RECENT CASES

CBS claim that blanket licensing of performance rights by ASCAP and BMI violates antitrust laws is dismissed by Federal Court of Appeals

After 10 years of litigation and three previous court opinions, including a United States Supreme Court decision (Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979), ELR 1:1:1), a Federal Court of Appeals in New York City has affirmed the District Court dismissal of CBS' claim that the blanket licensing of copyrighted musical compositions by ASCAP and BMI violates federal antitrust law.

Blanket licenses, usually granted for a one-year term, permit a licensee to use any music in the repertory of the performing rights society, as often as desired, for a one-time license fee of either a flat sum or a percentage of the user's revenue. CBS contended that the blanket license was an agreement unreasonably restraining trade in violation of section of the Sherman Act. The Supreme Court had held that the blanket license was not a per se violation of the Sherman Act. On remand, the Court of Appeals, in ordering dismissal of the action, concluded that CBS "failed to prove that the existence of the blanket license has restrained competition."

The court pointed out that under the terms of a 1950 consent decree, ASCAP and BMI may obtain only non-exclusive licensing rights from membercomposers and may not restrict or interfere with the right of any member to issue directly to any user a non-exclusive performing rights license. However, CBS apparently had not attempted to purchase performing rights to any song from the copyright owner. The court noted that since the opportunity to purchase performing rights to individual songs was fully available and since "the copyright owners retain unimpaired independence to set competitive prices for individual licenses . . ., the blanket license is not a restraint of trade."

The feasibility of direct licensing, including establishing the necessary "machinery" to handle such transactions, had been established by evidence presented during a trial in the District Court, which evidence "refute[d] all of CBS' allegations of barriers to direct licensing." The Court of Appeals observed that "CBS cannot expect the antitrust laws to assure it that a changeover to direct licensing can be accomplished instantly or at no expense." Further, if CBS encountered difficulties in obtaining performing rights licenses directly from the copyright owners, it would be entitled to obtain a renewed blanket license pursuant to the terms of the consent decree.

Columbia Broadcasting System, Inc. v. American Society of Composers, Authors and Publishers, Case No. 75-7600 (2d Cir., April 3, 1980) [ELR 1:24:1]

Producers of the film Arctic Rampage are ordered to pay Robert Aldrich $25,000 by Director s Guild of America arbitrator for failure to inform Aldrich of film s budget; Aldrich s claims that other creative rights were violated are denied

In the summer of 1979, Classic Films GMBH, an organization comprised of producers Albert Ruddy and Raymond Chow of Golden Harvest Productions along with German tax shelter elements, proposed to fund three major motion pictures including the film "Arctic Rampage." Based on Ruddy's estimate of approximately $4 million for below-the-line costs, Classic concluded that the film could be made for $9 million, and ultimately set a $10 million budget figure.

Robert Aldrich agreed to direct the film for a fee of $700,000. However, disputes soon developed between Aldrich and the producers; and in December of 1979, an expedited arbitration before Directors Guild of America arbitrator Edward Mosk was commenced by Aldrich in an attempt to resolve conflicts relating to alleged violations of Aldrich's creative rights. (The arbitration was subsequently conducted as a non-expedited proceeding.) At the same time, Classic terminated Aldrich as director of the film and employed Peter Hunt to replace Aldrich.

Aldrich's position was that he had anticipated working with a higher budget and that the producers' actions with respect to the budget violated Sections 7-201 and 7-202 of the DGA Basic Agreement of 1978. Section 7-201 provides that prior to the employment of a director, an employer must inform him of any budget (top sheet) which has been established. The director must then use his best efforts to conform with such budget after being given an opportunity to express his opinion about its practicability. The section continues "It is the intention hereof that Employer shall make full and complete disclosure to the director of all of the existing artistic and creative commitments with respect to the picture for which the director is to be employed prior to his actual employment. . ."

Section 7-202 of the Basic Agreement requires that the director participate in decisions regarding changes in previously-established elements and decisions concerning all creative elements in production, including casting, location selection and scheduling.

In addition to the provisions of the Basic Agreement, the deal memorandum between Aldrich and Classic incorporated the terms of previous employment agreements entered into by Aldrich on the films "Sudden

Death" and "No Knife," and these agreements purportedly set forth other creative rights. (The arbitrator found, however, that the agreement between Cheshire County Company and Robert Aldrich, which was also attached to the deal memorandum, only established the loan-out arrangement between Cheshire and Aldrich and was not an additional source of creative rights.) For example, the "Sudden Death" agreement gave Aldrich the right to approve the initial press release announcing his engagement on the project. Apparently through inadvertence, Classic neglected to obtain such approval, but the arbitrator ruled that the breach was unintentional and did not justify an award of damages.

On the major issue — the information provided to Aldrich regarding the budget for "Arctic Rampage" — Classic contended that Aldrich knew of the $10 million budget limitation due to his attorney's participation in organizing Classic Films. But the arbitrator found that any knowledge obtained by the attorney had not been sufficiently precise so as to charge Aldrich with that knowledge. Classic also argued that Aldrich had been informed of the budget limitation by Ruddy and by publicity for the film. Aldrich denied any such knowledge and, in particular, stated that he was unaware of the "irrevocable and unchangeable quality" of the figure. The arbitrator noted that above-the-line costs could have been submitted to Aldrich, but that this was not done. And the evidence presented could not sustain a finding, according to the arbitrator, that "Aldrich [had] embarked on the project knowing that he could not and/or would not conform to [the] precise budget limitations of Classic."

Among other claimed violations of his creative rights, Aldrich contended that he had been denied the right to select writers for a second re-write of the screenplay. The arbitrator noted that Aldrich had indicated his approval of the first re-write and that the request for the second re-write was not made until the beginning of December, at which point Classic's failure to act promptly to hire a new writer was "understandable" in view of the deteriorating relationship among the parties. Aldrich had participated in all decisions regarding script revisions, but he did not have "absolute and final approval of the shooting script" and in view of these factors, the arbitrator concluded that Aldrich's creative rights in connection with the screenplay had not been violated.

The arbitrator also found that potential or actual disputes about the following activities did not violate Aldrich's creative rights (or alternately, that he did not possess such rights as to the activities in question): meetings between the writers and the producer that did not relate to the content of the screenplay; the producers' unenforced anticipation that Aldrich would fill below-the-line crew positions with Canadian personnel;

producer suggestions regarding casting; the producers' rejection of a suggested composer; location selection; determination of production schedule; selection of laboratory and postproduction facilities.

The producers' contention that certain actions by Aldrich constituted breach of contract were found to be related to the claimed violations of creative rights or to the propriety of Aldrich's termination, which was a non-arbitrable issue. However, although non-arbitrable, the termination of Aldrich before the "ripening of the dispute as to most of the creative rights involved," and trator stated that he did "not intend . . . to any precedent that creative rights may be by peremptory termination of the director."

Terming the budgetary conflict "irreconcilable," the arbitrator concluded that the producers' failure to provide Aldrich with the top sheet information prior to, or at the time of employment was a "serious breach of creative rights." Damages in the amount of $25,000 and $20,000 were awarded to Cheshire County (on behalf of its employee Aldrich) and to the DGA respectively. All other claimed violations of Aldrich's creative rights were denied.

In the Matter of the Arbitration between the Directors Guild of America, Inc, Robert Aldrich, and Cheshire County Company, lnc. and Classic Films GMBH, Before the Arbitration Tribunal of the Directors Guild of America, Inc. (April 15, 1980) [ELR 1:24:2]

David Merrick is ordered to pay director Peter Hunt $134,000 due on pay or play contract by Directors Guild of America arbitrator

In August of 1979, producer David Merrick hired Peter Hunt to direct the Paramount film "Rough Cut," after Merrick had terminated the services of Don Siegel, the film's initial director. Merrick agreed to pay Hunt $150,000 in 10 weekly installments of $10,000 each with the final $50,000 payment to be made on delivery of the director's cut. Hunt's agent confirmed these terms in a telegram and letter in which he referred to the $150,000 commitment as "pay or play." (A "pay or play" deal is one which requires the producer to pay the talent's fee or salary, even if the talent's services are not used.) Hunt worked as director of the film for 5 days. His services were then terminated by Merrick and Siegel was reinstated as Director.

In a Directors Guild of America arbitration proceeding before arbitrator Dixon Q. Dern, Merrick contended that Hunt was a replacement director and that pursuant to Sections 3-101 and 3-102 of the DGA Basic Agreement of 1978, Hunt was entitled to receive only $10,000 for one week's work. Merrick, in fact, had paid this amount to Peter Hunt Films, Inc., Hunt's loan-out company.

The arbitrator concluded that the agreement between Merrick and Hunt "contemplated that Hunt would direct the picture for the period required to complete it" and that week-to-week employment was not negotiated between the parties. The agreement was found to be a "pay or play" contract for a minimum 10-week guaranteed period. Merrick was therefore ordered to pay Peter Hunt Films, Inc. the sum of $134,000 ($140,000 less $6,000 earned by Hunt from other employment secured during the guarantee period) and was required to make DGA pension and health and welfare contributions.

Paramount Pictures Corporation, as Merrick's guarantor, was ordered to make the payment in the event Merrick failed to do so.

In the Matter of the Arbitration between Directors Guild of America, Inc. and Paramount Pictures Corporation and David Merrick, Before the Arbitration Tribunal of the Directors Guild of America, Inc., Case No. 00596 (April 3, 1980) [ELR 1:24:3]

Arbitration award by American Federation of Musicians against promoter Bill Graham held unenforceable because AFM arbitration proceeding was not impartial

In June of 1973, concert promoter Bill Graham agreed with Scissor-Tail, Inc., musician Leon Russell's wholly-owned corporation, that Graham would promote two concerts featuring Russell and his musical group. The contract provided that Scissor-Tail would receive union scale or 85% of the net profits, whichever was greater.

Each contract, in accordance with the requirements of the American Federation of Musicians (AFM), contained a provision for arbitration by the International Executive Board of the AFM of disputes arising out of the contracts.

The first concert lost money and the parties disagreed as to who should bear this loss and whether it could be offset against the profits of the second concert. Graham then filed an action for breach of contract, seeking declaratory relief and rescission. The Los Angeles Superior Court, however, ordered an arbitration of the dispute by the Board, as requested by Scissor-Tail.

Prior to an arbitration hearing, the Board entered an award against Graham in the amount of approximately $53,000. Graham was advised that arbitration hearings were held only at the request of union members. Russell and Scissor-Tail had not requested a hearing. When Graham did not pay the arbitration award, he was placed on a "defaulters list" — a list of persons with whom AFM members are not allowed to deal.

Scissor-Tail subsequently agreed to a hearing at which a former executive officer and long-time member of the AFM served as arbitrator and which a court reporter was not permitted to attend. According to Graham's attorney, evidence was presented that in an "85-15" profit-sharing concert promotion, the promoter did not usually bear the risk of loss. The prior award against Graham was upheld by the Board and confirmed by the Superior Court.

On appeal, Graham contended that his due process rights under the Fifth and Fourteenth Amendments had been violated by AFM's failure to name an impartial arbitrator. He characterized the contract with Scissor-Tail as an unenforceable adhesion contract — a "non-negotiable, take-it-or-leave-it document he was required to sign if he wanted to continue to promote musical concerts."

A California Court of Appeal has held that the arbitration provision of the contract was unenforceable and has reversed the lower court judgment confirming the arbitration award. The court, observing the "Alice-in-Wonderland" sequence, and overall partiality of, the AFM's arbitration procedures, commented that "[s]uch a procedure, wholly at odds with any concept of due process and impartial arbitration, is little more than a caricature of due process." According to the court, both federal law and the California law under which the arbitration was conducted (Civil Code sections 1280-1288.8) require a neutral, "impartial arbitrator, free from the appearance of bias."

The court also pointed out that the evidence was overwhelming that the terms of the form contract were non-negotiable and non-modifiable and that members of the

AFM were not permitted to sign any contract forms other than those issued by the AFM. Scissor-Tail contended that Graham had entered into the contract freely and voluntarily, with full knowledge of, and despite, the nonmodifiability of the arbitration term. But the court concluded that the contract was executed under economic coercion amounting to duress because "the AFofM possessed a monopoly over musical services . . . [and] [i]f Graham desired to continue in the business of promoting musical concerts he was compelled to agree to the imposed terms in the AFofM's contract form."

The court also found significant the lack of parity in bargaining strength between Graham and Scissor-Tail (backed by the union). In such a situation, an AFM arbitration of a dispute between a group of union-member musicians and a non-union member promoter was not a "disinterested and impartial tribunal."

Scissor-Tall also contended that the contract was a product of collective bargaining protected by federal law. The court noted that an employer who agrees with a union to arbitrate disputes may be bound by his agreement. But in this case, Scissor-Tail, rather than Graham, was more likely the employer of the musicians. And, in any event, the arbitration provision had not been the subject of bargaining but was "unilaterally inserted by the union in all form contracts for musical services." The validity of such a provision in a collective bargaining agreement involving a contract negotiated between an employer or association of employers and a union or joint council of unions "for the benefit of workers in a particular employment trade . . ." was not addressed as such by the court. But the court reiterated its position that a labor-affiliated group is responsible for fundamental fairness when it uses its monopoly power to compel compulsory arbitration and that the other contracting party may not be required to relinquish its right of access to the courts unless an impartial arbitration proceeding is available.

The matter was therefore remanded to the Superior Court with instructions to appoint a neutral arbitrator.

Graham v. Scissor-Tail, Inc., 103 Cal.App.3d 115 (1980) [ELR 1:24:3]

Federal Court of Appeals holds that Universal s film The Hindenburg and book on which it was based did not infringe earlier historical account of the airship disaster

The dismissal of a copyright infringement lawsuit brought by A. A. Hoehling, the author of Who Destroyed The Hindenburg?, against Michael MacDonald

Mooney and Universal City Studios, Inc., the author of, and owner of motion picture rights to, the book The Hindenburg, has been affirmed by a Federal Court of Appeals in New York City.

Hoehling contended that Mooney and Universal had copied the plot of his account of the 1937 disaster involving a German dirigible as well as research facts and certain phrases and scenes in the book. Mooney acknowledged that he had not originated the theory that a crew member had sabotaged the dirigible — a theory propounded by Hoehling. But assuming that copying and substantial similarity were present, the court nevertheless pointed out that only very limited copyright protection is extended to historical works and held that Hoehling's interpretation of an historical event was not copyrightable as a matter of law.

The factual material appearing in Hoehling's book also was not copyrightable since such material is in the public domain. Although adverting to other federal appellate court decisions holding to the contrary, Judge Kaufman reiterated the position of the Second Circuit that copyright protection may not preclude an author from "saving time and effort by referring to and relying upon prior published material."

The use of certain "stock" or standard literary devices ("scenes a faire") such as a scene in a German beer hall (which appeared in the Hoehling book, the Mooney book and the Universal film) also was held noncopyrightable and thus, noninfringing.

The court cautioned, however, that while denying protection to noncopyrightable elements, courts should not overlook any "wholesale usurpation" or "verbatim reproduction" of a prior author's expression. In this case, Mooney and Hoehling had taken very different approaches to the Hindenburg story. And, citing the leading case of Rosemont Enterprises, Inc. v. Random

House, Inc., 366 F.2d 303 (2d. Cir. 1966), cert. denied, 385 U.S. 1009 (1967), the court noted that the purposes copyright law — encouraging creativity and contributions to historical knowledge — would best be furthered by allowing a “second author to make significant use of prior work, so long as he does not bodily appropriate the expression of another.”

Hoehling’s claim of common law unfair competition was also dismissed by the court.

Hoehling v. Universal City Studios, Inc., Case No. 79-7704 (2d Cir., March 25, 1980) [ELR 1:24:4]

HEW issues interpretation of regulations prohibiting sex discrimination in intercollegiate athletics; courts disagree over whether boys must be permitted to play on girl s volleyball teams

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in all federally-supported education programs, including athletics. (20 USC section 1681) In 1975, the U.S. Department of Health, Education and Welfare issued regulations implementing Title IX. (45 CFR Part 86) Among the most controversial portions of those regulations were the sections which dealt with sex discrimination in intercollegiate athletics. The National Collegiate Athletic Association filed suit against HEW, challenging the agency's authority to adopt those sections. The suit was dismissed on the grounds that the NCAA did not have standing to raise the issue. On April 17, 1980, however, a Federal Court of Appeals reversed that dismissal. The decision will be reported in a future issue of the Entertainment Law Reporter.

In the meantime, during the first three years after the regulations were issued, HEW received more than 100 complaints alleging sex discrimination in athletics by colleges and universities, and it received many inquiries concerning the intended meaning of those regulations. Accordingly, in 1978, HEW decided to issue an interpretation of its regulations, in order to provide additional guidance concerning their requirements. After publishing a proposed interpretation and considering the more than 700 comments it received in response, HEW has issued a formal Policy Interpretation. The Policy is intended to clarify the responsibilities of schools in three areas: athletic financial assistance; benefits and opportunities provided through athletic programs; and the accommodation of the athletic interests and abilities of all students. In the area of athletic financial assistance, the Title IX regulations require schools to provide reasonable opportunities for such assistance to both men and women athletes. The Policy Interpretation explains that schools must make financial aid available to men and women athletes in proportion to their participation to athletic programs. Thus, if a school has $100,000 available for athletic scholarships, and it has 70 men and 30 women athletes, male athletes are entitled to receive $70,000 in scholarships and female athletes $30,000. However, HEW has indicated that there is flexibility in the Policy. Therefore, apparent disparities which are the result of nondiscriminatory factors will not violate the law. For example, higher tuition costs for outof-state residents may be unevenly distributed between men and women athletes in some years. And schools may award fewer scholarships in some sports in their early years, while the programs in such sports are first being developed.

The Title IX regulations require HEW to evaluate specific factors in determining whether schools are providing equal athletic opportunities for students. Those factors include the provision of equipment, the scheduling of games and practices, the allocation of travel expenses, and the like. The Policy Interpretation indicates that HEW will evaluate whether these benefits are being made available to men and women athletes in an equitable way. Identical benefits, such as identical locker facilities or coaching staffs, are not required. Furthermore, HEW recognizes that equipment for some sports is more expensive than for others, and therefore HEW will not require equal amounts of money to be spent for equipment for men's and women's teams. On the other hand, colleges that provide new equipment every year for their men's teams, but only used equipment for their women's teams, will violate the HEW Policy.

The Title IX regulations also require schools to meet the athletic interests of both their men and women students. The Policy describes the methods by which HEW will evaluate schools' efforts in this area. Among other things, the Policy directs schools to take into consideration the increasing levels of women's interests and abilities in sports. The Policy also indicates that when a school has a team for men or women only, and does not have a team in that sport for the other sex, the school may be required to permit the excluded sex to try out for the team if it is not a contact sport, or sponsor a separate team for the excluded sex. These things would have to be done if opportunities for members of the excluded sex historically have been limited at that particular school. Furthermore, creation of a separate team will be required only where there is sufficient interest and ability to sustain a viable team, and it will be necessary in a non-contact sport only where members of the excluded sex are not sufficiently skilled to participate on a sex-integrated team.

The question of whether boys must be permitted to play on girls' volleyball teams, at schools that have no boys' volleyball teams, has been considered in three recent cases. In Gomes v. Rhode Island Interscholastic League, a Federal District Court held that the Title IX regulations did require a high school league to permit a boy to play on his school's girls' volleyball team. However, the preliminary injunction issued by the District Court was stayed by the Court of Appeals, and thereafter the Court of Appeals ruled that the dispute had become moot because of the boy's graduation from high school. The case was therefore dismissed and does not constitute a ruling on Title IX's application to this question.

In Petrie v. Illinois High School Association, the Appellate Court of Illinois ruled that neither the 14th Amendment nor Illinois state law required the league to permit a boy to play on the girls' volleyball team, even though the boy's school did not have a boys' volleyball team. The court concluded that the rule barring boys from girls' teams was "the only feasible classification to promote the legitimate and substantial state interest of providing for interscholastic athletic opportunity for girls." One judge dissented, saying that "the ultimate cruel element in the discrimination approved is that the majority seeks to `protect' females because of an implied conclusion that `they' are again to be classified as weak and inferior."

In contrast, the Supreme Court of Massachusetts has ruled, in Attorney General v. Massachusetts Interscholastic Athletic Association, that a league rule prohibiting boys from playing on girls' teams, even if there is no team for boys in the particular sport, was invalid under the Massachusetts Equal Rights Amendment and a state statute barring sex discrimination in education. The court held that the rule could not be justified on the theory that it was necessary to protect the players' safety, nor could it be justified on the theory that it was necessary to prevent the girls' athletic program from being inundated by boy athletes. The court concluded that potential inundation by boys was a "marginal" problem, and that where it arises, it can be met by measures less offensive and less sweeping than a complete sex barrier.

HEW Policy Interpretation, Title IX and Intercollegiate Athletics (December 1979); for further information contact HEW, Colleen O'Connor, 330 Independence Avenue, Washington, D.C., phone (202) 245-6671; Gomes v. Rhode Island Interscholastic League, 469 F.Supp. 659 (D.R.I. 1979), vacated, 604 F.2d 733 (1st Cir. 1979); Petrie v. Illinois High School Association, 394 N.E.2d 855 (III.App. 1979); Attorney General v. Massachusetts Interscholastic Athletic Association, 393 N.E.2d 284 (Mass. 1979) [ELR 1:24:5]

Expenses incurred by author in writing books may be deducted in year paid, and do not have to be capitalized, Tax Court decides

The Tax Court has ruled that expenses incurred by an author for such things as rent, phone, utilities and research, during a year in which he wrote two unpublished books, could be deducted by him during that year. The IRS had disallowed the deductions, asserting that the author's expenses had to be capitalized and deducted over the period In which he expected the books to generate income.

However, section 280 of the Internal Revenue Code, added by the Tax Reform Act of 1976, provides that since 1976, the cost of producing books must be capitalized and depreciated. Section 280 did not apply to the case just decided by the Tax Court, because the year in question in the case was prior to 1976.

Furthermore, it is unclear whether section 280 applies to authors. The Tax Court opinion seems to assume that it does, though the court reserved "until another day" any opinion on that subject. Arguably, section 280 applies only to the costs of publishing books, such as editing, typesetting, printing, and marketing costs, but not to costs incurred by authors in writing books. This is so because section 280 was aimed primarily at motion picture tax shelters rather than at producing artists. According to the section's legislative history, books apparently were added to the bill only because the Senate Finance Committee was informed that "the production company shelter may be expanding into other areas, such as the publishing field."

Faura v. Commissioner, 73 T.C. No. 68 (1980) [ELR 1:24:6]

Texas statute authorizing injunctions against exhibition of motion pictures that have not been found to be obscene is ruled unconstitutional by U.S. Supreme Court

A Texas public nuisance statute authorized injunctions to prevent the use of buildings for the commercial exhibition of obscene material. In 1973, the operator of an indoor, adults-only motion picture theater in Texas received notice from its landlord that the theater's lease would be terminated, because the County Attorney had informed the landlord that he intended to obtain an injunction to abate the theater as a public nuisance in order to prevent further showings of allegedly obscene movies.

The theater's operator filed suit in federal court seeking injunctive and declaratory relief to prevent the County Attorney from taking an%, action under the Texas statute. The principal legal issue in the case was whether the statute authorized injunctions prohibiting the exhibition of motion pictures that had not yet been found to be obscene. After considcration of that issue by three District Court judges (all of whom agreed that the statute was unconstitutional), and fourteen Court of Appeals judges (who voted eight to six against the constitutionality of the statute), the United States Supreme Court has just decided (in a five to four decision) that the statute does indeed permit injunctions against the exhibition of unspecified motion pictures which have not yet been found to be obscene. Therefore, the Supreme Court has ruled that the statute is unconstitutional.

The constitutional defect in the Texas procedure was that it permitted a court to declare a building a public nuisance because it had been used to exhibit obscene movies in the past, and then to enjoin the future exhibition of motion pictures that had not yet been found to be obscene. "Presumably," the Supreme Court said, "an exhibitor would be required to obey such an order pending review of its merits and would be subject to Contempt proceedings even if the film is ultimately found to be nonobscene." Accordingly, the Supreme Court held that the absence of any special safeguards governing the entry and review of orders restraining the exhibition of named or unnamed motion pictures precludes enforcement of the nuisance statute against motion picture exhibitors.

Justices White and Rehnquist dissented, because as they read the statute, an exhibitor would have been permitted to defend any contempt proceeding by showing that the movies exhibited after the injunction was issued were not obscene.

Vance v. Universal Amusement Co., Inc., United States Supreme Court, Case No. 78-1588 (March 18, 1980) [ELR 1:24:6]

Briefly Noted:

Billboard Advertising.

A San Diego ordinance banning off-site advertising billboards and requiring the removal of existing bill-boards after an amortization period has been upheld by the California Supreme Court. The court held that the stated purposes of the ordinance — to eliminate the traf-fic hazard of distracting advertising displays and to improve the appearance of the city — were within the city's police power, and that the ordinance was reasonably related to those purposes. The court therefore reversed a lower court judgment holding the ordinance unconstitutional. The Supreme Court also rejected the lower court's finding that the ordinance violated the First Amendment, noting that the ban did not abridge freedom of speech or press.

However, the provision of the ordinance requiring the uncompensated removal of billboards within 660 feet of certain federal or interstate highways was found to be partially preempted by state law. California's Outdoor Advertising Act (Bus. & Prof. Code Sections 5200 et seq.) requires compensation when necessary to protect the state's receipt of federal funds. The case was therefore remanded for further consideration of the compensation due upon the removal of such billboards in view of the provisions of the Federal Highway Beautification Act.

Metromedia v. City of San Diego, Case No. L.A. 30782 (April 14, 1980) [ELR 1:24:7]

Libel.

A Federal Court of Appeals has held that a libel plaintiff's assertion of the 5th Amendment privilege against self-incrimination during pretrial depositions did not automatically require the dismissal of his action. The court held that dismissal is appropriate only when other less burdensome remedies would be ineffective to prevent unfairness to the defendant. In this case, in which CBS was the defendant, it was held that staying discovery until the statute of limitations on the plaintiff's possible criminal offense expired would not impose an undue hardship on CBS. Accordingly, the dismissal of the case was reversed.

Wehling v. Columbia Broadcasting System, 608 F.2d 1084 (5th Cir. 1979), 611 F.2d 1026 (5th Cir.1980) [ELR 1:24:7]

DEPARTMENTS

New Book:

Motion Picture Distribution - An Accountant s Perspective by David J. Leedy

The author of this 73-page booklet was the controller of Universal Pictures for four years. Although he is now in private practice, it does not appear to be Mr. Leedy's purpose to bite the hand that formerly fed him. Indeed, the introduction to the booklet says that it was "inspired by the `bad press' received by motion picture distribution and its related accounting," and Mr. Leedy specifically states his opinion that Universal and other major distributors report motion picture results with the "highest level of integrity and honesty."

Why then the "bad press" which inspired this booklet? Distribution and profit participation agreements are, in essence, lengthy and complex word formulas describing the manner in which proceeds from the exploitation of movies are to be divided among those who distribute them and those who are active in their production. The end result is rarely as cut and dried as the end result of a mathematical formula, however, because words are rarely as precise as a mathematician's symbols. Reasonable people can, and do, disagree about their meanings.

In this booklet, Leedy explains how and why people disagree about the meaning of provisions of distribution and profit participation agreements, and he demonstrates with dozens of sample calculations the different bottom lines that may result from those disagreements.

The booklet describes the accounting consequences of provisions describing gross revenue, distribution fees and expenses, production costs, financing and interest, and profit participations.

Although the booklet is short, much of it is very specific. Five pages, for example, are devoted to an explanation (including sample calculations) of the infamous ”rolling breakeven” — a concept which Mr. Leedy suspects was developed “one morning after several pick-me-ups” by an “inebriated attorney” and a “demented accountant.”

The booklet is available for $6.95, including sales tax and postage, directly from its author, David J. Leedy, Certified Public Accountant, P. 0. Box 27845, Los Angeles, CA 90027. [ELR 1:24:7]

In the Law Reviews:

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CATV Franchise Fee: lncentive for Regulation, Disincentive for Innovation, 30 Syracuse Law Review 741-765 (1979)

The FCC, Cable TV, and Visions of Valhalla: Judicial Scrutiny of Complex Rulemaking and Institutional Competence by Allen E. Shoenberger, 14 University of Richmond Law Review 113-154 (1979)

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Privacy and the Limits of Law, 89 Yale Law Journal 421 471 (1980)

Freedom of the Press and a Reporter's Ability to Gather News, 26 Wayne Law Review 75-96 (1979)
[ELR 1:24:8]