RECENT CASES

Marx Brothers' rights of publicity did not survive their deaths, Federal Court of Appeals holds in case involving the musical play "A Day in Hollywood/A Night in the Ukraine"

The secret word is "reversed," because a Federal Court of Appeals has overturned a lower court decision (ELR 3:12:2) and has held that the rights of publicity of the Marx Brothers did not descend to their respective heirs or assigns at their deaths.

During his life, Julius "Groucho" Marx assigned the rights in the name, likeness and style of the character Groucho, both as an individual and as a member of the Marx Brothers, to Groucho Marx Productions (GMP). GMP received a similar assignment from the widow of

Leo "Chico" Marx. Susan Marx the Trustee of the Residuary Trust under the will of Adolph "Harpo" Marx. GMP and Susan Marx together filed suit against the producers of the musical play "A Day In Hollywood/A Night in the Ukraine."

The play has been described as a "satirical comment" on Hollywood in the 1930s. Its second (Ukraine) half purported to be the way the Marx Brothers would have dramatized Chekhov's novel "The Bear." Though the names of the Marx Brothers were not used, the three principal performers reproduced the appearance and comedy style made memorable by Groucho, Chico and Harpo.

In the lower court, GMP and Susan Marx moved for summary judgment on the issue of the alleged appropriation of their rights of publicity in the names and likenesses of the Marx Brothers. After determining that New York law governed the substantive rights involved, the Court ruled that New York recognizes a right of publicity and that such a right is assignable and descendible. The lower court also concluded that, under New York law, whatever exploitation of the right during a celebrity's life is necessary to render the right descendible is satisfied by normal professional performing. Thus, the court ruled that the Marx Brothers' every performance was sufficient exploitation without the need for them to "endorse dance studios, candy bars or tee-shirts."

In reversing, the Court of Appeals found it unnecessary to rule on the correctness of those interpretations of New York law, because it held that the initial decision to look to the law of New York was incorrect. The court held that, under the principles laid down in its ruling in Factors Etc., Inc. v. Pro Arts, Inc., 652 F.2d 278 (2d Cir. 198 1) (ELR 3:13:2), the law governing the existence of the rights of publicity in this case is California law.

"The three Marx Brothers ... were California residents at the times of their deaths. Plaintiff GMP is a California corporation. Nine months prior to his death, Groucho executed in California a contract assigning to GMP his right of publicity. Chico and Harpo made no assignment of a publicity right during their lives. Chico's estate, 18 years after his death, executed a contract purporting to convey to GMP Chico's right of publicity; this contract provides that it is made and entered in the State of California' and that it is to be governed by California law. Plaintiff Susan Marx is a California resident, purporting to assert Harpo's right of publicity as the Trustee of the Residuary Trust under Harpo's Will, which was probated in California. Though the conduct alleged to impair plaintiffs' rights occurred in New York, the existence of their rights must be determined under the law of California."

Turning to California law, the court interpreted a rather nebulous pair of California Supreme Court decisions on the subject, Lugosi v. Universal Pictures, 25 Cal.3d 813 (1979), and Guglielmi v. Spelling & Goldberg Productions, 25 Cal.3d 860 (1979). (ELR 1:18:1)

Though these decisions, said the court, appear to establish that under California law an individual's right of publicity terminates at his death, the Lugosi decision is at least open to another interpretation.

"Without question, Lugosi established that California law does not recognize a descendible right of publicity available to the heirs of a celebrity who did not exploit his own right during his lifetime. What is less certain, however, is whether the right is descendible when the celebrity does exploit it during his lifetime."

After discussing certain passages in the Lugosi opinion, the court determined that California either does not recognize the descendibility of the right of publicity, or, if it does, the right is limited to the particular "commercial situations" - products or services - that the celebrity promoted with his name and likeness during his lifetime.

The court concluded that under either interpretation the producers of "A Day in Hollywood/A Night in the Ukraine" must prevail. They were not using the name and likenesses of the Marx Brothers in connection with any product or service that the comedians promoted during their lives. Accordingly, the court reversed the lower court's ruling, remanding to the District Court further consideration of any issues that remain.

One of those remaining issues concerns the extent to which heirs may rely on trademark law to protect the names and likenesses of their deceased celebrities.

Groucho Marx Productions, Inc. v. Day and Night Company, Inc., Docket Nos. 82-7183, 82-7185 (2d Cir., September 10, 1982) [ELR 4:12:1]

Tennessee state court declares that the unauthorized use of Lester Flatt's likeness violated the deceased musician's descendible right of publicity; New York court, in Elvis Presley merchandising case, allows licensee to seek rehearing based upon Tennessee ruling

In a series of actions dealing with the descendibility of Elvis Presley's right of publicity, various federal courts have attempted to divine Tennessee law on this issue, because a Tennessee corporation claims to own that right. A Tennessee Chancery Court, in a decision which was rendered in October 1981 but which was published only recently, may have brought the waltz of the courts to an end. In an action brought by the estate of bluegrass artist Lester Flatt against a distributor of Coors beer, the Chancery court declared that it had no reason to believe that the Tennessee Supreme Court "would refuse to enforce the right of publicity presented with an appropriate case."

Coors was distributing posters containing Flatt's likeness without having obtained permission to use the musician's likeness and without having paid any compensation for such use. The posters displayed cans and bottles of beer along with a slogan recommending Coors. The word "Tennessee" was written in large letters across the top of the poster. Also depicted on the poster were scenes representing Tennessee, such as pictures of Andrew Jackson, boaters and frontiersmen. But the most prominent features of the poster were the containers of beer and the portrayal of Lester Flatt and Earl Scruggs with the Foggy Mountain Boys.

The Chancery court first noted the widespread recognition, in other jurisdictions, of the right of publicity and its descendibility. Although the Tennessee Supreme Court has not had occasion to consider the scope of the right of publicity, it nevertheless has recognized, in two cases dealing with business trade names, the survival of rights in intangible property. A Federal District Court in

authority of other jurisdictions, held in Memphis Development Foundation v. Factors, Etc., Inc., 441 F.Supp. 1323 (W.D.Tenn. 1977), that Elvis Presley's right of publicity survived his death. The Chancery court found further support for its position in "considerations of fundamental fairness," for "Often an entertainer or athlete has devoted his or her entire life to attain celebrity status, and it would be unfair to permit a commercial enterprise to reap windfall benefits from the celebrity's labors at the expense of the celebrity's heirs or beneficiaries. . . ." The ability to leave a valuable property interest to one's heirs also serves the public interest by encouraging "enterprise and creativity," stated the court.

The Chancery court declined to follow the Sixth Circuit's conclusion in the appeal of Memphis Development 616 F.2d 956 (1980), that the right of publicity is not descendible in Tennessee (ELR 1:22:1). The Chancery court noted that in another Elvis Presley merchandising case, Factors, Etc., Inc. v. Pro Arts, Inc., 652 F.2d 278 (2d Cir. 1981) (ELR 3:13:2), the Second Circuit believed itself obligated to follow the Sixth Circuit's opinion in the absence of a ruling on the issue by the state courts of Tennessee. However, Judge Mansfield, a dissenter in Factors, cautioned that the Memphis Development opinion was not derived from a careful analysis of the local law and procedures of Tennessee and was contrary to the current views of scholarly commentators on the subject. He also recognized that Tennessee courts in particular might wish to adopt a policy favorable to the interests of the many musical artists located in Nashville and Memphis.

The Chancery court proceeded to distinguish California's ruling against descendibility in Lugosi v. Universal Pictures, 23 Cal.3d 813 (1979). (ELR 1: 18:1) It was noted that the Lugosi court stressed that the actor had made no attempt to profit from the use of his name and likeness during his life. Lester Flatt, however, did have a longstanding commercial relationship with Martha White Mills, a company which sponsored his radio programs with Earl Scruggs, and with whom he became "indelibly identified." Coors also was exploiting Lester Flatt as himself, not as an actor playing a role as was the case with Lugosi's portrayal of Count Dracula.

Accordingly, the court denied Coors motion to dismiss Flatt's executors' right of publicity claim.

Waltzing back to New York and to the Presley case, the Second Circuit had issued a ruling in Factors, that was based on the Sixth Circuit's view of Tennessee law, Boxcar Enterprises, a Tennessee corporation which was the assignee of Presley's merchandising rights, did not possess a descendible right of publicity. The distributor of an unauthorized memorial poster of Presley therefore returned to the Federal District Court and moved for summary judgment and for damages for wrongful injunction. But in view of the decision in Commerce Union Bank, the Federal District Court announced that it would stay entry of judgment in order to permit Factors, which is Boxcar's licensee, to petition the Second Circuit to rehear the case. Commerce Union Bank, as a trial court decision, does not bind the federal courts, but it is entitled to "proper regard," stated the District Court.

Commerce Union Bank v. Coors, 7 Med.L. Rptr. 2204 (Tenn.Chanc.Ct. 1981); Factors, Etc., Inc. v. Pro Arts, Inc., 541 F.Supp. 231 (S.D.N.Y. 1982) [ELR 4:12:2]

Poster reproduction of Jordache jeans advertising photograph did not violate model's right of privacy; but use of TV commercial after expiration of performer's employment contract did

In 1979, Frank Dzurenko, a male commercial model, posed for photographs to be used to advertise Jordache jeans. He and model Brooke Shields were wearing only jeans, and were photographed in "what might be described as a sexually suggestive position." Dzurenko signed the standard commercial model release but inserted the words "for magazine use only." Nevertheless, Jordache or its advertising representatives caused the photographers to be blown up into a poster, copies of which were distributed to retailers of the Jordache jeans. Dzurenko brought an action seeking, among other things, damages for invasion of his right of privacy in violation of sections 50 and 51 of New York's Civil Rights Law.

The Appellate Division observed that Dzurenko had consented to the commercial exploitation of his photograph. And although the use of the photograph in a manner varying from that specified in the release may constitute a breach of the parties' agreement, such use was not an invasion of privacy. The case of Welch v. Mr. Christmas, 447 N.Y.S.2d 252 (ELR 4:2:4) was distinguished. In Welch, an actor who had authorized the use a seasonal commercial in 1973 and 1974 learned that the commercial was used, without his consent, in 1975. A New York Appellate Division ruled that the model's "revested" right of privacy was violated. But in Welch the model had set a time limit on the use of the commercial in question, while Dzurenko had limited only the "form and forum" of use. Therefore, the distribution of the poster may have involved a breach of contract. It was not, however, an intrusion on his privacy, concluded the court.

Justice Kupferman, in dissent, commented that he would have reinstated Dzurenko's cause of action for violation of his right of privacy in the belief that the matter deserves consideration by the state's Court of Appeals. Noting the similarity of Dzurenko's and Welch's claims, Justice Kupferman stated that further review was warranted on the issue of when the right of privacy may be invoked if permission to use an individual's name and likeness has been given in writing.

Quite by coincidence New York's Court of Appeals has since made known its views concerning the rights of a party whose consent to the use of a picture has expired. It has affirmed the Appellate Division ruling in Welch v. Mr. Christmas. To recap the facts briefly - in 1973, Charles Welch, a professional actor, entered into a one-year contract with a manufacturer of Christmas trees whereby for a fee of $1,000, Welch agreed to appear in a television commercial advertising the trees. An option on Welch's services was provided for in the agreement and was exercised in 1974. In 1975, the commercial was aired again, without Welch's permission and without payment to the actor. A jury verdict for Welch was reached in the amount of $1,000 compensatory damages and $25,000 exemplary damages (though the trial judge reduced the exemplary damage award to $15,000). The Appellate Division held that the evidence concerning Mr. Christmas' failure to prevent its distributor from using the commercial was sufficient to justify compensatory damages under the statute.

Judge Meyer of the Court of Appeals found that an individual's "right to withhold consent to a use includes the right to limit the period within which the consent remains in effect," and that continued use of the commercial after the expiration of consent constituted an invasion of privacy. A showing of knowledge was not required, stated Judge Meyer. Mr. Christmas had encouraged its distributors to make maximum use of the commercial and did not restrict the period of use or recall prints of the commercials from the distributors.

Judge Meyer went on to note that while recovery of exemplary or punitive damages in a common law action generally requires a showing of conscious disregard of the rights of others, the legislature may establish different criteria for damages, and did so in section 51. Under the statute only "knowing use" need be shown for the recovery of exemplary damages. Mr. Christmas had received a warning from the Screen Actors Guild to refrain from further use of the commercial. This warning, along with other evidence, sufficiently established that the company knew that Welch had not consented to the use of the commercials in 1975.

Dzurenko v. Jordache, Inc., 451 N.Y.S.2d 102 (App.Div. 1982); Welch v. Mr. Christmas (N.Y., October 7,1982; New York Law Journal, October 13, 1982, p. 1) [ELR 4:12:3]

Broadcast of excerpts from theatrical films on "Behind Oscar" show did not entitle film directors to compensation under Directors Guild Basic Agreement because excerpts were used for news purposes, arbitrator rules

Hollywood's annual spring rite of lavishing attention on a small gold statue draws widespread media coverage. In 1980, for example, KNXT, a CBS-owned station in Los Angeles, produced a one-half hour television program entitled "Behind Oscar." The program was broadcast two days prior to the Academy of Motion Picture Arts and Science's Oscar Award ceremony. During "Behind Oscar," Steve Edwards, KNXT's News Entertainment Editor, provided information about award nominees, interviewed several nomines and other persons involved with the nominated films, and reviewed the history of the Oscar award. The main portion of the program consisted of the interviews, which had been taped previously for the entertainment segment of regularly scheduled KNXT news broadcasts. Only one interview relating to the history of the Oscar award was taped specifically for the "Behind Oscar" program. The program also used excerpts from about 19 American films. The excerpts, ranging in length from about four seconds to one minute seven seconds, were taken from clips previously supplied to KNXT's News Department by various production companies for use in Steve Edward's film reviews on regularly scheduled news broadcasts.

The Directors Guild of America contended that the directors of the films from which excerpts were taken were entitled to compensation under the terms of the DGA's Basic Agreement with the networks. (Although CBS did not produce the theatrical motion pictures excerpted for the television production, the parties agreed to arbitrate the DGA's claims on a "non-precedential" basis under the Basic Agreement.)

The relevant provision of the Agreement, Section 11-303, restricts the television showing for advertising purposes of "complete scenes or portions of any scene from a theatrical motion picture." However, the restrictions do not prohibit "the use of trailer advertising or exploiting the exhibition of the picture on television." But if excerpts from a theatrical picture are used in a television film, including television films "which consist substantially of excerpts of theatrical motion pictures," the Employer is liable for the payment of a one-time only sum to the director. Nevertheless, continues Section 11-303, "The word excerpts as used herein shall not be deemed to apply to excerpts which are used with the consent of the Guild ... or to the televising of trailers or advertising of a motion picture by shots or scenes substantially in the nature of a trailer or to the use of stock shots or to the televising of excerpts for news or review purposes."

KNXT argued that "Behind Oscar" fell within the news and review exception of Section 11-303 since the program was produced and treated as a news program.

Arbitrator Joseph F. Gentile found it necessary to review the bargaining history of Section 11-303. It appeared that the "news or review purposes" exception of the section derived from Article 15B.10 of the Writers Guild of America Basic Agreement of 1977. During the 1977 negotiations between the WGA and the "Alliance," a group of producers which then included Universal, Paramount, T.A.T. and Tandem, M.T.M., and Lorimar, the parties agreed to delete the provision of the WGA Basic Agreement granting producers free use of excerpts in a "factual documentarytype program." The Alliance purportedly agreed to eliminate the factual documentary exception in exchange for the WGA agreeing to retain the "news" exception. There was testimony that this balance was reached with the understanding that "news" referred to hard news -"an event that happens today" according to Michael Franklin, who then was the Executive Director of the WGA. The arbitrator noted that it was not clear and precise whether this specfic definition of "news" was adopted and endorsed by the Alliance.

The WGA subsequently presented its agreement with the Alliance to the producers represented by the Association of Motion and Television Producers (AMPTP) and to the networks. The AMPTP and the networks adopted the same language as the Alliance regarding the use of excerpts without further discussion of the definition of "news." The AMPTP and the networks had made a proposal to the WGA which would have exempted from the television productions "when used for industry award or recognition programs such as 'The Academy Awards,'" but this proposal was rejected.

In 1978, during the DGA's negotiations with the AMPTP and the networks, it was agreed to incorporate the language of Section 15B.10 of the 1977 WGA Basic Agreement into the DGA's Agreement. There was no further discussion of the meaning and intent of the language of the section.

Arbitrator Gentile's conclusion, after reviewing this negotiating history, was that even if the Alliance actually intended to accept the WGA's "understanding" of the term "news," this intent could not flow from the WGA-Alliance bargaining table to the AMPTP negotiation and "ultimately come to rest" in yet a third set of negotiations with the DGA in 1978. Most significantly, in 1978, the language was adopted without the benefit of any meaningful discussion of the phrase "news purposes." The networks had "every reason to assume, and properly so, that 'news or review purposes' meant just what it said." The networks did not adopt or accept any "understanding" that occurred without their knowledge, stated the arbitrator.

In any event, arbitrator Gentile concluded that the content of "Behind Oscar" did relate to an event of considerable public interest, was aired within two days of the event and had its origin in news reports. T-he timing and purpose of the program was found reasonably within the scope of the forthcoming news event, the excerpts were being used for "news purposes," and the DGA's claim for payment under Section 11-303 therefore was denied.

In the Matter of Arbitration between Directors Guild of America, Inc. and CBS Inc., DGA Arbitration Case Nos. 00758 and CBS Docket A-22-80 (August 13, 1982) [ELR 4:12:4]

California Supreme Court declares unconstitutional San Diego's ban on billboard advertising

The California Supreme Court recently has had an opportunity to consider the constitutionality of a ban on commercial speech. On remand from the United States Supreme Court, the California court reviewed a San Diego ordinance which prohibits off-site billboards and which limits on-premises signs to those identifying or advertising the business being conducted on the premises. Exceptions were made in the ordinance for signs containing 12 forms of noncommercial speech, but the exceptions were found to be too narrow by the U.S. Supreme Court (ELR 3:7:5).

The California court declined to salvage the constitutionality of the ordinance by limiting its scope to prohibit only commercial signs. The court stated that such a construction "would be inconsistent with the language of the ordinance and the original intent of the city council at the time of enacting the ordinance." Interpreting the ordinance to avoid any prohibition on noncommercial signs was found an unacceptable judicial amendment of the ordinance. The city's purpose in adopting the ordinance was to eliminate billboard structures which were distracting to drivers and which were unesthetic, and the character of the billboard's message is "largely irrelevant" to these goals, observed the court.

The city argued that the ordinance could be saved by severing and deleting all language imposing a ban on noncommercial signs. But the resulting ordinance would require the city to police the content of advertising messages and to distinguish commercial from noncommercial speech - a difficult task with "serious constitutional problems," concluded Judge Broussard.

The court suggested that an alternate ordinance which regulated the location, size and appearance of billboards but stopped short of a total ban might better serve the city's purpose. Such a "time, place and manner" regulation might avoid the problem of basing a regulatory distinction on the content of a billboard's message.

In dissent, Judge Kaus pointed out that in response to the United States Supreme Court decision, the city of San Diego enacted an emergency interim billboard ordinance in which the city expressed its intent to preserve the ordinance "insofar as constitutionally permissible." In view of the city's position, Judge Kaus would have construed the ordinance's prohibition on offsite billboards as applicable only to commercial billboards and as so interpreted would have upheld the ordinance as constitutional.

Metromedia, Inc. v. City of San Diego, Case No. L.A. 30782 (Cal., Aug. 30, 1982) [ELR 4:12:6]

Mississippi's ban on alcoholic beverage advertising is ruled unconstitutional

Certain Mississippi statutes and regulations which effectively prohibited the advertising of alcoholic beverages in the state have been declared unconstitutional as a violation of the First Amendment and of the equal protection clause of the United States Constitution. While recognizing that the 21st Amendment gives the states considerable powers to regulate alcohol, Federal District Court Judge Dan M. Russell refused to find that the 21st Amendment is "superior" to the First Amendment.

In resolving the conflict between free speech rights and state latitude in regulating alcoholic beverages, Judge Russell first considered the landmark case in this area, California v. LaRue, 409 U.S. 109 (1972). In LaRue, the United States Supreme Court upheld a state liquor regulation which prohibited lewd sexual performances in licensed bars. The Court found that the regulation was a reasonable and rational exercise of the state's power to restrict viewer access to alcohol rather than a restriction on access to a particular form of expression. The Supreme Court considered such factors as the "questionable communicative value" of nude dancing, the presence of a legitimate state regulatory interest, and the availability of alternate alcohol-free performance sites. In Judge Russell's view, LaRue concerned only an incidental infringement of partially protected speech and did not foreclose all freedom of expression objections to 21 st Amendment regulations.

Judge Russell acknowledged that Mississippi's regulations limit commercial speech which is an area generally afforded less protection than other First Amendment activity. However, recent Supreme Court decisions have granted limited First Amendment protection to commercial speech. It was ruled in Central Hudson Gas &

Electric Corp. v. Public Service Commissioner of New York, 447 U.S. 557 (1980), a case involving an administrative ban on promotional advertising by an electrical utility, that the First Amendment "(1) protects commercial speech only if that speech concerns lawful activity and is not misleading." A restriction on protected commercial speech then would be valid only if it "(2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no farther than necessary to accomplish the given objective."

In the Mississippi case, 56 media organizations challenged the state's ban on the advertisement of alcohol, not a ban making it unlawful to sell or consume alcohol in those counties of the state choosing to remain dry. Thus, the advertising involved a lawful activity and was not misleading. No evidence was produced to substantiate the claim that alcohol advertising artificially stimulates alcohol consumption. Therefore the complete prohibition of advertising did not bear a rational relationship to the furtherance of the asserted state interest in promoting temperance, held the court.

It also was observed that the state's residents, both in wet and dry counties, are inundated with alcohol advertising originating outside the state and distributed therein. Judge Russell concluded that the advertising ban violated the equal protection clause by penalizing advertising originating within Mississippi.

Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Commission, 539 F.Supp. 817 (S.D.Miss. 1982) [ELR 4:12:6]

Briefly Noted:

Video Games.

"Although video games may be copyrighted, they contain so little in the way of particularized form of expression' that video games cannot be fairly characterized as a form of speech protected by the First Amendment," a Federal District Court in New York has held. "Rather, a video game, like a pinball game, a game of chess, or a game of basketball, is pure entertainment with no informational element." America's Best Family Showplace Corp., a prospective restauranteur, wished to open a restaurant in New York City with forty table-size video games in lieu of regular dining tables. However, New York City administrative regulations precluded Showplace's plan by requiring establishments with more than four video games to obtain a special arcade license, unavailable to restaurants. Showplace sued New York City, seeking a declaration that the City's regulatory scheme violates Showplace's First and Fourteenth

Amendment rights, as well as its civil rights under 42 U.S.C. section 1983. Since the court determined that video games are not a protected form of speech under the First Amendment, the City's regulatory scheme only had to withstand due process and equal protection scrutiny. Finding the City regulatory scheme ,'substantially related to the legitimate governmental objectives," the court upheld the City regulatory scheme's constitutionality. In doing so, the court explained that "Amusement arcades have attracted much media and community attention of late. The City has noted their proliferation and their deleterious effect upon the quality of life in the City's neighborhoods to justify regulating their operation. Amusement arcades attract large numbers of people for short periods of time. The City's regulatory provisions minimize the problems of noise and congestion and provide for the stable development of local communities, free from unnecessary noise and congestion."

America's Best Family Showplace v. City of New York, 536 F.Supp. 170 (E.D.N.Y. 1982) [ELR 4:12:7]

Obscenity.

"Those who produce obscene movies in the State of New York do so at their own peril. That at least was the warning of a New York appellate court in a decision involving the distribution of a movie entitied "Fulfilling Young Cups." After the film was shown in Nassau County, its producers were arrested. They entered pleas of guilty to charges of obscenity and attempted obscenity, and these pleas established the obscene nature of the film, stated the court. Since the film was produced in violation of the state's penal statutes, the court refused to allow the film's producers to pursue their fraud claims against the distributors of the film. The producers had argued that the contract for the distribution of "Fulfilling Young Cups" called for the films to be distributed only in jurisdictions where the showing of the film would be lawful. This did not alter the court's reluctance to serve as "paymaster of the wages of crime." The court expressed the view that any recovery in this case might encourage further unlawful production of obscene films in the state.

Braunstein v. Jason Tarantella, Inc., 450 N.Y.S.2d 862 (App.Div. 1982) [ELR 4:12:7]

Libel.

An action for libel brought against Los Angeles Magazine, American Broadcasting Companies, Inc. and KCET has been dismissed by a Los Angeles trial court judge on the ground that California Civil Code sections 45, 45a and 46 "liability without fault." The defense counsel had argued that the California libel statutes, on their face and as interpreted by the courts, "permit the imposition of liability without fault even for an entirely innocent misstatement . . ." It also was argued, and the court apparently agreed, that the statutes permit malice to be inferred and allow presumed damages, contrary to U.S. Supreme Court rulings in New York Times Co. v. Sullivan and Gertz v. Welch.

Mechanics National Bank v. Los Angeles Magazine, Case No. SEC 23467 (L.A.Sup. Ct., July 12, 1982) [ELR 4:12:7]

Contracts.

In a high speed decision, issued the day NBC was scheduled to begin showing the series "Chips" pursuant to a license from MGM, a Federal District Court in New York ruled that MGM's prior syndication license with McGraw-Hill Broadcasting does not preclude NBC's network exhibition of the series. The court found that McGraw-Hill had not demonstrated a probability of success on the merits. Also, the fact that McGraw-Hill, upon learning of the NBC license, sought rescission of its contract with MGM and the return of its purchase price, clouded the company's allegation of irreparable injury. NBC's hardship in attempting to reschedule its programming was found as significant as any hardship which might accrue to McGraw-Hill from the denial of the injunction.

McGraw-Hill Broadcasting Company, Inc. v. MGM/UA Entertainment Company, 537 F.Supp. 954 (S.D.N.Y. 1982) [ELR 4:12:7]

NEW LEGISLATION AND REGULATIONS

California statute exempts personal managers from Talent Agencies Act so that unlicensed managers may procure recording contracts for their clients

California's close regulation of talent representatives has undergone a major and controversial revision. Talent agencies are licensed by the Labor Commissioner under section 1700.4 of the state Labor Code. The section defines a talent agency as "a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagement for an artist or artists."

However, the California legislature has enacted a bill authorizing personal managers, who handle career and financial planning for entertainers, to negotiate recording contracts without being subject to state laws and union contracts that limit most talent agents to 10% commissions. It also will be lawful for an unlicensed personal manager to work in conjunction with and at the request of a licensed talent agency in negotiating employment contracts.

The bill repeals criminal sanctions for the violations of the Talent Agencies Act and bars proceedings alleging violations of the Act which occurred more than one year prior to the commencement of the proceeding. These revisions will be in effect until January 1, 1985. During the "pre-Broadway" tryout of the legislation, the California Entertainment Commission, a 10-member panel created by the bill, will review licensing practices in the entertainment industry generally in order to recommend to the Legislature a model bill on the licensing of personal managers and talent agents.

California Assembly Bill No. 997, Amending Labor Code sections 1700 et seq. (August 1982) [ELR 4:12:4]

Federal Communications Commission clarifies its FM radio assignment policies

The FCC has updated its procedures and standards in connection with its FM Table of Assignments. The first priority in assigning stations will be to assure the availability of at least one full-time radio station to as many people as possible. The Commission will then attempt to provide either a first local or a second nonlocal radio station depending upon which type of station would reach a greater audience.

Also reviewed by the Commission was the policy known as "preclusion." Previously, if a channel were assigned to one location, that assignment precluded the use of the channel and adjacent channels elsewhere in the same general area. The policy was adopted at a time when there was great concern about the need to hold channels in reserve for future use when the FM medium developed. But FM has "matured," in the Commission's view, and the need to continue to reserve channels via preclusion has ceased.

Another means of holding channels in reserve was the use of population criteria. These guidelines were designed to allocate channels based on community size in order to prevent larger cities from obtaining a disproportionate share of channels. However, since a waiver of the guidelines has become the general practice, the Commission found little reason to retain them.

The requirement that demographic showings accompany a request to assign an FM channel also has been terminated. After all, noted the FCC, "If the petitioner believes that the service is needed and that advertising support for it could be generated, what reason is there for the Commission to question this judgment?" The Commission will require demographic information only if the assignment of a channel is sought for a location that is neither incorporated nor listed in the census reports in order to verify that the place is a "geographically identifiable population grouping," that is, a community.

The Commission also will relax its policy on assigning a second channel when two applicants seek the use of a particular channel. Each applicant's proposal still will be examined on its merits, but if a second assignment can properly be made, such a decision will be reached to avoid the cost and delay of a comparative evidentiary hearing.

In the Matter of Revision of FM Assignment Policies and Procedures, BC Docket No. 80-130 (Second Report and Order, May 20, 1982) [ELR 4:12:5]

DEPARTMENTS

In the Law Reviews:

The Tennessee Bar Association has commenced publication of the Journal of Copyright, Entertainment and Sports Law Subscription orders may be sent to the Association in care of S. Ralph Gordon, Second Floor, Trial Lawyers Building, 430 Third Avenue North, Nashville, Tennessee 37201; the rate for 1982 is $12 for 2 issues, and for 1983 is $18 for three issues. The Association also is eager to receive manuscripts which may be sent to the Journal's Editor-in-Chief, William L. Warren, Polygram Corporation, 450 Park Avenue, New York, N.Y. 10022. The first issue contains the following articles:

Software v. Hardware: The Battle for Cable Television Copyright Liability by James Llewellyn Kaler, Jr., 1 Journal of Copyright, Entertainment and Sports Law 1 (1982)

Video Game Litigation and the 1976 Copyright Act: The Ideas of Games, the Expression of Aliens and the Underlying Computer Software by Henry W. Jones, III, 1 Journal of Copyright, Entertainment and Sports Law 17 (1982)

Protection Against the Unauthorized Use of the Title of a Song as the Title of a Motion Picture: The Doctrine of Unfair Competition in California and Under the Lanham Act by Michele Anthony and Richard Finkelstein, 1 Journal of Copyright, Entertainment and Sports Law 49 (1982)

Reversion Under British Copyright Law by Phillip L. Rosen and Frederic Silber, 1 Journal of Copyright, Entertainment and Sports Law 67 (1982)

Home Videotaping of Copyright Material: Cracks in the 1976 Copyright Act? by David J. Cole, 11 Capital University Law Review 215 (1981)

The News Gathering/Publication Dichotomy and Government Expression by Steven Helle, 1982 Duke Law Journal 1

Public Television and the Hearing Impaired by Louis Schwartz and Robert A. Woods, 9 Journal of College and University Law 1 (1982)

Standard of Review for Regulations of Commercial Speech: Metromedia v. San Diego, 66 Minnesota Law Review 903 (1982)

Street v. National Broadcasting Co.: Libel and Invasion of Privacy, 77 Northwestern University Law Review 84 (1982)

In Praise of the Betamax Decision: An Examination of Universal City Studios v. Sony Corp. of America by William Patry, 22 South Texas Law Journal 211 (1981)

It's a Bird, It's a Plane or is it Public Domain?: Analysis of Copyright Protection Afforded Fictional Characters by James L. Turner, 22 South Texas Law Journal 341 (1981)

Sex Discrimination in High School Athletics: An Examination of Applicable Legal Doctrines, 66 Minnesota Law Review 1115 (1982)
[ELR 4:12:8]