Telecast Corporation. Rogers and Summerall made these statements in infomercials produced by American Telecast to sell the videos. And as a consequence, the two celebrities got themselves sued, along with Armstrong and American Telecast, by an inventor and golf enthusiast named Russell Brown.

Brown is the inventor of some golf gadgets designed to help users improve their games. Several years ago, Armstrong appeared in a video promoting the use of Brown's gadgets. This is the sort of thing Armstrong does for a living, and shortly thereafter, Armstrong appeared in an infomercial produced by American Telecast promoting the sale of that company's golf instructional videos.

According to Brown, American Telecast's videos feature three ideas that were used in Brown's own video, without crediting Brown for those ideas in any way. As a result, Brown sued, alleging that the defendants' infomercial and instructional videos violated both the false designation and false advertising provisions of the Lanham Act.

Brown filed his lawsuit even though none of the three ideas in question were original with him. The ideas involved: (1) "coiling" the right thigh during a golf swing, which is an idea that first appeared in a 1927 book; (2) drawing an analogy between this coiling and the twisting and untwisting of a rubber band, which is an analogy that first appeared in a 1972 book; and analogizing the golf swing to a soccer-style kick, which was an analogy mentioned by Armstrong himself in a video Armstrong made two years before he ever met Brown.

Nevertheless, in support of his false designation claim, Brown argued that "the public so strongly associates the ideas" used by the defendants in their videos and infomercial "with Brown's products that the ideas themselves have become a type of . . . trademark or . . . designation of origin." The court, however, rejected this argument, saying that Brown had not cited, nor had the court found, "a case supporting the proposition that the Lanham Act creates or confers proprietary rights in ideas. To the contrary, courts that considered such arguments have rejected it."

In support of his false advertising claim, Brown made two arguments. He asserted that the defendants' videos were false because they failed to give him credit for the ideas they portrayed. And he asserted that the infomercial was false, because Rogers and Summerall said their golf games had improved as a result of their use of techniques discussed in those videos.

The court rejected Brown's failure-to-credit argument, because the alleged falsity of that failure appeared only in the videos themselves, not in the infomercial, while the Lanham Act is limited to misrepresentations made in advertising and promotions. Moreover, there was no evidence that consumers were in any way deceived by the videos' failure to credit Brown, because there was "no evidence that customers cared at all who the originator [of those ideas] was."

Apparently Rogers' and Summerall's statements in the infomercial were technically false, because the infomercial was produced before the videos were, and thus their golf games could not have been improved by anything they learned from those videos. Nevertheless, there was no evidence that "any customer even mentioned Rogers and Summerall, let alone evidence that

Rogers' or Summerall's statements caused [Brown] any injury." Thus, the court rejected Brown's claims against them as well.

The court also rejected trade secret and copyright arguments Brown made in response to the defendants' motion to dismiss, because the ideas which Brown claimed Armstrong had misappropriated simply "were not trade secrets," and because "copyright does not provide legal protection for ideas."

The court therefore granted the defendants' motion for summary judgment and has dismissed Brown's lawsuit.

Brown v. Armstrong, 957 F.Supp. 1293, 1997 U.S.Dist. LEXIS 20601 (D.Mass. 1997) [ELR 19:7:15]

National Football League not liable to Astrodome for damages suffered when Oilers game was canceled

because field was unsuitable for play, federal District Court rules

The NFL's Oilers play their home games in Tennessee now. But they used to play their home games in the Astrodome in Houston, Texas. One of those games was supposed to be played against the San Diego Chargers in August of 1995, but it wasn't. The game was canceled, because NFL referee Ronald Blum determined that the Astrodome's field was "unsuitable for play."

The Astrodome is a multipurpose facility intended for baseball games, conventions, concerts, rodeos, tractor pulls and other events, as well as for football games. The problem identified by referee Blum before the start of the scheduled game between the Oilers and Chargers had something to do with the reconfiguration of the field's artificial turf surface. But the Astrodome's owner said the game really was canceled in order to improve the Oilers' negotiating position for a new lease.

Canceling the game was expensive. The NFL assessed the Oilers more than $325,000 for its failure to furnish a proper field as required by its league obligations; and the Oilers paid the Chargers $440,000 for refunded ticket sales. The Astrodome's owner suffered financial damage too, from lost concession and parking revenues - damage which the Astrodome's owner sought to recover from the NFL.

Now the Astrodome has lost both the Oilers (to Tennessee) and its suit against the NFL. Federal District Judge Lynn Hughes has ruled that the Oiler's lease required the Astrodome to furnish a field that met NFL standards, and if the Astrodome "met those standards and if the Oilers did not use the facility - costing the [Astrodome] its revenues from concessions and parking, for instance - its complaint is with the Oilers."

Judge Hughes also rejected other legal theories the Astrodome asserted against the NFL. The facts did not suggest that the referee had incompetently inspected the field. "Blum knew his job," the judge concluded. Moreover, Judge Hughes added, although "the court is fully capable of running the League, stadium, and franchise, . . . it will not because the parties have consented to a private mechanism to decide the suitability of field conditions."

Houston Oilers, Inc. v. Harris County, Texas, 960 F.Supp. 1202, 1997 U.S.Dist.LEXIS 5156 (S.D.Tex. 1997) [ELR 19:7:15]

Buffalo Bills cannot prevent vendors from selling food and merchandise on grassy area alongside road leading to stadium

The Buffalo Bills have failed in their attempt to get a court order preventing vendors from selling food and merchandise on the grassy area between the curb and sidewalk alongside the road that leads to Erie County Stadium on days the Bills are playing at home. Instead, New York Supreme Court Justice Joseph Glownia has declared that it is legal for vendors to conduct their business in that area and has granted them an injunction prohibiting any interference with their activities.

The vendors obtained vending permits from the Town of Orchard Park where the stadium is located. The stadium is owned by the County of Erie, though the county has no licensing provisions. The Bills lease the stadium from the county, and thus took the position that on game days at least, permits issued by Orchard Park "are not valid."

Judge Glownia disagreed, however. As far as he was concerned, the only issue was whether the vendors' activities created a public safety hazard or nuisance. After an evidentiary hearing on that issue, the judge concluded that they did not. And thus the judge concluded that vending along the Abbott Road right-of-way is "lawful and should not be interfered with."

Kelly v. Buffalo Bills Football Club, Inc., 655 N.Y.S.2d 275, 1997 N.Y.Misc.LEXIS 56 (1997) [ELR 19:7:16]

NBA is dismissed from lawsuit filed by hearing-impaired basketball fans who contend that Americans with Disabilities Act requires interpreters or a scoreboard with captions; federal District Court

rules that Act does not apply to NBA because it does not own or operate arenas

In a "case of first impression," a group of hearing-impaired basketball fans has sued the NBA, the San Antonio Spurs and the owner of the Alamodome, contending that the Americans with Disabilities Act requires them to make the arena commentator's descriptions of games and the referees' calls accessible to the deaf and hard of hearing. To do this, the plaintiffs seek a court order requiring the defendants to provide an interpreter or to modify the Alamodome's "Jumbotron" scoreboard so that it provides captioning.

The Americans with Disabilities Act prohibits those who own or "operate" places of public accommodation from discriminating against the disabled in ways that prevent them from fully enjoying the services provided in those public places. According to the plaintiffs, the Act entitles them to the court order they seek, because at a "live NBA basketball game, the commentator's description of the game (or sporting event) and the referees' calls are essential components of the game."

Federal District Judge Samuel Biery has granted the NBA's motion to dismiss it from the case. The judge did so, because the league itself does not own or operate the Alamodome.

The plaintiffs had argued that the NBA does effectively "operate" the Alamodome and other arenas in which NBA teams play, because the league has issued a 35-page set of guidelines detailing the minimum standards required for NBA arenas. However, the NBA Facility Standards document does not contain requirements or guidelines for scoreboards or other audio-visual systems used in arenas. And thus the NBA does not "operate" the Alamodome in connection with the particular way in which the plaintiffs want it to be modified to accommodate their needs, Judge Biery has held.

Cortez v. National Basketball Association, 960 F.Supp. 113, 1997 U.S.Dist.LEXIS 4241 (W.D.Tex. 1997) [ELR 19:7:16]

NBA player Chris Childs is ordered to arbitrate salary dispute with New Jersey Nets

NBA player Chris Childs has been ordered to arbitrate - rather than litigate - a salary dispute with his team, the New Jersey Nets. The dispute arose in the aftermath of the 1995 NBA player lockout.

Childs played for the Nets during the 1994-95 season for the NBA minimum salary of $150,000. During the lockout that preceded the following season, a professional team in the Greek Basketball Federation offered Childs $650,000 to $700,000 to play for it. Childs declined the offer, after his agent was told by the Nets' General Manager that when the lockout ended, the Nets would make Childs an offer that was "as financially attractive" as the one he had received from the Greek team.

However, when the lockout ended, the Nets were only able to offer Childs $350,000, because of limitations imposed on the team by the NBA "salary cap." By then, it was too late for Childs to accept the Greek team's offer, so he signed with the Nets for $350,000, and then sued the team for damages in federal District Court.

The contract between Childs and the Nets contained a clause providing that any dispute concerning the contract would be resolved "in accordance with the Grievance and Arbitration Procedure set forth in the

NBA/NBPA Collective Bargaining Agreement." Relying on that clause, the Nets sought a court order requiring Childs to arbitrate. And Judge Harold Ackerman has granted that order.

The judge rejected Childs' argument that the arbitration clause was invalid because it hinged on a procedure in a collective bargaining agreement that was not in existence when he signed his contract. Judge Ackerman concluded that Childs and the Nets "clearly intended to submit their disputes to arbitration, and did not condition the arbitrability of their disputes upon the existence of a fully executed, formally written CBA."

The judge also rejected Childs' argument that his dispute with the Nets did not concern their contract, but instead was based on alleged misrepresentations made by the Nets' General Manager concerning the amount the team would offer when the lockout was over. Childs' cause of action arose only when the Nets allegedly dishonored the General Manager's salary representations, the judge explained. And that occurred "in the contract itself." Moreover, one issue in the case was based on an integration clause in the contract (that said "there are no undisclosed agreements of any kind" between Childs and the Nets); and the impact of that clause on Childs' claim did involve a dispute concerning the contract.

Childs v. Meadowlands Basketball Associates, 954 F.Supp. 994, 1997 U.S.Dist.LEXIS 3082 (D.N.J. 1997) [ELR 19:7:17]

NCAA is enjoined from preventing freshman from playing basketball for, and receiving scholarship from, Fairfield University, in case involving dispute about whether student had earned enough credits in required high school math classes

In the early months of his freshman year, Darren Phillip won what will probably be the most important contest in his entire collegiate basketball career. A federal District Court in Connecticut has issued a preliminary injunction that bars the NCAA from doing anything to prevent Phillip from playing basketball for, and receiving an athletic scholarship from, Fairfield University.

Phillip was a 1996 graduate South Shore High School in Brooklyn, New York. Early in the fall of his senior year, he and his high school filled out NCAA forms that were necessary to confirm his collegiate eligibility. Phillip also consulted his guidance counselor to be certain he had earned enough units in the "core" courses the NCAA requires of student-athletes. His counselor advised Phillip that he had. And the NCAA did not tell him otherwise, until it was far too late for him to take the additional math class the NCAA eventually told him he needed.

The factual point at issue was whether the math classes Phillip had taken were worth a half-credit each, as his high school said, or whether they were worth only a third-credit each as an NCAA eligibility committee said. The legal point at issue was who got to decide: Phillip's high school principal, as 1995-96 version of The NCAA Guide for the College-Bound Student Athlete said; or the NCAA committee, as the 1996-97 version of that Guide said.

Since Phillip was a high school senior during 1995-96, the court had no trouble concluding that the 1995-96 version of the Guide applied to his case. Thus his principal's determination that his math classes were worth a half-credit each was controlling, and he did have enough math units to satisfy NCAA "core course" requirements. While after 1996-97, the NCAA "may rightfully flex [its] muscle" to determine how many units high school courses are worth, "it may not do so retroactively to pin Darren Phillip," the court concluded.

Phillip v. National Collegiate Athletic Association, 960 F.Supp. 552, 1997 U.S.Dist.LEXIS 21098 (D.Conn. 1997) [ELR 19:7:17]

Student-athlete not entitled to attorneys fees from athletic association even though he obtained preliminary injunction that permitted him to play baseball during his senior year, because injunction was reversed on appeal

Edward Pottgen was able to play baseball during his senior year in high school, despite an athletic association rule making students ineligible once they become 19 years old. Pottgen is learning disabled, and the District Court granted him an injunction under the Americans with Disabilities and Rehabilitation Acts (ELR 16:7:30). The District Court's ruling was reversed on appeal, however, after Pottgen graduated (ELR 16:12:12), and thus the injunction was vacated and Pottgen's complaint was dismissed.

The District Court nevertheless awarded Pottgen more than $9,000 in attorneys fees and court costs, on the theory that since he was able to play baseball for his entire senior year, he was the "prevailing party" in the case.

The athletic association appealed the attorneys fee award, and has won on appeal again. The Court of Appeals has ruled that Pottgen was not the "prevailing party," because the preliminary injunction which enabled him to play was reversed. Therefore, the appellate court reversed the order awarding fees and costs to Pottgen.

Pottgen v. Missouri State High School Activities Association, 103 F.3d 720, 1997 U.S.App.LEXIS 361 (8th Cir. 1997) [ELR 19:7:18]

Civil RICO suit filed against Texas Tech and its coaches by former football player is dismissed

"Hell hath no fury" as an injured football player - or so it may seem to Texas Tech and at least two of its football coaches. The university, as well as head coach William "Spike" Dykes and coach Rudy Maskew, have been sued by Stephen Gaines who has charged them with civil RICO violations.

Gaines was a starting defensive lineman for Texas Tech during the 1992 and '93 seasons, and was signed by the New England Patriots in 1994. Gaines however failed his NFL physical, because of a knee injury he had earlier suffered during a Texas Tech workout. Gaines' lawsuit followed.

Although it was "unclear precisely what injuries Gaines alleges that he suffers," it appeared to federal District Judge Sidney Fitzwater that Gaines is claiming damages arising from his knee injury and from loss of educational opportunities.

Nonetheless, the judge has granted Texas Tech's motion to dismiss, and those made by its coaches to the extent they are being sued in their official capacities, because as a state institution and state employees, they are immune from liability under the Eleventh Amendment.

To the extent the coaches are being sued as individuals, the judge dismissed Gaines' complaint, because the injuries asserted by Gaines "are not compensable under RICO."

The judge has, however, given Gaines permission to amend his complaint to allege an alternate theory of recovery against his former coaches, in their individual capacities.

Gaines v. Texas Tech University, 965 F.Supp. 886, 1997 U.S.Dist.LEXIS 11216 (N.D.Tex. 1997) [ELR 19:7:18]

New York Times wins access to transcript of deposition of acting baseball commissioner Bud Selig in case involving compensation to be paid by Florida

Marlins for the territory of minor league Fort Myers Miracle

The New York Times has won access to the transcript of a deposition given by acting baseball commissioner Bud Selig, in a case that arose when the major league Florida Marlins "drafted" the territory previously occupied by the minor league Fort Myers Miracle.

Agreements governing professional baseball permit major league teams to "draft" territories belonging to minor league teams, though if a major league team does so, it must compensate the minor league team for its loss. If the teams cannot agree on the amount of compensation to be paid, the amount is determined by an arbitration panel that includes the commissioner of major league baseball. For some reason, the Miracle wanted Selig to be on the panel; but someone else was designated instead of him "on the premise that the office of Commissioner of Baseball is vacant."

Selig's deposition was taken on the subject of whether or not he is the Commissioner of Baseball. The New York Times wanted to see what Selig had to say on that subject. But Selig's deposition was taken pursuant to a "protective order" stipulated to by the parties; and Selig didn't want the Times to have access to the transcript.

Federal District Judge Lewis Kaplan has granted the Times' motion for access to the transcript, ruling that "judicial records are presumptively subject to public inspection." The judge said that "the fact that the deposition was designated confidential under the protective order was not entitled to any weight," because "Selig had no justifiable basis in assuming that the testimony would remain confidential unless Selig could establish good cause for such treatment." Selig made a "blunderbuss" attempt to do so, but he failed. Judge Kaplan reviewed the transcript and concluded that "there is no good cause" for keeping it confidential.

Greater Miami Baseball Club v. Selig, 955 F.Supp. 37, 1997 U.S.Dist.LEXIS 1660 (S.D.N.Y. 1997) [ELR 19:7:18]

DEPARTMENTS

In the Law Reviews:

Entertainment and Sports Lawyer, published by the American Bar Association Forum on the Entertainment and Sports Industries, 750 North Lake Shore Drive, Chicago, IL 60611-4497, has issued Volume 15, Number 2 with the following articles:

Getting the Pentagon Into the Picture: A Guide to U.S. Military Assistance on Film and Television Productions by Kirk T. Schroder, 15 Entertainment and Sports Lawyer 1 (1997) (for address, see above)

Music Plagiarism: A Framework for Litigation by Christine Lepera and Michael Manuelian, 15 Entertainment and Sports Lawyer 3 (1997) (for address, see above)
Facts, Copyrights, Unfair Competition and Contracts: Will NBA v. Motorola Lead to Shrink Wrap Television? by James N. Talbott, 15 Entertainment and Sports Lawyer 7 (1997) (for address, see above)

Book Review: Licensing of Intellectual Property by Jay Dratler, Jr., reviewed by Lisa A. Palter, 15

Entertainment and Sports Lawyer 14 (1997) (for address, see above)

South Carolina Law Review has published a symposium issue on Cameras in Courtrooms: Contrasting Viewpoints with the following articles:

Whose Life Is It Anyway?: A Proposal to Redistribute Some of the Economic Benefits of Cameras in the Courtroom from Broadcasters to Crime Victims by Stephen D. Easton, 49 South Carolina Law Review 1 (1997)

Televised Trials: Can the Government Market Electronic Access? by The Honorable William L. Howard, 49 South Carolina Law Review 55 (1997)

No Pay, No Play: Trial Broadcast Fees Are Constitutional by Stephen D. Easton, 49 South Carolina Law Review 73 (1997)

Intellectual Property in the Western Hemisphere by Robert M. Sherwood, 28 The University of Miami Inter-American Law Review 565 (1997)

Protecting Copyrights in Cyberspace: Holding Anonymous Remailer Services Contributorily Liable for Infringement by Marie M. Stockton, 14 Thomas M. Cooley Law Review 317 (1997)

A Narrow View of Creative Cooperation: The Current State of Joint Work Doctrine by Laura G. Lape, 61 Albany Law Review 43 (1997)

Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet by David R. Sheridan, 61 Albany Law Review 147 (1997)

The European Intellectual Property Review, published by Sweet & Maxwell, Cheriton House, North Way, Andover Hants SP10 5BE, England, has issued Volume 19, Number 11 with the following articles:

Freedom of Political Discussion and Intellectual Property Law in Australia by Megan Richardson, 19 European Intellectual Property Review 631 (1997) (for address, see above)

Developments in the Law of Copyright and Public Access to Information by Sir Anthony Mason, 19 European Intellectual Property Review 636 (1997)

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