RECENT CASES

Comedian Richard Pryor is awarded more than $3 million by California Labor Commissioner in case against former manager involving unlicensed agenting and alleged misappropriation

Richard Pryor has more than 3 million new reasons to laugh himself these days. For that is the amount in dollars - the California Labor Commissioner has awarded the popular actor and comedian as a result of a dispute between Pryor and his former manager, David McCoy Franklin. The case is not entirely over yet, because Franklin has taken the case to the Superior Court where he will be entitled to a new trial. But the first round decision by the Labor Commissioner has clearly gone to Pryor. The principal legal issue in the case - as in so many artist/manager dispute cases - is whether Franklin acted as Pryor's talent agent as well as his personal manager. The distinction between a "talent agent" and a "personal manager" is critical under California law. Agents seek employment for their clients and must be licensed by the state's Department of Labor. Managers on the other hand do not need to be licensed, but they are not permitted to seek employment for their clients without a license. The penalty unlicensed personal managers must pay if they do seek employment for their clients is a stiff one. In appropriate cases, they may have to refund all of the fees or commissions their clients have ever paid them.

Franklin served as Pryor's manager from 1975 through 1980 without having a talent agent's license. Though Franklin had no license, Pryor alleged and the Labor Commissioner has found that Franklin did obtain employment for Pryor in movies, on television, in concerts and on records. In fact, there was evidence that during those years, Franklin was the only one who negotiated contracts on Pryor's behalf and even referred to himself as Pryor's "agent." Nevertheless, Franklin argued that he had not actually obtained employment for Pryor in violation of California law, because, Franklin said, he did not solicit employment for Pryor or make the initial contact with any potential employer. Rather, Franklin asserted that potential employers called him with proposals for Pryor, and Franklin merely negotiated Pryor's contracts. The Labor Commissioner rejected this argument however, saying that it is well established that a person who negotiates an artist's employment agreement must have a talent agent's license even if the employer makes the initial contact. If the law were otherwise, said the Labor Commissioner: "many artists would lose much of the protection that the (Talent Agencies) Act was intended to afford, particularly the most sought after artists whose services are in the greatest demand." Franklin also argued that when he performed services for Pryor he did so as a lawyer and did not need an agent's license for that reason. The Labor Commissioner rejected this contention as well, however, because Franklin is not licensed to practice law in California. For this reason, the Labor Commissioner noted that it was not necessary to decide whether Franklin's conduct would have required an agent's license even if he had been licensed to practice law in California. (The question of whether California lawyers must have agents' licenses if they seek employment for their clients has never been answered by appellate courts, and it appears that the Labor Commissioner is reserving his right to argue that lawyers do. It is a position the Commissioner's office has publicly espoused before, though it is a position that has been met with derision by the entertainment bar.)

The Labor Commissioner also found that Franklin had used his position as Pryor's agent to have himself appointed executive producer of "Bustin' Loose" at a $75,000 salary, though he rendered no services in connection with the movie. Had this money not gone to Franklin, it would have gone to Pryor, and thus Franklin abused his position of trust, the Commissioner found. Finally, the Commissioner found that Franklin misappropriated and embezzled money owed to Pryor for his services. For all of these reasons, the Commissioner decided that this was an appropriate case for the exercise of his broadest remedy powers. And thus the Commissioner has ordered Franklin to return to Pryor $3,110,918. This amount consists of $753,217 in compensation Pryor previously paid to Franklin for his unlicensed services which Franklin must now return, plus $1,850,772 in misappropriated funds and money that should have been paid to Pryor but was not, plus $506,929 in interest.

Pryor v. Franklin, Case No. TAC17 MP114, Before the Labor Commissioner of the State of California (August 12, 1982) [ELR 4:11:1]

NCAA football television plan and network contracts violate antitrust law, Federal District Court declares

The Universities of Oklahoma and Georgia have won a stunning victory in a legal scrimmage with the National Collegiate Athletic Association. At issue in an antitrust suit filed by the two schools is the legality of the NCAA's plan for televising college football games. Oklahoma and Georgia contend that the plan violates the Sherman Act, and Federal District Judge Juan Burciaga has agreed.

In a nutshell, the plan declares that the NCAA is the exclusive representative of all of its member schools for the purpose of selling television rights to their football games. Colleges are not permitted to make their own deals with networks or individual television stations. NCAA rules also generally limit the number of times schools may be on television each season. And the amount of money that each school is paid when its games are televised is determined by the NCAA rather than by negotiation between the school and the network.

The origins of the NCAA television plan can be traced back to 1952 when the first such plan was adopted by a vote of the NCAA's membership. Ever since, revisions of the plan have been adopted by majority vote of the membership as well - though in the eyes of Oklahoma and Georgia, that has been the source of the problem, not a solution to it. This is so because the NCAA has some 800 members, fewer than 500 of which play football at all. Of the 500 that play football, only 187 are Division 1 schools, and many of those 187 do not have football programs of the same caliber as Oklahoma, Georgia, and other major college football powers whose games are most frequently televised. Nevertheless, all 800 of its members vote on the NCAA's football plan. As a result, the court found that in effect, the vast majority of NCAA schools that do not play football on television (or even at all) have voted to restrict the television rights of the minority that do play on television; and those members who make up the majority have voted to help themselves to a substantial portion of the television money that otherwise would have been paid by the networks to those schools whose games are televised.

Some time ago, the major college football powers formed an organization known as the College Football

Association (CFA). Originally, the purpose of the CFA was to lobby within the NCAA itself for the interests of CFA members. In 1979, however, the CFA concluded that its members should have been given a greater voice in determining the NCAA football television plan,. and thus the CFA began exploring the possibility of negotiating its own agreement with the networks for television rights to its members' games.

In 1981 (while the NCAA was negotiating with ABC, CBS and Turner Broadcasting), the CFA received a lucrative offer from NBC. NBC's offer was accepted by the CFA, subject however to the right of individual CFA members to opt out by a certain date, and subject to NBC's right to rescind if any CFA members did opt out. While CFA members were deciding whether or not to opt out, "high officials of the NCAA were making public statements to the effect that CFA members, if they chose to go with NBC, would be in violation of NCAA rules" and "that retaliation would be swiftly forthcoming." The NCAA also made clear that the sanctions imposed on any CFA member who chose to go with NBC would affect not only their football programs, but other sports as well.

In response to these threats Oklahoma and Georgia filed suit against the NCAA and obtained a temporary order barring the NCAA from initiating disciplinary proceedings or interfering in any other way with the CFA's efforts to complete its agreement with NBC. Though the NCAA abided by that order, CFA members were concerned that sanctions might be applied in the future, and this was a major consideration in the decision of many CFA members to opt out of the NBC contract which therefore was terminated.

The case was tried before Judge Burciaga in June of 1982. After three months of deliberation, Judge Burciaga has issued a 98-page opinion agreeing with all of the contentions made by Oklahoma and Georgia, and with none of those made by the NCAA. The court found that the NCAA's television plan, and its contracts with ABC, CBS and Turner Broadcasting, are devices by which the NCAA has fixed prices and restricted the "output" of its members. These practices are illegal per se under the antitrust laws, and the court held them to be such in this case.

The court also found that the NCAA's threat to discipline any member that sells its own television rights is a group boycott, also illegal per se under the antitrust laws. The NCAA had argued that it is a voluntary membership organization, and thus, any school that is dissatisfied with its rules may withdraw and thereby avoid any restraints imposed by those rules. The court disagreed, however. It found that any school that withdraws or is expelled from the NCAA no longer will be able to operate a fully-rounded athletic program, because it would be unable to compete "in the prestigious NCAA championship events in such sports as baseball, basketball, track, swimming, wrestling and gymnastics." Furthermore, even its football team would be unable to compete on television against teams of NCAA members. Thus, the court found that "as a practical matter," NCAA membership is not voluntary for any school "for which athletic excellence is an institutional priority."

Though the court found the NCAA's television plan to be illegal per se, it also analyzed the plan under the rule of reason, and found it to be illegal by that more lenient standard as well. In fact, the court found that the plan has no redeeming pro-competitive benefits. Said the court, "The (plan's) controls have not been shown to protect gate attendance, nor do they preserve competitive balance among the schools. The only benefits from the plan go to the NCAA itself, and the less prominent schools whose games would not appear on network television in the absence of the controls."

Finally, the court also found that the NCAA has monopolized the market for televised college football. The court therefore enjoined the NCAA from prohibiting its members from selling their own television rights or from requiring them to assign those rights to the NCAA as a condition of membership.

Shortly after Judge Burciaga's order was filed, a Federal Court of Appeals stayed the order until the appellate court rules on the case itself. Thus the ultimate result will depend on whether the Court of Appeals agrees with Judge Burciaga's analysis or whether it finds merit in the NCAA's arguments that Judge Burciaga did not find. All parties seem to agree on one thing however. If Judge Burciaga's ruling is upheld, there will be substantial changes in the number and kinds of college football games that are televised each fall.

Board of Regents of the University of Oklahoma v. National Collegiate Athletic Association, Civil No. 81-1209-BU (W.D.Okl., September 15, 1982) [ELR 4:11:2]

Bookseller's use of the name "Batcave" did not violate trademark or copyright held by D.C. Comics in Batman character

A comic book retailer whose main office is located in a subterranean room with a rough unfinished ceiling may continue to use the service mark "Batcave" in connection with its bookstores and its mail order business, notwithstanding the protests of a certain masked hero. D.C. Comics, the holder of the copyrights to the stories depicting such comic strip characters as Batman and Green Arrow, claimed that Reel Fantasy's use of the name of

Batman's secret hideout constituted trademark infringement and unfair competition. But Federal District Court Judge Kevin Thomas Duffy, in a most uncomical opinion, has ruled that D.C. failed to establish a secondary meaning in the term "Batcave." There was no showing by D.C. of a likelihood that Reel Fantasy's use of the mark would cause consumers to believe that its stores were sponsored by the producers of Batman.

Judge Duffy noted that D.C.'s trademark in Batman would not protect a dissimilar mark used for a dissimilar purpose. The company had registered trademarks for Bat Code, Bat Bomb, Batcycle, and other Bat objects. But it was not alleged that the "Bat" has acquired a secondary meaning linking all "Bat objects" with D.C.'s Batman character.

Even if D.C. were to establish a secondary meaning in "Batcave," infringement by Reet Fantasy had not been shown, the court ruled. The bookstore does not specialize in Batman goods; it stocks the comic books of various publishers.

Judge Duffy also was receptive to Reel Fantasy's suggestion that it did not intend to capitalize upon Batman's fame, but rather upon its own underground location. The word "Batcave" is descriptive of a natural habitat, noted Judge Duffy. Hence, Reel Fantasy was found to have exhibited a "good faith" basis for its use of the service mark.

Another factor considered by the court was that D.C. does not plan to operate comic book stores or to use the name "Batcave" in such a venture. It was recalled that "A property interest in a trademark only exists as a right appurtenant to an established business or trade in connection with which the mark is employed."

D.C.'s claims under section 43(a) of the Lanham Act and under New York's anti-dilution statute also were dismissed due to the company's failure to establish that

Reel Fantasy's operations would confuse the public as to the source of the D.C. Comics being sold. The equities involved - the apparent lack of harm to D.C. versus the relatively greater disadvantage to a fledgling small business of having to change its name - "tipped" in favor of Reel Fantasy, concluded the court.

D.C. also was foiled by the court's ruling on its charges that Reel Fantasy infringed D.C.'s copyrights in the Batman and Green Arrow characters by depicting the characters on the borders of advertising flyers. Only a "few" flyers using the illustrations were distributed. This incidental reference was related to advertising that Reel Fantasy sells comic books and was found to constitute fair use. The characters were not used to endorse or sponsor the store and no actual frames from D.C. strips were used. Again, the court found that D.C. did not appear to be harmed by Reel Fantasy's use of the figures, and might indeed benefit from any increase in the market for D.C. goods generated by the store's advertising.

D.C. Comics, Inc. v. Reel Fantasy, Inc. 539 F.Supp. 141 (S.D.N.Y. 1982) [ELR 4:11:4]

Unauthorized replicas of National Football League jerseys infringe NFL's rights

NFL football jerseys have become a fashionable article of clothing. Fans wear the football jerseys of their favorite players to games while students wear football jerseys to class. Clothing manufacturers, of course, are profiting from the enormous popularity of football jerseys by manufacturing "replicas" of the NFL's jerseys.

National Football League Properties (NFLP) is a California corporation jointly owned by the 28 NFL teams.

NFLP licenses the trademarks or other commercial identifications of the 28 member clubs. Royalties from these licenses fund a charitable foundation known as NFL Charities. The NFLP also imposes vigorous quality controls in order to ensure that the merchandise manufactured by its licensees is of high quality.

Wichita Falls Sportswear, a clothing manufacturer, made "replica" NFL football jerseys. A replica football jersey is a football style shirt with large numerals on the front and back which has colors corresponding to an NFL team, a sleeve design, and either the name of an NFL city or NFL player printed on the jersey. NFLP brought suit against Wichita Falls Sportswear under the Lanham Act for trademark infringement and for false designation of origin.

NFLP's main contention was that Wichita's jerseys confused the buying public since buyers purchased the garment believing that the jersey was an official NFL jersey - one made with the authorization and sponsorship of the NFL.

Judge Coughenour of the Federal District Court in the state of Washington first determined whether NFLP had established secondary meaning with respect to NFL football jerseys. In order to establish secondary meaning, NFLP introduced into evidence a nationwide survey which established that the buying public believed that Wichita would not have been able to manufacture its jerseys without first obtaining the sponsorship and approval of the NFL. The court also concluded that this showing established the presence of actual confusion.

Wichita Falls Sportswear had argued that NFLP's survey evidence was irrelevant because the proper "universe" of people had not been surveyed. Wichita contended that only a poll of prospective purchasers of NFL jerseys was relevant. The court disagreed however, and ruled that the proper "universe" included all potential purchasers. Persuaded by NFLP's professionally conducted survey, the court ruled that Wichita's jerseys were confusingly similar to those licensed by NFLP.

What was perhaps most fatal to Wichita Falls was the court's finding on the issue of intent to infringe. First, the court emphasized the fact that Wichita admitted in its own pleadings that it sought to capitalize on the market of those who purchase jerseys in order to associate themselves with an NFL team. In addition, the court found evidence of an intent to deceive the buying public by Wichita's violation of the terms of a preliminary injunction. The injunction had Wichita to put a disclaimer on the label of its jerseys which disclaimed any affiliation with the NFL. Wichita did insert the disclaimer as required, but affixed the disclaimer to the back of its labels where it would not be seen by consumers. The court viewed this as direct evidence of an intent to create confusion concerning the NFL's sponsorship of the jerseys.

In an unrelated though similar case, NFLP recently reappeared in Los Angeles Superior Court in connection with the move of the Oakland Raiders to Los Angeles. After the Raiders moved to Los Angeles, Los Angeles retail stores were flooded with replica Los Angeles Raiders jerseys. NFLP has obtained an injunction from Judge John L. Cole against specific manufacturers and retailers prohibiting the sale of counterfeit L.A. Raiders football jerseys.

NFLP, Inc. v. Wichita Falls Sportswear, Inc., 532 F.Supp. 651 (W.D. Wash. 1982) [ELR 4:11:5]

University of Pittsburgh wins right to license merchandise bearing its name and mascot despite the school's delay in registering its trademarks

Panthers have been prowling courtrooms recently, as well as football fields, in a dispute involving the right to merchandise clothing and other items bearing the name and mascot of the University of Pittsburgh. These items were being distributed by Champion Products, Inc., the "premier manufacturer" of clothing imprinted with school names and symbols. The names or insignia of more than 10,000 schools and colleges appear on Champion goods, and the company has annual sales in excess of $100 million. But Champion never has entered into a licensing arrangement with, or paid royalties to, any of the institutions whose insignia it uses. Nevertheless, since 1936, Champion has been supplying Pitt with athletic uniforms. Champion also sold goods with the Pitt name and symbol to sporting goods stores not affiliated with the university.

During the 1970s, Pitt spent a lot of money on its football team and the prowess and popularity of the team increased accordingly. University officials responded by registering the school's name and marks under federal and state trademark laws. The school then attempted to license the use of the marks to soft goods manufacturers. In December 1980, Pitt notified Champion of its claim to the marks and requested that Champion execute a license agreement. The proposed agreement included an annual fee of $100 plus a royalty of 6% of all sales of Pitt-marked products. When Champion refused to enter into this arrangement, Pitt brought an action against the company alleging trademark infringement, unfair competition and false designation of the origin of goods under section 43(a) of the Lanham Act. The District

Court's conclusion that Pitt's claims were barred by laches has been reversed, in part, on appeal.

The Court of Appeals noted that in 1960, Pitt had stopped carrying imprinted goods in its bookstore. Officials at the school most likely were aware that Champion soft goods still were being sold at other area stores. However, there was no indication that Pitt had "abandoned" its name or mark despite its knowledge of the continuing sales. It was not until the 1977 Sugar Bowl game that Pitt officials learned of the volume of sales of Pitt merchandise outside of the Pittsburgh area. As the court stated, the "character and scope of the alleged infringement changed substantially over the years from a modest program of sales to students ... to a program of national sales ... capitalizing upon Pitt's emergence as a national college football power." Thus, Pitt's "silent acquiescence" in the preregistration sales by Champion, while sufficient to bar an accounting for those sales, was not so "outrageous and inexcusable" as to cut off all of the school's rights.

Champion also argued that laches should apply to deny Pitt's claims since the company would be prejudiced by Pitt's entry into a field which had been essentially created and developed by Champion. But the demand for the imprinted merchandise resulted from Pitt's efforts to make its name widely known, said the court. Consumers request a Pitt T-shirt, not a Champion T-shirt. In this sense, "it is Champion .which seeks to profit from Pitt's investment, particularly in its athletic program," observed the court.

The Court of Appeals also questioned the District Court's findings concerning Champion's asserted reliance on Pitt's delay, pointing out that Champion did not build up its entire business in reliance on Pitt's inaction. This was not a case in which the junior user of a mark developed its entire business around one name or product which the senior user then sought to prohibit it from producing. Champion was developing its sales outlets for whichever of its products were in demand. Consumer demand for Pitt merchandise, again, did not result from Champion's efforts to "Push" these items but from consumers' enthusiastic response to Pitt-generated popularity.

The Court of Appeals concluded that the crucial element in evaluating trademark claims is "consumer desire to associate with the entity whose imprint is reproduced" - the entity in this case being the University of Pittsburgh. Champion's petition for a rehearing was denied, and the matter has been remanded to the District Court for it to decide on the scope of an injunction barring Champion from infringing Pitt's trademarks in the future.

University of Pittsburgh v. Champion Products, Inc., Case No. 81-02167 (W.D.Pa., Aug. 12, 1982) [ELR 4:11:5]

RKO General must face competitive challenges to its broadcast licenses rather than defend its licenses in noncomparative hearings

Broadcasting companies seeking to obtain licenses to operate thirteen stations presently licensed to RKO General, Inc., will be entitled to file competing applications at once, a Federal Court of Appeals has ruled.

After the Federal Communications Commission disqualified RKO as licensee of WNAC-TV in Boston, KHJ-TV in Los Angeles, and WOR-TV in New York (ELR 3:16:2), the Commission decided to hold noncomparative hearings to determine what action should be taken against RKO's remaining 13 stations. RKO had been granted renewals for some of the stations, without challenge or hearings, in the years 1977 to 1979; but the renewals were expressly conditioned on the outcome of the Boston, Los Angeles, and New York license proceedings. The FCC ordered the reopening of the prior renewals in order to allow RKO to present evidence, on a station-by-station basis, of its qualifications to continue as licensee.

The difficulty with this plan, according to RKO's competitors, is that RKO's licenses (all but one of which have expired) will remain immune from competitive challenge until the FCC concludes its as-yet unlaunched review.

The Court of Appeals concluded that it was no longer reasonable to close out prospective competitors and vacated the Commission's order. A significant factor in the court's decision was that the Commission is likely to review the same issues in the proposed noncomparative hearings as in the eventual comparative proceedings. Thus, the noncomparative hearings were not a "resource-conserving" measure as the FCC had claimed.

New South Media Corporation v. Federal Communications Commission, Case No. 80-2556 (D.C.Cir., Aug. 13, 1982) [ELR 4:11:6]

Peoria radio station denied license renewal due to misrepresentations regarding changes in the ownership and control of the corporate licensee

In 1975, the minority shareholders of Peoria Community Broadcasters, Inc. (PCB), the licensee of WWCT-FM, Peoria, Illinois, effected the withdrawal of the then-majority shareholder as an officer, director and shareholder of the corporation. PCB did not seek authority from the FCC for this transfer of control, as required under section 310(d) of the Communications Act of 1934.

Administrative Law Judge John H. Conlin has found that PCB displayed a "far too casual" attitude toward the Commission's regulatory requirements and, more significantly, entirely misrepresented the interest and participation of the various shareholders in the corporation. It appeared that the principals in PCB planned to sell the station sometime in 1976 and believed that an application to assign the license to the proposed buyer might be jeopardized if it were known that a transfer from the majority shareholder had occurred less than three years prior to the planned sale. Judge Conlin regarded PCB's reporting violations and the corporate officers' continued refusal to admit the inaccuracy of their reports at the hearings as "the willful concealment of highly material facts." PCB therefore was found not qualified to remain a Commission licensee.

PCB had argued that, as an existing licensee, it was entitled to a "renewal expectancy." However, WWCT-FM's station logs and other programming data no longer exist; this made it impossible to conduct a quantitative or qualitative analysis of the station's overall programming. Since it could not be concluded that WWCT-FM rendered a service to the public that was more than minimal, the station was not entitled to a renewal expectancy, the judge ruled.

Judge Conlin also granted the application of Central Illinois Broadcasting Company to construct and operate a new FM radio station in Peoria. Of particular importance was Central's declaration that two principals in the company, both possessing broadcast experience and close community ties, would be actively involved in the operation of the station.

In re Applications of Peoria Community Broadcasters, Inc. and Central Illinois Broadcasting Company, Before the Federal Communications Commission, BC Docket Nos. 80-331 and 80-332 (September 10, 1982) [ELR 4:11:6]

Briefly Noted:

Club Membership Policy.

The cable cars may be absent temporarily, but San Francisco's "venerable" Dolphin Boating and Swimming Club and the South End Rowing Club will sail on, albeit with revised membership policies. After actions were filed in 1974 and 1976 which challenged the allegedly discriminatory membership policies of the clubs, the city's Recreation and Park Commission adopted a resolution whereby both members and nonmembers would have access to the clubs. However, the fee schedule, the times the clubs are open, and the equipment use procedures differ depending upon whether the user is a member or nonmember. A Federal Court of Appeals has upheld these distinctions. It found that the nonmember classification bears a rational relationship to several valid legislative purposes. The clubs are selfsupporting and are capable of providing a far more intensive use of the park property on which they are located than any program which might be operated by the Recreation Park Department, noted the court. Limiting nonmember access to the clubs to daylight hours will avoid high security protection costs. And the fees charged both classifications of members are limited to an amount reasonably related to expenses. In all, the plan "recognizes both the burden of keeping the facilities open to nonmembers as well as the obligation of the

Commission and clubs to encourage maximum public use of the city's recreational facilities." The District Court's award of summary judgment on behalf of the clubs therefore was upheld.

Besig v. The Dolphin Boating and Swimming Club, Case No. 81-4285 (9th Cir., Aug. 12, 1982) [ELR 4:11:7]

Libel.

A libel action brought by the parents of a young singer named Susan Larsen, formerly Susan Dietz, alleged that an article which was published in a newspaper owned by Westchester Rockland Newspapers, Inc., incorrectly referred to Miss Larsen as having been an abused child who freed herself legally from her parents. The Dietzes claimed that although a Family Court proceeding had declared their daughter a "person in need of supervision" she had not been an abused child. The article was based upon a press release prepared by the singer's manager. The manager testified that she had reviewed the contents of the press release with Miss Larsen. A Westchester County court has dismissed the Dietzes' complaint because it failed to allege that either the manager or the newspaper had acted with knowledge of falsity or reckless disregard for the truth. The article did not mention the Dietzes; it did, however, include a glamorous photo of Miss Larsen, which photo bore little similarity to her appearance when she lived with the Dietzes. "Indeed, there are few people, if any, who could have connected the article and the Dietzes," noted the court. The Dietzes also conceded that they knew of no one who believed that the statements in the article applied to them. Further, the court found that the newspaper justiftably had relied on its employee's knowledge of the manager's reputation, and on the accuracy of the statements in the press release.

Dietz v. Matturro, (N.Y. Sup. Ct., Westchester County) New York Law Journal, pg. 16, Sept. 15, 1982 [ELR 4:11:7]

NEW LEGISLATION AND REGULATIONS

FCC considering elimination of network syndication and financial interest rule

The Federal Communications Commission has announced that it is considering the elimination of its 12-year-old network and financial interest rule (47 CFR sec. 73.6586)) The announcement came as no surprise to those in the television industry, because for some time now, the FCC has been riding the deregulation wave that has overcome Washington. Furthermore, just two years ago, the FCC's Network Inquiry Special Staff recommended that the rule be revoked. Nevertheless, the proposal is as controversial as any the FCC has ever made.

ABC, CBS and NBC strongly support the elimination of the rule. Program producers, on the other hand, just as strongly support its retention. In fact, several producers have formed an organization known as the "Committee for Prudent Deregulation" to fight for the rule's continued existence.

In a nutshell, the rule prohibits ABC, CBS and NBC from acquiring syndication rights to domestically produced television programs, and it prohibits the networks from acquiring most other financial interests in such programming as well. (The FCC has interpreted its rule to permit the networks to acquire non-broadcast rights in programming, such as cable and home video rights. ELR 3:6:2. And that interpretation has been upheld, over the protest of Viacom International, by a Federal Court of Appeals in New York. Viacom International v. FCC, 672 F.2d 1034 (2d Cir. 1982).)

The network syndication and financial interest rule was adopted by the FCC in 1970 after a six-year "investigatory proceeding" and a five-year "rulemaking proceeding." The FCC concluded that the rule was necessary to protect competition in the television programming industry, because the networks had substantially more bargaining power than program producers.

The United States Department of Justice shared the FCC's concerns, and in 1972, the Justice Department filed an antitrust suit of its own against the three networks alleging that they had restrained trade in acquiring program rights. After several years of expensive litigation, the Justice Department suits were settled by Consent Decrees. (ELR 2:11:1) The Decrees impose restrictions on network practices that duplicate and in some respects exceed the restraints imposed by the FCC's syndication and financial rule.

Ironically, at about the same time the Justice Department settled its antitrust suits against the networks with Consent Decrees that reinforce the FCC's rule, the FCC's Network Inquiry Special Staff issued a report in which it concluded that the rule should be eliminated altogether. According to the Special Staff, the rule is misguided at best; it interferes with risksharing arrangements between the networks and producers; it restrains competition; and it does little to further FCC goals of diversity, local broadcast service or increased competition. The Special staff concluded that this is so, because it said that prohibiting ABC, CBS and NBC from sharing in syndication profits has simply caused them to reduce the amount they are willing to pay for program development. ABC, CBS and NBC argue that since pay and cable television networks are not prohibited from sharing in syndication profits, they can pay more for program development than if they too were bound by the FCC's rule; and thus they have an unfair competitive advantage over ABC, CBS and NBC.

The FCC has not approved or adopted the Special Staff s report. But the FCC has said that its Staff "has made a case warranting review of the ability of this rule to achieve its intended result." The FCC also has emphasized changes in the television industry that have occurred over the past 12 years, especially the birth of new program "outlets" such as pay and cable television that now compete with the major networks.

Comments on whether the FCC should eliminate its syndication and financial interest rule must be filed by January 26, 1983, and reply comments by April 26,

1983. For further information, contact Israel Teitelbaum of the FCC's Broadcast Bureau at (202) 632-7792.

Notice of Proposed Rule Making in the Matter of the Syndication and Financial Interest Rule, 47 Federal Register 32959 (July 30, 1982) [ELR 4:11:3]

DEPARTMENTS

In the Law Reviews:

The Benjamin N. Cardozo School of Law has commenced publication of the Cardozo Arts & Entertainment Law Journal. Subscriptions to the new twice-yearly journal are $lo per year from Cardozo School of Law, Yeshiva University, 55 Fifth Avenue, Room 121, New York, N.Y. 10003. The inaugural issue contains the following articles.

The Copyright Royalty Tribunal and the Statutory Mechanical Royalty: History and Prospect by Frederick F. Greenman, Jr., and Alvin Deutsch, 1 Cardozo Arts & Entertainment Law Journal 1 (1982)

Direct Broadcast Satellites: Public Access or Exclusive Use, 1 Cardozo Arts & Entertainment Law Journal 91 (1982)

Art Resale Royalties: Symbolic or Economic Relief for the Fine Artist, 1 Cardozo Arts & Entertainment Law Journal 115 (1982)

Has the Right of First Refusal Been Thrown to the Wolves? American Broadcasting Co. v. Wolf 1 Cardozo Arts & Entertainment Law Journal 137 (1982)

Hastings College of the Law has published another issue of Comm/Ent, A Journal of Communications and Entertainment Law Subscriptions and single issues are available from Hastings College of the Law, 200 McAllister Street, San Francisco, California 94102. The latest issue contains the following articles.

Literature and Libel by Marc. A. Franklin and Robert Trager, 4 Comm/Ent 205 (1982)

Extension of the Federal Communications Commission's Jurisdiction to the Television Networks by Lance S. Davidson, 4 Comm/Ent 235 (1982)

The Regulatory Status of Cable Television Leased Channels: Issues of Common Carriage and Preemption by Nicholas P. Miller, W. Randolph Young and Robert H. Ruxin, 4 Comm/Ent 269 (1982)

After Richmond Newspapers: A Pubic Right to Attend Civil Trials? by Doug Gummerman, 4 Comm/Ent 291 (1982)

Communications Behind Bars: Are We Finally Applying the Reasonable Expectation of Privacy Test to Custodial Conversations? by Lynn Soodik, 4 Comm/Ent 327 (1982)

The Century City Bar Association has published the third issue of its twice-yearly Entertainment Law Journal. Subscriptions are $30 per year and are available from the Entertainment Law Journal, c/o Michael

Meyer, 1888 Century Park East, Suite 622, Los Angeles, California; phone (213) 553-1555. The latest issue contains the following articles.

The Prime Time Crime by Larry A. Thompson, 1/3 Entertainment Law Journal 1 (1982)

Talent and the Industry by Frank Price, 1/3 Entertainment Law Journal 12 (1982)

The FCC, Hollywood and the "Blank Generation" by Mark S. Fowler, 113 Entertainment Law Journal 16 (1982)

Bruce Mallen Discusses Interim Financing, 1/3 Entertainment Law Journal 22 (1982)

Current Trends in Entertainment Litigation: The Insurance Empire Strikes Back by Ronald S. Rosen, 1/3 Entertainment Law Journal 29 (1982)

Demise of the Airwave Pirates Under Section 605 of the Communications Act by Dave Vieva, 1/3 Entertainment Law Journal 38 (1982)
[ELR 4:11:7]