

**BUSINESS AFFAIRS**

**The Trials and Tribulations of Producing Docu-Dramas: Tales of Elizabeth Taylor, John DeLorean and Network Program Standards**

**by Lionel S. Sobel**

Every year, the networks announce the inception of dozens of television movie projects that are never seen or heard about again. They vanish, a victim of the high mortality of the business of movie development, without a public trace - not even a release to the trades marking their demise. There is an explanation for this, of course. There is no reason to announce a project's failure. Moreover, what appears at first to be a failure may turn out to be nothing more than a snag. "Blood Feud," for

example, made it to the screen last spring as an Operation Prime Time presentation more than six years after NBC announced that it had given a green light to the production of the Bobby Kennedy/Jimmy Hoffa story.

Last May, however, the trades did carry an obituary for a TV-movie project that seemed at first to be a natural. ABC had scrapped its plans for "The Elizabeth Taylor Story," the trades reported. And what was truly interesting about the announcement was that it came, not from ABC, but from Elizabeth Taylor herself. In fact, it took two weeks for ABC to confirm the story. And when it did, the network said simply that "creative reasons" had made it decide not to proceed with the movie.

Those in the know - and that included many thousands of people who read nothing more specialized than the New York or Los Angeles Times - knew why Ms. Taylor herself announced the death of her own filmed biography. And they had to smile at ABC's explanation that

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"creative reasons" brought the project to halt. "The Elizabeth Taylor Story" was being developed for ABC by David Paradine Television, Inc., without Ms. Taylor's consent and indeed over her most vigorous objections. Furthermore, one of the "creative reasons" that ABC decided to abandon the project was that in October of 1982, Ms. Taylor had filed a lawsuit against the network and Paradine Television in Federal District Court in New York City expressing some of her objections in unsettling, legal language.

### Taylor complaint

Ms. Taylor's complaint alleged that ABC's planned movie was not a biography or documentary concerning her career, but instead was "fictionalized 'docudrama,' deliberately employing manufactured dialogue and invented incidents" which would use her "name and

likeness to draw attention to and promote the film." In doing so, the complaint alleged that ABC and Paradine Television would "misappropriate Miss Taylor's name, likeness, reputation, and image for their own commercial use and profit, without her consent," and would thereby diminish the value to her of her own name, likeness and reputation, and would cause public confusion. The complaint asserted that the proposed movie would violate her rights under sections 50 and 51 of New York's Civil Rights Law which prohibit the unauthorized use of a person's name or picture for trade purposes without consent; that it would misappropriate her right of publicity; that it would violate her rights under section 43(a) of the Lanham Act and section 368-d of New York's General Business Law; and that its broadcast would constitute an act of unfair competition.

At a press conference called on Ms. Taylor's behalf when the suit was filed, she explained her anger in her

own less legal, but still dignified, words. "I am suing the ABC television network because they plan on doing a story of my life which is completely fictionalized unless there was somebody under the carpet or under the bed during my 50 years," she said. "No matter who portrays me, she will not be me; I will not be she. I am my own commodity. I am my own industry. The way I look, the way I sound, that is my industry and if somebody else portrays me and fictionalizes my life, it is taking away from me. Someday I will write my autobiography, and perhaps film it, but that will be my choice. By doing this, ABC is taking away from my income."

Law not clear

Although there is a great deal of apparent logic and surface appeal in what Ms. Taylor had to say, it is not at all clear that the law supports her claim. Because the

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movie had not yet been made - because she objected to the very concept of such a movie being made at all - Ms. Taylor's case was uncluttered by the libel, privacy and copyright infringement issues that so frequently are at the heart of docu-drama lawsuits. She asked in effect, "Whose life is it anyway?", thinking no doubt that all would agree it is hers. As a matter of law, however, the answer may have been, the public's. There are, surprisingly, few precedents squarely in point, and two that come close, disagree with one another. Their disagreement is especially significant to the entertainment industry, because the decisions were rendered by the New York Court of Appeals and the California Supreme Court, the high-est courts of the two states in which the industry is centered.

ren Spahn against publisher Julian Messner, Inc., and author Milton Shapiro. The suit was provoked by the

defendants' publication of an unauthorized biography for youngsters entitled "The Warren Spahn Story." The law of New York is clear that even unauthorized biographies do not violate sections 50 and 51 of the New York Civil Rights Law, provided they are factual. In Spahn's case, however, the biography made use of "imaginary incidents, manufactured dialogue and a manipulated chronology." Because it did, and because the defendants knew that it did, the court held that the book violated Spahn's rights under New York law and thus it affirmed a \$10,000 judgment and injunction in his favor. *Spahn v. Julian Messner, Inc.*, 286 N.Y.S.2d 832 (1967).

### Valentino case

The California case was filed by Jean Guglielmi who is the nephew of actor Rudolph Valentino. In his suit, Guglielmi alleged that he had inherited his uncle's right

of publicity when Valentino died in 1926. In 1975, ABC broadcast a movie entitled "Legend of Valentino: A Romantic Fiction," without Guglielmi's authorization, which Guglielmi alleged was a knowingly "fictionalized version" of his uncle's life. As it happens, the court held that although the right of publicity does protect against the unauthorized use of one's name, likeness or personality, that right is not descendible and expires on the death of the protected person. The court thus upheld the dismissal of Guglielmi's lawsuit, ruling in effect that whatever rights Valentino himself may have had against ABC if he had lived, those rights died with him and were not inherited by his nephew. This portion of the decision would have had no bearing on Elizabeth Taylor's lawsuit, because she of course is very much alive.

But in a concurring opinion in the Valentino case, Chief Justice Rose Bird dealt with the issues that would have faced Valentino had he been alive; and that opinion



was itself concurred in by three other justices of the California Supreme Court, thus giving it the support of a majority of the court's seven members. In that decision, Justice Bird ruled that "no distinction may be drawn ... between fictional and factual accounts of Valentino's life," and ABC's election of the fictional mode "does not diminish the constitutional protection afforded (to it) as speech." Then in language equally applicable to the Elizabeth Taylor case, Justice Bird explained that "Valentino was a Hollywood star. His life and career are part of the cultural history of an era. As the title of (the) film suggests, Valentino became a 'legend,' a symbol of the romantic screen idol and lover. His lingering persona is an apt topic for poetry or song, biography or fiction. Whether (the movie) constitutes a serious appraisal of Valentino's stature or mere fantasy is a judgment left to the reader or viewer, not the courts." *Guglielmi v.*

Spelling- Goldberg Productions, 25 Cal. 3d 860 (1979)  
(ELR 1:18:1)

Elizabeth Taylor's lawsuit was a case which would have tested perfectly which of these two competing views of the 1st Amendment is the more persuasive had the case not been settled with ABC's capitulation.

When ABC announced that it had dropped plans for a movie on her life, Ms. Taylor issued a press release saying, "I am extremely gratified that ABC has agreed to drop this project, which would have violated my legal rights. I have long believed that the so-called docudrama misleads the public by combining fact and fiction in such a way that the two are indistinguishable."

### Docu-drama criticism

Ms. Taylor's criticism of docu-dramas as a genre is not the first such criticism the genre has received. Indeed, in

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the late 1970s, criticism of the television docu-drama reached almost fever pitch with questionable justification. As Joe Saltzman points out in the current issue of Emmy Magazine, all of the flaws inherent in TV docu-dramas are found in Shakespeare's plays as well. In writing Julius Caesar, for example, it can be said that Shakespeare was guilty of faulty research, conjecture, oversimplification of history, compressing time and action, mixing fact and fiction, rearranging the chronology of events, and inventing dialogue and scenes that never could have taken place. (Emmy, July/August 1983, page 44-45). Yet Shakespeare's work is no less respected for any of these reasons.

Television docu-dramas are not a recent phenomenon. As early as 1955, Armstrong Circle Theatre began presenting 60-minute docu-dramas on a regular basis and continued to do so for years. The word "docu-drama" itself, as well as the modern two-hour or mini-series

version, appears to date from ABC's 1974 broadcast of "The Missiles of October," a dramatic re-creation of the 1962 Cuban missile crisis. The criticism built slowly. In 1975, Newsweek was equivocal, saying only that although docu-drama techniques may be acceptable when confined to "innocuous froth," they may not be when applied to controversial subjects. In 1977, however, ABC premiered "Washington: Behind Closed Doors," a 12 1/2 hour roman a clef of Watergate, and the criticism began in earnest. Time Magazine published a signed opinion piece by Thomas Griffith entitled "Playing With the Facts" which concluded that "There ought to be a truth-in-labeling law to separate truth and fiction," but since "there won't be ... everybody concerned - and TV docu-dramatists most of all - should be held more accountable for fat content and fact content, properly labeled." By 1979, concerns about docu-drama accuracy had reached the point where U.S News & World Report

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could headline an article, "Do TV 'Docu-Dramas' Distort History?"

### TV Academy symposium

As a result of these concerns, the Academy of Television Arts & Sciences conducted a symposium on docu-dramas in 1979. It was attended by 50 people who were invited because of their experience and expertise - producers, writers, network executives, TV journalists and critics, historians, educators and lawyers - and for two days they "discussed, debated, analyzed, and dissected the docu-drama." When they left, the 50 agreed "unanimously" on several points. They agreed that docu-dramas were viable programs and should be continued. They agreed that a better name, such as historical drama or drama based on fact, should be used. They agreed that networks should provide background material to,

the media before docu-dramas are aired. They agreed that better use of historians should be made for an overview. And they agreed that information should be supplied directing viewers to other sources of information. They did not agree on how accurate docu-dramas were, are or should be. Nor did they give consideration to whether celebrities do or should have the right to control docu-dramas about their own lives. That issue was left to the courts. (Emmy Magazine, Summer 1979, Special Pullout Section.)

### DeLorean case

At about the time Elizabeth Taylor filed her lawsuit against ABC, sports-car manufacturer John DeLorean was arrested on cocaine trafficking charges. The story quickly became irresistible grist for the syndicated comic strip "Doonesbury." But artist Garry Trudeau

approached DeLorean's travails from an angle. Duke, one of the strip's regular characters, decides to make a movie about DeLorean's rise and fall. And with the assistance of his agent, Sid Kibitz, they pursue the elusive "Hollywood Deal," contacting studios they hope will make them rich by buying from Duke the rights to DeLorean's life-story rights which Duke himself has not yet acquired.

In the meantime, real life began to imitate art, and rumors circulated around Hollywood that producers were contacting studios and networks with the "idea" of doing a docu-drama on the DeLorean case. This disturbed DeLorean and his wife, Cristina Ferrare DeLorean, because they had not sold their life story rights to anyone, and - like Elizabeth Taylor - they certainly did not want anyone making an unauthorized version of a story they might sell someday. As a result, the DeLoreans publicly announced that they would file suit if necessary to

prevent any unauthorized dramatization of their story. And the DeLoreans' lawyers directed this same announcement to all of the major insurance companies that issue errors and omissions insurance to motion picture and television producers.

Apparently, the DeLoreans' strategy for forestalling an unauthorized docu-drama of their lives has met with some success, because as a result of their announcements, the DeLoreans have been sued in Federal District Court in Los Angeles by two producers and writers named Brian McKay and Harvey G. Cooper. Messrs. McKay and Cooper allege that they have written a "documentary-style script suitable for television and motion pictures, based on actual events in the lives of the (DeLoreans) and the story of the DeLorean automobile. . . ." They allege that their script "was taken completely from articles and news stories appearing in Time magazine, Newsweek, People magazine and the Los Angeles



Times, and is therefore public domain material." McKay and Cooper further allege that the DeLoreans contend that they themselves own the rights to their life story and that it is "not public domain and cannot be dramatized without their consent." Finally, McKay and Cooper allege that as a result of the DeLoreans' announcement of their intentions to sue, it is "impossible for any television or motion picture productions to be made" of their story. Accordingly, McKay and Cooper ask that the court "declare the rights and obligations of all the parties in and to the particular script" they have written. (Brian McKay et al v. John Z. DeLorean et al., U.S.D.C., C.D.Cal. No. 83-1134 WMB.)

### Insurance necessary

Whatever the outcome of McKay and Cooper's lawsuit, their complaint does highlight one interesting fact

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about the docu-drama business: as a practical matter, docu-dramas cannot be produced without errors and omissions insurance. Networks routinely require production companies to obtain liability insurance covering claims for copyright infringement, invasion of privacy, libel, and the unauthorized use of material. In order to get such insurance, producers must fill out an application form that asks: whether the name or likeness of any actual person is used in the production, and if so, whether clearances have been obtained; whether the production portrays actual events; and whether the producer bargained for rights or releases but failed to get them. An insurance company may issue insurance even if the producer indicates that the production portrays actual events, that the names and likenesses of actual people are used, and that rights and releases were bargained for but were not obtained. But the chances of a policy being issued under these circumstances - at an

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affordable premium and with an acceptable deductible - are certainly less than they would be if releases were obtained or the production was entirely fictional. And in cases, such as the DeLoreans', where suit has been threatened beforehand, the chances of a policy being issued are slighter even still.

### Network program standards

Networks also routinely require producers to agree that their productions will conform to network program policies and standards. This is true for programs of all kinds, but network program policies impose special requirements on docu-drama producers. According to ABC's Program Standards guide, the purpose of its docu-drama guidelines "is to enable such dramatizations to be presented within the bounds of authenticity as a fair interpretation of the facts, within the time limits of

the dramatic form, and in such a manner as not to mislead, deceive or be untruthful with respect to the facts or events upon which the dramatization is based."

Although writers and producers frequently refer to the network review process as "censorship," lawyers will appreciate how that process makes it virtually impossible for anyone to prove that the program was broadcast in "reckless disregard for the truth." At ABC, for example, docu-dramas are reviewed by the network's standards and practices staff at the treatment stage, the script stage, after rough cut and then again after the final cut. The script for a docu-drama must be annotated to provide detailed substantiation for every scene, and all supporting materials relied on for that scene - such as books, articles, interviews and transcripts - must be submitted as well. The standards and practices staff then issues a detailed research review, to which the producer must respond.

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## ABC docu-drama guidelines

ABC permits the use of composite characters (characters based on more than a single real person), though generally it does not approve the use of composites for major characters. When composite characters are used, script annotations must indicate the identities of those people; and all of the dialogue and actions of the composite must be accurate for the people making up the composite. Except for incidental characters who have no bearing on the plot, fictitious characters may not be used.

ABC requires that locations, circumstances and the chronology of events be accurate, and that evidence supporting their accuracy be submitted with the annotated script. Although events may be telescoped, they must be chronologically accurate, and events that did

not occur cannot be invented. Furthermore, the passage of time must be clearly indicated, by dialogue, supers, dissolves or other visual techniques.

Characters' personal characteristics, attitudes and demeanor must be substantiated. And dialogue that is created on the basis of circumstantial material must be reasonably substantiated to establish that it fairly represents the attitudes and beliefs of the speaker.

If the subject is controversial or sensitive, ABC may require several sources of verification for scenes, events and in some instances even specific lines. Such subjects include, for example, sexuality, religion, highly charged political events, and the lives of living famous people.

Finally, ABC requires that docu-dramas be clearly identified as such to their viewers by means of audio and video disclaimers. The disclaimer for "Marilyn Monroe: The Untold Story" was: "The following is a dramatization of the life of Marilyn Monroe, based on

the book by Norman Mailer and other sources. Some composite characters and time compression have been used for dramatic purposes."

### Program standards and legal concerns

The activities of network program standards and practices departments complement, rather than duplicate, the legal work done in connection with obtaining liability insurance. On the other hand, an issue that is only a program standard concern one day may become a legal concern the next. An ABC movie produced by Universal City Studios entitled "The Longest Night" illustrates how this is so. "The Longest Night" dramatized the true story of the 1968 kidnapping of a college student named Barbara Mackle. Mackle was buried alive in the Georgia woods in a coffin-like container while her abductors demanded a ransom from her father, a wealthy Florida

land developer. The young woman was rescued after five days, shortly before the container's crude life support system would have given out. A Pulitzer Prize-winning reporter from the Miami Herald named Gene Miller, who covered the story for his paper, later collaborated with Mackle on a book about her ordeal. Miller estimated that he devoted more than 2,500 hours to the research and writing of the book, over a period of 18 to 20 months. Entitled "83 Hours Till Dawn," the book was published in 1971, was condensed in Reader's Digest, and was serialized in Ladies Home Journal.

In 1972, a Universal producer read the Reader's Digest condensation while waiting in a doctor's office. He immediately sensed that the story would make a good movie for television, and he gave a copy of the book to a screenwriter. The producer then called Miller about purchasing the movie rights to the book and offered him \$15,000. Miller countered by asking for \$200,000, and



though the producer said he might go as high as \$25,000, no deal was made. In the meantime, the screenwriter had commenced work on a script using Miller's book as a source even though he had been told that use of the book was "verboden." Later, the evidence conflicted concerning whether the screenwriter relied almost entirely on the book, or whether he arrived at his version independently by using the transcript of the criminal trial of Mackle's kidnappers and news stories. But in either event, it apparently was the case that certain scenes, statements and facts in the movie were found only in Miller's book, and that even one mistake made by Miller in the book found its way into the movie. As a result, Miller filed a copyright infringement suit. And a jury in Fort Lauderdale awarded Miller \$185,000a verdict even the trial judge found "intriguing" because it exceeded the amount Miller's lawyer had asked for in his closing argument.

Ultimately, the verdict was overturned on appeal, because the jury had been incorrectly instructed that "research is copyrightable." This instruction was "at best confusing" and "at worst wrong," because "it is well settled that copyright protection extends only to an author's expression of facts and not to the facts themselves." *Miller v. Universal City Studios*, 650 F.2d 1365 (5th Cir. 1981) (ELR 3:7:2) Although the case was of tremendous interest to entertainment lawyers, it had nothing to do with ABC's program standards. ABC's program standards department was, however, concerned about another aspect of the movie - the extent to which the movie depicted the manner in which the kidnappers had buried Mackle.

Copycat behavior

"Copycat" behavior is a major concern in a mass media culture such as ours. Following the first of last year's Tylenol poisonings, a rash of similar drug tamperings took place, most of them attributed to copycats. There even has been speculation that some people have killed themselves playing Russian roulette while imitating scenes they had watched in "The Deer Hunter." As a result, ABC's written program standards - for all programs, not just docu-dramas - provide that "The presentation of techniques of crime in such detail as to be instructional or invite imitation shall be avoided."

When "The Longest Night" was being made, ABC's program standards department expressed concerns about the movie's demonstration of how the coffin-like box was assembled, and a number of deletions were made to satisfy the department that the movie would not teach viewers how to make such a box. ABC's satisfaction was not shared by all, however. Several years ago, ABC

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retained Dr. Melvin S. Heller, a professor of psychiatry at Temple University, to write a workbook on Broadcast Standards Editing. In connection with his work, Dr. Heller viewed "The Longest Night" and concluded that it "introduced a broad viewing audience to the details of a bizarre crime" that was "so far out of the ordinary ... and was such a horrible and brutal crime, that its introduction to a large viewing audience carries with it unnecessary and undue potential risk." According to Dr. Heller, more than 20% of youthful, incarcerated violent offenders admit to trying techniques that were first illustrated on television. And so far as Dr. Heller was concerned, "The Longest Night" provided a detailed, authentic and technical demonstration of how the coffin-like box was made.

ABC disagreed with Dr. Heller's assessment, saying the movie did not show how the box was assembled and operated. Furthermore, it pointed out that the box was

described in newspaper accounts and in Miller and Mackle's own book. To that Dr. Heller responded, "That's interesting. The Literati and Illiterati. Did Miss Mackle's book sell a million copies, or even 10,000? How many million viewers watched this program? Television is supposed to have a greater degree of responsibility. You people have a greater responsibility because you reach a larger audience of all levels of intelligence and persuasion - and the picture you present is worth more than all the words in her book."

Although, according to Dr. Heller, the Mackle kidnaping has been imitated at least once, it does not appear that any lawsuits against ABC or Universal have resulted from those imitations in particular. But other imitations have resulted in lawsuits. The best known of these is the case in which it was alleged that a criminal attack on a nine-year-old girl was motivated by a similar attack in a scene in the NBC movie "Born Innocent."

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The court ultimately ruled that NBC's broadcast of the movie was protected by the 1st Amendment, because there was no evidence the movie "incited" the attack. *Olivia N. v. NBC*, 126 Cal.App. 3d 488 (198 1) (ELR 3:16:2) The case nevertheless illustrates how network "program standards" and the law tend to merge into one another in ways that are not always expected.

Lionel Sobel is the editor of the Entertainment Law Reporter and is a professor at Loyola Law School in Los Angeles. [ELR 5:3:3]

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## RECENT CASES

**Federal District Court rules that "splitting" agreement among Milwaukee movie exhibitors is illegal per se**

Film, the fragile carrier of our fantasies, may not be "split" by exhibitors, Federal District Court Judge Robert W. Warren has ruled. Judge Warren's farreaching opinion was issued after a 4 1/2 week civil antitrust action brought by the Government against four motion picture exhibitors who operate most of the first-run motion picture theaters in the Milwaukee area - Capitol Service Inc., Kohlberg Theatres Service Corporation, Marcus Theatres Corporation, and United Artists Theatre Circuit Inc.

The Government alleged that in 1977 the exhibitors had agreed to allocate among themselves the right to negotiate for films released by motion picture distribution companies and that this split agreement was a restraint of trade and illegal per se under section 1 of the Sherman Act. Judge Warren found extensive support for the Government's position and has enjoined the exhibitors

from engaging in any further motion picture split agreements "in any form and with any person in any motion picture exhibition market throughout the United States."

In order to assess the anticompetitive impact of the Milwaukee split, Judge Warren first reviewed the structure of the motion picture distribution network. Currently, there are seven major distributors - Buena Vista Distribution Co., Columbia Pictures Industries, Paramount Pictures Corp., Twentieth Century-Fox Film Corp., MGM-UA Entertainment Co., Universal Film Exchanges Inc., and Warner Brothers Distributing Corp. - as well as several "independent" distributors such as Embassy Pictures Corp. and Orion Pictures Inc. These companies generally market their films via a nationwide system in which a designated office has the responsibility for distribution in a particular geographic area. Motion pictures are licensed to exhibitors on a



picture-by-picture, theater-by-theater basis in each local market.

License agreements include, among other provisions, the term of the film's engagement and a rental fee. For example, a distributor may receive a weekly payment of 90% of the gross box office income after the theater's house allowance has been deducted, or a percentage of the gross box office without any deductions, whichever is greater. License agreements also may include guarantees and/or advances. A guarantee, which generally is paid prior to a film's exhibition, is a minimum film rental payment that the exhibitor promises to pay the distributor regardless of the amount of film rental earned under the percentage rental terms in the exhibition contract. An advance is an advance payment of film rental which is applied against the film rental actually earned under the rental terms in the contract; if a portion of the advance is not earned under the percentage rental terms,

this amount may be refunded or credited to the exhibitor. The court noted that guarantees are of particular importance to a distributor, because the guarantee: "is a method by which the exhibitor shares with the distributor some of the risk inherent in producing and distributing motion pictures;" allows the distributor to recoup part of its investment before a picture is actually exhibited; and assures prompt payment from exhibitors who otherwise might withhold portions of amounts due under a licensing agreement if a picture does not do well at the box office. An exhibition license may be awarded to an exhibitor after a process of bidding (in which competing exhibitors submit bids after receiving solicitation letters from the distributor which contain suggested minimum terms) or after a distributor has engaged in competitive negotiations with more than one exhibitor. Distributors also have attempted to license films via blind bidding which requires exhibitors to propose license terms prior

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to a trade screening of a film. However, about 23 states now have enacted antiblind bidding statutes.

In the Milwaukee area, prior to 1977, exhibitors usually submitted competitive bids for film licenses. In 1977, however, Marcus, United Artists, Kohlberg and Capitol Service agreed to engage in a "picture-by-picture" split, in which particular films would be allocated to specific theaters. The exhibitors proposed to take turns selecting films for their respective theaters, and they anticipated that no two theaters in the same geographic zone would play the same film. In light of the evidence presented at trial, including statements by the exhibitors themselves, the court concluded that the exhibitors agreed to the split for an anticompetitive purpose. According to a Capitol Service representative, ". . . the base cause of the split was not to prevent payment of requested terms of the film companies but to prevent overpayment of unrequested terms." The court rejected

the exhibitor's suggestion that the split was entered into to provide a more orderly method of distributing films, to provide better access to popular films for the public, or to deal with blind bidding.

The Government contended, and the court agreed, that in order to facilitate the split's anticompetitive purpose, the exhibitors agreed not to bid on pictures; not to negotiate for a picture until it was split; and not to negotiate for a picture split to another exhibitor. Ben Marcus admitted that the essence of the split was to eliminate bidding and that after the split began, the exhibitors "would simply discard the bid solicitations sent by distributors to exhibitors." For the years 1976 through 1981, the number of bids submitted by the exhibitors' indoor theaters to the seven major distributors, Filmways and Embassy declined from 322 bids on 68 pictures in 1976 to no bids on any pictures in 1981. Despite the exhibitors' arguments to the contrary, the court found it reasonable

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to infer that the reduction in the number of bids was caused by the split. It was not necessary for the Government to prove an express agreement; the evidence demonstrated that the exhibitors had agreed not to bid or negotiate for films until the films had been split. With respect to the alleged third term of the split - the agreement that an exhibitor would not negotiate for films split to the other participating exhibitors - the exhibitors claimed that they merely were allocating the "right of first negotiation" for particular films. The exhibitors also asserted that several films were licensed without being split to a particular theater, including "Poltergeist," "Rocky III," and "Annie." But since all of these films were licensed close to the time of trial, Judge Warren stated that the alleged non-split licensing did not disprove the government's claim.

Most significantly, the split has had its intended effect of reducing price competition among the exhibitors. In

addition to the reduction in the number of bids submitted, the amount of guarantees paid by exhibitors in Milwaukee fell from about \$1.8 million in 1977 to \$140,000 in 1981. The exhibitors also were able to obtain downward adjustments in the rental terms for a greater number of films than the number of adjustments that might have been granted if competitive bidding prevailed. And the length of playtime was reduced as a result of the split, so that there could be more runs of a particular film. An increased number of runs in a market makes it less likely, that a distributor will receive rental payments based on the more lucrative 90/10 formula. All of these factors affected the price paid for film licenses, stated the court, and the split was ruled an unlawful price fixing device notwithstanding the exhibitors' argument that the split had not had an adverse effect on the overall film rentals paid to distributors.

The exhibitors also were unsuccessful in attempting to rely on the case of *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) (ELR 1:1:1). In *Broadcast Music*, the United States Supreme Court refused to find that the blanket licensing of performance rights by BMI was illegal per se because to some extent, the blanket performance license was a "different product." It was stated that there was no evidence that the blanket license had "the effect, or could have been spurred by the purpose of restraining competition among individual composers." In this case, however, Judge Warren determined that the purpose and effect of the split agreement was anticompetitive and that distributors were not being presented with a "different product."

The exhibitors also cited *Greenbrier Cinemas, Inc. v. Attorney General*, 511 F.Supp. 1046 (W.D.Va. 1981) (ELR 3:14:4), in support of their position that splits

must be examined under the rule of reason rather than under a per se rule. In Judge Warren's view, however, *General Cinema Corp. v. Buena Vista Distribution Co.*, 532 F.Supp. 1244 (C.D.Cal. 1982) (ELR 3:21:1), was the sounder precedent; and it held splits to be illegal per se price fixing devices. The court therefore found immaterial the exhibitors' evidence with respect to the alleged procompetitive benefits achieved by the split, such as promoting efficiency in the licensing of films or increasing the availability of first run theaters to less prominent distributors. Judge Warren did note, however, that the purported procompetitive benefits were not such as would justify the split even under the rule of reason.

The court also ruled that the split agreement was illegal per se as a market allocation. If competition for particular films did occur on occasion in Milwaukee, it was only because the exhibitors chose to compete with respect to some films. But "this (does) not mean that the



basic split agreement, when adhered to, is any less anti-competitive," concluded Judge Warren.

The broad scope of the injunction issued by the court was found appropriate, because the evidence indicated that the Milwaukee exhibitors had engaged in split agreements in other markets throughout the United States, all of which are essentially anticompetitive.

United States of America v. Capitol Service, Inc., Case No. 80-C-407(E.D.Wisc., June 16, 1983) [ELR 5:3:8]

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**Court of Appeals affirms decision that NCAA football plan and TV network contracts violate antitrust laws, but Supreme Court Justice Byron White stays lower court's order until full Supreme Court decides whether to review the case**

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The Universities of Oklahoma and Georgia are on the verge of making legal, sports and television history - in one of two ways. Either they will succeed in overturning more than 30 years of NCAA television practices, on the grounds those practices violate the antitrust laws. Or they will make new law in failing.

As college football fans and readers of these pages are aware, a Federal District Court in Oklahoma ruled last fall that the NCAA's football television plan, and its contracts with ABC, CBS and Turner Broadcasting, violate the Sherman Act. (ELR 4:11:2) That ruling has been upheld, by a 2 to 1 vote, by a Federal Court of Appeals. But Supreme Court Justice Byron White stayed the lower court's order until the full Supreme Court decides whether to review the case. The Supreme Court has recessed for the summer and will not reconvene until the first Monday in October. And thus it appears that the

NCAA football plan will control college football telecasts this fall at least.

In a nutshell, the NCAA television plan provides that the NCAA is the exclusive representative of all of its members 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. Furthermore, NCAA rules generally limit the number of times schools may appear 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 schools and the networks. Last year, the NCAA entered into agreements with ABC, CBS and Turner Broadcasting giving them the exclusive rights to carry live NCAA football games.

The Court of Appeals affirmed the District Court's ruling on virtually all legal theories. It agreed, for example,

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that the NCAA's television plan and its contracts suppress diversity and restrict the "output" of televised football games, and thus constitute price fixing that is illegal per se under the antitrust laws.

The appellate court also agreed that the NCAA plan is illegal even when tested under the rule of reason. In this connection, the court noted that the NCAA sells football television rights only as a package. Thus, if a broadcaster - such as an independent television station - does not have the financial ability to bid for the entire package, or simply does not want to, it is virtually prevented from acquiring broadcast rights to any games at all. This limits the number of broadcasters that can buy college football rights, and thus creates a "potential for vertical foreclosure" because only certain broadcasters can become buyers of NCAA rights.

The NCAA argued that college football is not the only "product" in the market - that properly analyzed, the

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relevant "product market" includes all televised programming. The court disagreed, however, finding that college football is a unique product. This conclusion was based on some very interesting facts. For example, in 1980, a 30-second advertising spot on college football cost \$47,900 while such a spot on major league baseball cost only \$17,100. Even after correcting for audience size, the cost per thousand households for college football was \$5.35 but only \$3.04 for professional baseball.

The Court of Appeals did agree with the NCAA on two issues. The appeals court held that the NCAA plan was not a group boycott, as the District Court had ruled. And the appeals court agreed that the wording of the District Court's injunction was too vague and broad in certain respects. Among other things, the injunction could have been read to prohibit the NCAA from imposing television appearance sanctions on schools that violate other NCAA rules. Indeed, the athletic director of

USC - which now is on probation and thus barred from making live television appearances - was quoted by Sports Illustrated as saying that the injunction does prohibit the NCAA from using TV appearances as punishment. But the Court of Appeals ruled that such a reading would not be warranted.

The dissenting judge of the Court of Appeals would have held that the NCAA plan and television contracts are valid and legal. He accused Oklahoma and Georgia of wanting "the best of both worlds" - the benefits of NCAA rules on all subjects except television, and the right to sell their own TV rights in order to keep for themselves the additional revenue their excellent football programs could command if sold to national television. Insofar as the dissenting judge was concerned, the restraints imposed by the NCAA television plan "are fully justified under the rule of reason in that they are

necessary to maintain intercollegiate football as amateur competition."

Following its loss before the three-member panel of the Court of Appeals, the NCAA petitioned the entire court for a rehearing, but its petition was denied, as was its subsequent petition for a stay pending its appeal to the Supreme Court. On July 21st, however, Justice White granted a stay. He did so, even though the United States Department of Justice, in an amicus brief, told Justice White that it was unlikely four Supreme Court justices would vote to hear the case. Justice White disagreed, however. In a brief order, he said that he would vote to review the case, and though he was less confident about the other justices, he expects that at least three others will vote to do likewise. (Four of the Court's nine members must vote to hear a case.) If the Supreme Court does agree to hear the case, their ultimate decision is

unlikely to be handed down until next spring or even early summer.

Board of Regents of the University of Oklahoma V. National Collegiate Athletic Association, 1983-2 CCH Trade Cases, para. 65,366 (10th Cir. 1983) [ELR 5:3:9]

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**NCAA did not violate antitrust laws by sponsoring women's intercollegiate athletics, Federal District Court rules in suit filed by AIAW**

The National Collegiate Athletic Association has never been accused of being excessively progressive, especially where relations with women athletes are concerned. Indeed, for the first 77 years of its existence, the NCAA's Constitution limited its jurisdiction to men's athletics only. In 1981, however, the NCAA voted to

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extend its activities into women's athletics; and for its trouble, the NCAA promptly was sued by the Association for Intercollegiate Athletics for Women.

The AIAW was organized in 1966, shortly after the NCAA made it clear that it had no intention of offering a women's program. By the time the NCAA changed its mind some fifteen years later, the AIAW had grown to an organization of 961 colleges and universities, doing for women athletes precisely what the NCAA had long done for men. The impetus for the NCAA's change of heart about women's athletics has been the subject of some debate. According to the NCAA, its members instigated the change because they preferred a unitary administrative structure for their athletic programs, and because there was some concern that separate administrative structures could violate equal protection laws, especially because the NCAA and AIAW had different eligibility and recruiting rules. According to the AIAW,

the NCAA decided to expand into women's athletics because it wanted to monopolize all of intercollegiate sports - something it could not do so long as women's sports were administered by the AIAW.

AIAW's antitrust suit was triggered by the loss of more than 200 of its members - including many of its most visible members - following the NCAA's decision to sponsor women's championships. This loss of membership resulted in a substantial loss of revenue and prestige. AIAW lost membership dues income of course. But in addition, it lost television revenues it otherwise would have received from NBC and ESPN for rights to AIAW championships; it lost commercial cosponsorships with the Broderick Company and Eastman Kodak; it lost the ability to license the commercial use of its logo; and it lost money on a 1981 basketball tour of the Peoples Republic of China. As a result of these and other less

tangible losses, the AIAW suspended operation in June of 1982.

Prior to going out of business, the AIAW filed suit against the NCAA in Federal District Court in Washington, D.C., alleging that the NCAA had monopolized or attempted to monopolize women's sports in America, and had restrained trade in women's sports, all in violation of sections 1 and 2 of the Sherman Act. Following trial, however, the court ruled that the AIAW failed to prove its claims, and thus judgment has been entered in favor of the NCAA.

The court's decision suggests that the AIAW's case failed for lack of supporting facts, rather than on the law. For example, the court found that the NCAA is "not engaged in the sort of trade or commerce the Sherman Act originally contemplated," because the NCAA exists "primarily to enhance the contribution made by amateur athletic competition to the process of higher education"

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rather than to maximize the return on athletics as an "entertainment commodity." Nevertheless, the court did not exempt the NCAA from the Sherman Act. It did not, because it also found that the NCAA's activities "cost money and make money ... and it is clear they are quite capable of imposing a considerable restraint upon avowedly commercial enterprise whether or not they are a part of it."

The court also agreed with the AIAW that "if present trends continue," the NCAA will "exert an influence in the women's market (for intercollegiate athletics) comparable to that it presently possesses in the men's," and that therefore the AIAW had "proved the probability of NCAA's success as a monopolist." Why then did the AIAW lose? Because, according to the court, the AIAW failed to prove that the NCAA will have acquired such monopoly willfully and with an intent to do so, rather

than "innocently" as a result of "a superior product, business acumen, or historic accident."

The AIAW contended otherwise, of course. According to AIAW's view of the case, the NCAA entered the women's market using four predatory practices to attract the women's programs of its members: the NCAA failed to raise its dues to schools who joined for their women's programs as well as for their men's programs; it adopted an optional rules structure for schools that joined for their women's programs; it selected dates for its women championships that conflicted with the dates already selected by the AIAW for its championships; and it interfered with AIAW's commercial relationships. The court reviewed the AIAW's evidence on these issues in some detail, but concluded that the evidence was "at best, equivocal."

Furthermore, the court concluded that the NCAA did not intend to monopolize women's athletics when it

voted to sponsor women's championships. Instead, the court read the evidence to show that the NCAA's members - some 90% of whom also were members of the AIAW - voted to sponsor women's championships because they wanted an "alternative" to the AIAW whose continued existence the NCAA favored.

Finally, the court found that any injury suffered by the AIAW was not the result of monopolization, but rather was the result of "direct competition." On this issue, the court cited the testimony of witnesses from UCLA, Missouri and North Carolina State who said that their schools had decided their women's programs would join the NCAA because of its superior management and promotional resources; its philosophic emphasis on competitive excellence (rather than maximum participation irrespective of ability); its future promise of uniform rules for men and women athletes; and because it offers championship competition by conferences of

comparable schools located in several states (rather than by state or region between teams of different abilities).

The court also rejected the AIAW's claim that the NCAA had restrained trade by tying the sale of television rights for its men's basketball tournament to the sale of TV rights for its women's basketball tournament. The court found that the sale of the women's event was merely "collateral to a much larger transaction which would have gone forward with or without the women's event."

Association for Intercollegiate Athletics for Women v. National Collegiate Athletic Association, 558 F.Supp. 487 (D.D.C. 1983) [ELR 5:3:10]

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**Pink Floyd, The Who, Neil Young, Pat Benatar, Styx and other rock stars win judgment barring**

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## **unauthorized use of their names and likenesses on right of publicity, but not trademark, grounds**

Several noted and successful music figures have prevailed in the first round of court proceedings to enjoin the unauthorized sale of novelty items bearing their logos, names and likenesses. These figures include Pink Floyd, The Who, Devo, Neil Young, Pat Benatar, Judas Priest, Molly Hatchet and Styx. The action was filed in the Federal District Court in New York City by an authorized licensee of the rock artists against all manufacturers and distributors of buttons and other novelty items bearing the likenesses, logos, trademarks and service marks of the artists.

The court determined at the outset that the artists' licensee, Bi-Rite Enterprises, Inc., had authority to sue on behalf of the named and unnamed artists. The court then addressed the claim that the defendants were liable for



unfair competition and trademark and service mark infringement. The court observed that trademark and service mark law and unfair competition law in general, "function primarily to protect consumers from confusion as to the source of goods in the market." In fact, "the touchstone of both trademark infringement and unfair competition is the likelihood of confusion among prospective purchasers." Although the court recognized numerous decisions that have "granted relief against distributors which, without authorization, placed the marks of rock groups on T-shirts and sold them at concerts where the groups were playing, the court rejected those decisions and found that they "dispense even with the pretense of analytic effort to extend trademark relief."

The court felt constrained by the "controlling principles" in its own jurisdiction as stated in *American Footwear Corp. v. Universal Footwear Co.*, 609 F.2d 655

(2d Cir. 1979), cert. denied, 445 U.S. 951 (1980) (ELR 1:21:1). In *American Footwear*, the court ruled that "one can capitalize on a market or fad created by another provided that it is not accomplished by confusing the public into mistakenly purchasing the product in the belief that the product is the product of the competitor." The court's analysis in the present case focused on the critical distinction between protecting a product for its intrinsic value as in the case of copyright protection or protecting the creator of the product by preventing competitors from confusing the public such that the public would reasonably conclude that the competitor rather than the actual creator created the product. It is the "confusion as to source" that is determinative in the law of unfair competition and trademark and service mark law. In this case, no evidence supported the contention that the public in fact was confused as to the source of the novelty items; in fact, the public likely had no idea who created

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the items. "When a mark without copyright protection is exploited for its intrinsic functional value, Congress has implicitly determined that society's interest in free competition overrides the owner's interest in reaping monopoly rewards." The court noted that Congress has sanctioned "monopoly power to reward and encourage originality and creativity in otherwise competitive markets" in the context of copyright and patent laws, but that "trademark laws do not share this purpose. They function instead to protect the individual reputation and good-will that parties build for their goods in the market."

The court went on to distinguish the cases in which novelty items exploiting groups' likenesses were sold where the groups were performing. In those case, the public may in fact have assumed that the novelty items were sponsored or even produced by the artists whose names and likenesses were exploited since the artists

were performing nearby the sale. In the present case, the court ordered that the plaintiffs be given an opportunity to offer evidence that the public was confused as to the source of the novelty items at issue.

Plaintiffs also argued that under section 368-d of the New York General Business Law, they were entitled to relief on the ground that their trademarks were diluted by the unauthorized conduct of the defendants and the value of the trademarks was thus diminished. The court disagreed. "Although, by its own terms, the statute does not require public confusion, it does require a likelihood of injury to plaintiff's business reputations or dilution of the distinctive quality of their marks ... It seems that defendants' use only operates to strengthen plaintiffs' marks." The court added, "Rather than clouding the distinctive message of quality that plaintiffs' marks carry, defendants provide fans of the various Performers an

opportunity to announce their allegiance to the groups, thereby publicizing the popularity of the groups."

The plaintiffs did succeed, however, with their claim that the defendants violated their right of publicity. The court emphasized that the plaintiffs could not succeed with the claim that their privacy had been violated, because they could not demonstrate any harm to their feelings justifying legal action, which the general law of privacy requires. "Plaintiffs fare better," the court added, "under the so-called 'right of publicity.'" The exclusive right to control the commercial exploitation of one's name and likeness "prevents unjust enrichment by providing a remedy against exploitation of the good-will and reputation that a person develops in his name or likeness through the investment of time, effort and money." The court added that unauthorized commercial exploitation of the novelty items violated the individual and group performers' rights of publicity; and thus the

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performers were granted summary judgment on that claim. In response to the defendants' contention that a group is not entitled to sue for violation of its right of publicity, the court stated that the "rationale for protecting the right to publicity does not justify treating similarly situated plaintiffs differently merely because one is an individual and one is a group member.

The plaintiffs were found to be entitled to injunctive relief as well as damages.

Bi-Rite Enterprises, Inc. v. Button Master, 555 F.Supp. 1188 (SDNY 1983) [ELR 5:3:12]

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**National Football League fails in bid for temporary restraining order authorizing United States Marshall to seize allegedly counterfeit merchandise bearing NFL trademarks**

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National Football League Properties has been blocked in its drive to obtain a temporary restraining order against three named individuals and various Does barring the sale of unlicensed souvenir merchandise bearing the company's registered trademarks. Several courts have recognized that TROs may provide merchandisers with an expeditious means of confiscating counterfeit goods from transient vendors. (See for example, *Rock Tours, Ltd. v. Roach*, ELR 3:10:2.) But Federal District Court Judge Charles R. Richey has stated that the order requested by NFL Properties "would appear to invite catastrophe. It promises a nightmare of jurisdictional flaws, deprivations of due process, and windfall litigation that could ensue for years to come. This is not even to mention the physical spectacle of the United States Marshall Service . . . in the company of paid thugs (euphemistically styled 'security representatives') roaming

the streets of Washington to confiscate the merchandise of small businessmen and other licensed vendors who sell their wares in the open air."

Judge Richey determined that NFL Properties did not, and would not have been able to, demonstrate that it was likely to prevail on the merits of its trademark infringement claim with respect to the merchandise of unnamed vendors, nor with respect to the authorized merchandise that might be seized in a wholesale confiscation of property."

The court noted that by itself the allegation of trademark infringement did not establish the infliction of irreparable injury and that, in any event, a TRO was not the appropriate means of assuaging any such injury in this case. NFL Properties had advised the court that many of the infringers would disappear and that goods would be transported out of the jurisdiction once notice of its lawsuit was given to one alleged infringer. But



rather than perceiving this mobility as an evasive tactic to thwart the rights of trademark owners, Judge Richey stated that the flight of the "professional infringers" would be "precisely the result that (NFL Properties) is seeking here through a restraining order, and it can be accomplished merely by service of a complaint." Or NFL Properties could allow the vendors to continue their activities and retroactively sue for the profits earned.

Judge Richey also ruled against NFL Properties on the other factors relevant to the issuance of a TRO. The degree of harm that the issuance of an injunction would cause to the defendants and other parties interested in the proceedings was characterized as "potentially enormous." Federal Marshalls would be "sent scuttling through Washington as messengers for the NFL," said the court, and legitimate and authorized merchandise might be seized at a time when it was most marketable.

Physical outbreaks and other substantial disruptions at the city's "busiest interchanges" might ensue. This would be contrary to the public interest, declared Judge Richey, discounting NFL Properties' claim that only minimal inconvenience to the infringing parties would occur. NFL Properties' application for a TRO therefore was denied and a hearing on the requested preliminary injunction was ordered only after service of all defendants and the submission of responsive pleadings.

National Football League Properties v. Coniglio, 554 F.Supp. 1224 (D.D.C. 1983) [ELR 5:3:13]

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**Vanessa Redgrave entitled to seek consequential damages from Boston Symphony Orchestra due to orchestra's termination of Redgrave's contract to narrate performances of "Oedipus Rex," but causes**

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**of action alleging tortious conduct by orchestra are dismissed**

In March 1982, Vanessa Redgrave entered into a contract with the Boston Symphony Orchestra by which Redgrave was to be paid \$31,000 to narrate six performances of Stravinsky's "Oedipus Rex," then scheduled for April 1982. When the orchestra cancelled the contract, Redgrave alleged that the cancellation occurred because certain parties who disagreed with her political views on Israel threatened the orchestra with "severe adverse consequences" if it did not repudiate the contract.

Redgrave's complaint was itself orchestrated with a variety of causes of action. On her breach of contract claim, Redgrave sought damages, in addition to the contractual fee, based on her asserted loss of future bookings as a result of the repudiation of the contract. The

orchestra contended that there were no circumstances under which Redgrave would be entitled to incidental or consequential damages and that Redgrave need only be placed in the same position she would have been in if the contract had been performed. But Federal District Court Judge Keeton has refused to dismiss Redgrave's claim, noting that (1) if the actress establishes that other employers refused to hire her after the termination of the Boston Symphony Orchestra contract because of that termination, and that (2) this loss of other employment could reasonably have been foreseen by the parties at the time of contracting and at the time of termination, and that (3) damages are rationally calculable, then Redgrave might be entitled to damages that would include the loss of earnings from other employment.

Judge Keeton also refused to dismiss Redgrave's claim that the orchestra, by interfering with her First and Fourteenth Amendment rights, and with her rights under the

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Massachusetts Constitution, violated the Massachusetts Civil Rights Act. In allowing Redgrave to pursue this claim, the court pointed out that Redgrave must demonstrate that the orchestra, as distinguished from unidentified individual parties, coerced the actress so as to violate her constitutionally protected rights.

The court did dismiss Redgrave's claim alleging the tortious repudiation of her contract. The complaint did not set forth the elements of any tort. And the court stated that even if the pleadings were amended to allege the intentional infliction of emotional distress, the orchestra's conduct with respect to Redgrave was not "extreme, outrageous and beyond all possible bounds of decency." Furthermore, the repudiation of a contract is not in and of itself a tort. Although "A contract for services may create a relationship between parties by reason of which the law recognizes a duty of reasonable care in performance that will support a tort action as well as an

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action for breach of contract," no such special relationship had been created between the orchestra and Redgrave.

Redgrave's request for an order directing the orchestra to reschedule the performances called for in the contract also was denied. Specific performance in an employment contract case is the exception, noted the court, and there was no showing that this remedy was necessary or appropriate when hundreds of performing and support personnel would be required to stage the performances at issue.

Redgrave v. Boston Symphony Orchestra, Inc., 557 F.Supp. 230 (D.Mass. 1983) [ELR 5:3:13]

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**Ads and covers for unauthorized anthologies of public domain Louis L'Amour stories must be changed to avoid deception, Federal District Court rules**

Louis L'Amour is one of America's most popular western writers. He has more than 84 books in print, including two on the New York Times best-seller list as of last month: "The Lonesome Gods" and "Ride the Red River." And he is about to have two new books come out: "The Hills of Homicide" and "Law of the Desert Born." These last two books do not please Mr. L'Amour, however, because they are being published without his authorization. They are anthologies of short stories he authored for pulp magazines, apparently thirty or more years ago, which have fallen into the public domain because their copyrights were not renewed as required under the old Copyright Act of 1909. The exact titles of the stories to be included in the anthologies are

not being disclosed to the public in advance of the books' release, in order to prevent other publishers from coming out with identical collections at the same time.

Since 1958, L'Amour's work has been published exclusively by Bantam Books. But the two anthologies of public domain stories are being published by a relatively new company, Carroll & Graf Publishers, Inc. In June of this year, Carroll & Graf promoted their L'Amour anthologies at the annual convention of the American Booksellers Association and in an advertisement in Publishers Weekly. When L'Amour learned of Carroll & Graf's plans, he immediately filed suit in Federal District Court in New York City.

Because the stories themselves are in the public domain, L'Amour withdrew his copyright infringement claims. But other aspects of Carroll & Graf's unauthorized efforts have resulted in a preliminary injunction requiring some significant changes in their marketing



plans. Judge Charles E. Stewart has found that Carroll & Graf's promotional materials and book covers have a "capacity to deceive" booksellers and the public into believing that L'Amour participated in preparing or authorizing the two anthologies.

In an oral decision rendered from the bench, Judge Stewart specifically cited language in Carroll & Graf's catalog which said that one book is a "brand new collection of Louis L'Amour stories," and the other is a "new story collection appearing in paperback for the very first time." Judge Stewart concluded that this language "clearly" and "obviously" was intended to suggest that the stories in the anthologies are new ones that have never before been available.

Judge Stewart also found that the cover designs Carroll & Graf intended to use on its anthologies were very similar to the designs used by Bantam Books on its series of L'Amour novels. For example, the type style used

for L'Amour's name was similar to that used by Bantam. Descriptive phrases used on the Carroll & Graf covers were similar to those used by Bantam. The color schemes were similar. And the back covers were laid out in similar fashion. While Judge Stewart acknowledged some differences between the covers, he found they were "not significant differences."

For these reasons, Judge Stewart ruled that L'Amour was entitled to preliminary injunctive relief. In doing so, Judge Stewart cited *Harlequin Enterprises v. Gulf & Western*, 644 F.2d 946 (2d Cir. 1981) (ELR 3:13:4), in which Simon & Schuster was enjoined from using a cover design for its "Silhouette Romance" books that was confusingly similar to covers used on the "Harlequin Presents" series. L'Amour had asked that Carroll & Graf be required to use a disclaimer indicating that he had nothing to do with the Carroll & Graf anthologies. And Judge Stewart agreed that the disclaimer could be

handed in this "negative" fashion. However, the judge also suggested that it could be done "just as effectively" with a statement saying, "The stories in this collection have been compiled by Carroll & Graf from the public domain." Carroll & Graf also must change the covers of their books so that they are not misleadingly similar to Bantam's covers.

L'Amour v. Carroll & Graf Publishers, Inc., 83 Civil 4658 (S.D.N.Y., July 6, 1983) [ELR 5:3:14]

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**Unauthorized use of photographs of actresses Valerie Perrine and Ali MacGraw by High Society Magazine constituted copyright infringement**

High Society Magazine's unauthorized use of photographs of Valerie Perrine and Ali MacGraw violated

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Michael Childers' copyrights in the photographs, a Federal District Court in New York City has ruled. Childers' agent, Sygma Photo News, Inc., provided slides of the actresses' photographs to a company known to the agency as Drake. Drake represented that the photographs would be reproduced in "inoffensive trade paperback books" entitled "Media Stars of the 70's," "Stars of the 80's," and "Media Stars of 1981."

Unbeknownst to Sygma, Drake's stock had been purchased in 1978 by High Society. And it came pass that Childers' photographs of the actresses did not appear in any trade paperback books, but rather on the covers of three issues of High Society. According to Childers, he never intended to sell his photographs of prominent performers to "sleazy, exploitive or pornographic publications, such as 'High Society.'"

In granting summary judgment to Childers, District Court Judge Kevin Thomas Duffy upheld the validity of

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the copyright registration of the photographs as unpublished works. High Society's argument that the photographs were "works for hire" was rejected, because Childers had testified by affidavit that his contracts with his subjects provided for his sole ownership of the photographs. This statement was not contested by the magazine.

High Society also failed to produce any evidence controverting the restrictive terms pursuant to which Sygma had licensed the use of the photographs.

Judge Duffy has referred the case to a magistrate for the calculation of damages.

Childers v. High Society Magazine, Inc., 557 F.Supp. 978 (S.D.N.Y. 1983) [ELR 5:3:15]

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**CBS did not violate New York's Civil Rights Law despite technically unconsented-to appearance of mental hospital patient in telecast of documentary concerning mental health policies**

During a news documentary entitled "Anyplace But Here," which was televised by CBS in 1978, David Delan, a mentally disabled patient at the Creedmor Psychiatric Center where a portion of the documentary was filmed, appeared on camera for approximately four seconds. Delan had signed the hospital's "Consent for Patient Interview" form after being advised by a physician of the purpose of the program and the nature of the patients' participation. Nevertheless, an action subsequently was brought on behalf of Delan alleging that the broadcast violated Delano's rights under sections 50 and 51 of New York's Civil Rights Law.

A trial court judge granted summary judgment to Delan on the ground that the inclusion of commercial messages in the initial telecast and the subsequent licensing of the documentary amounted to the unauthorized use of Delan's name and image for trade and advertising purposes within the meaning of sections 50 and 51. The court also found that Delan's consent was invalid for lack of capacity (ELR 4:1:4).

But a New York appellate court has reversed this ruling, finding that the documentary film concerned a matter of legitimate public interest - the state's mental hygiene program - and therefore was a privileged report. The court pointed out that Delan's appearance in the film was not, of itself, a use for advertising or trade purposes. Although the telecast was commercially sponsored, there was no connection between the performance and the commercial. And a literal reading of the term "purposes of trade" would violate

constitutional guarantees of free speech and free press when the audience-attractive subject matter of a profit making publication also involves a matter of public interest, stated the court. Thus, "The reporting of matters of public information or of legitimate public interest ... is a matter of privilege and not within the ambit of the term 'purposes of trade' as used in the Civil Rights Law . . . notwithstanding the inclusion of commercials." In this case, there was a legitimate connection between the brief use of Delan's name and picture and the public interest theme of the documentary. Accordingly, CBS did not violate sections 50 and 51 by its telecast, and its nontheatrical licensing of the documentary for exhibition by civic and educational organizations also was privileged. Such non-theatrical screenings were characterized as having "no different effect than the printing and disseminating of multiple copies of any newsworthy article."

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The appellate court also ruled that the technical flaws in the written consent executed by Delan were irrelevant since the telecast and its distribution were not subject to the provisions of the Civil Rights Law. Furthermore, Delan's constitutional right of privacy was not violated, because cooperation between the hospital staff and the documentary's producers was not such state action as could have violated Delan's constitutional right of privacy. The court concluded by noting that Delan also had not demonstrated that he was a public personality whose right of publicity could have been violated by the televising of the documentary.

Delan v. CBS Inc., 458 N.Y.S.2d 608 (N.Y.App. 1983)  
[ELR 5:3:15]

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## **Briefly Noted:**

### **Invasion of Privacy.**

A newspaper's publication of a photograph of a scantily clad woman in connection with a newsworthy story, although perhaps embarrassing, does not constitute an invasion of privacy, a Florida state appellate court has ruled. The woman's predicament arose after her estranged husband kidnapped her and ordered her to remove her clothing while holding her at gunpoint in their former apartment. In an effort to save the woman, the police stormed the apartment and rushed her outside clutching a dish towel to her naked body. Under Florida law, where one becomes involved in an event of public interest, it is not an invasion of privacy to publish a photograph of that individual with a news story of the event. Finding this event to be newsworthy, the court noted

that "Courts should be reluctant to interfere with a newspaper's privilege to publish news in the public interest."

Cape Publications, Inc. v. Bridges, 423 So.2d 426  
(Fla.App. 1982) [ELR 5:3:16]

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### **Collegiate Sport.**

The Supreme Court of Indiana has ruled that a student athlete who receives an athletic scholarship in return for his participation in a college football program is not an "employee" of the college as defined by the Indiana Workmen's Compensation Act. The student, a varsity football player at Indiana State University, suffered an injury during team practice in 1976 which left him a quadriplegic. The Industrial Board rejected his claim

seeking workmen's compensation, finding that an employer-employee relationship did not exist between the student and the University and therefore he was not entitled to workmen's compensation benefits. The court took note of the NCAA's constitution and bylaws which were incorporated into the student's financial aid agreement. Under the NCAA's constitution, intercollegiate sports are viewed as part of the educational system, as distinguished from the professional sports business. The NCAA has strict rules against "taking pay" for sports activities and imposes severe sanctions against violators. Furthermore, the student had not reported the scholarship proceeds as income for tax purposes. Although the Internal Revenue Service does not tax scholarship proceeds, the court nevertheless said that this indicated that the student himself did not consider the scholarship proceeds as employment income.

Rensing v. Indiana St. Univ. Bd. of Trustees, 444 N.E.2d 1170 (Ind. 1983) [ELR 5:3:16]

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### **College Sports.**

A suit by a student athlete challenging NCAA eligibility rules did not present a substantial federal question, a Federal Court of Appeals in Kansas has ruled. The case challenged the NCAA policy that leaves it up to individual high schools to determine which classes to include in computing student grade point averages. "NCAA does not delve into the curricular at the various high schools throughout the country, and make substantive determinations regarding the worth of various courses." Without the inclusion of his physical education course grades, the student who filed the suit failed to meet the minimum grade point average (2.000) required to participate

in Division 1 intercollegiate athletics. The student argued that the lack of uniformity in the method of computation resulted "in a disparate and unequal application of the 2.000 rule" in violation of his equal protection rights. While not recognizing federal jurisdiction, the court held that the policy "clearly furthers NCAA's objectives of having a representative student body and of admitting individuals who will be students first and athletes second."

Jones v. Wichita State University, 698 F.2d 1082 (10th Cir. 1983) [ELR 5:3:16]

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### **Previously Reported:**

The United States Supreme Court has declined to hear the following cases: Cher v. Forum International

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(4:13:1); Central Florida Enterprises v. FCC (4:15:2); and Pring v. Penthouse International (4:22:3).

The following cases have been published: Harper & Row, Publishers v. Nation Enterprises, 557 F.Supp. 1067 (4:22:3); Davis v. High Society, 457 NYS2d 308 (4:23:4); Loretto v. Teleprompter, 459 NYS2d 743, 446 NE2d 428 (4:24:7); Davidoff v. Metropolitan Baseball Club, 459 NYS2d 2 (4:24:7); Saumell v. New York Racing Association, 447 NE2d 706 (5:1:18); and Clark v. Arizona Interscholastic Association, 695 F.2d 1126 (5:1:18).[ELR 5:3:16]

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## IN THE NEWS

**Actors and producers reach tentative accord on 3-year collective bargaining agreement**

After a month and a half of negotiations, the Screen Actors Guild and the American Federation of Radio and Television Artists have reached tentative agreement with the Alliance of Motion Picture and Television Producers on the terms of a new three-year collective bargaining agreement. The agreement must be ratified by SAG's and AFTRA's membership, which now numbers almost 87,000. But ratification is expected to occur early this month without significant dissent.

The new agreement provides for a 21% increase in actors' minimum salaries, 100% immediately and the balance in 18 months. The size of the increase, measured in percentages, was not as great as SAG had won during the 1980 or 1976 negotiations. But the inflation rate is lower now, and that was cited as the reason the SAG and AFTRA negotiating teams were satisfied with smaller increases this year.



The matter of pay-TV compensation, which triggered the 1980 SAG strike, was settled by compromise this time. The actors' share has been increased from 4.5% to 6% of the distributor's gross receipts. But the point at which the actors' share begins to accrue has not been changed from the 1980 agreement, as SAG and AFTRA had asked at the outset of this year's negotiations.

The producers' contributions to the actors' healthand-welfare plan have been increased as well.

Changes also have been made in provisions of the collective bargaining agreement that do not deal directly with money, but which are important to both sides nonetheless. For example, the affirmative action language of the agreement has been strengthened to provide SAG and AFTRA with more comprehensive minority casting data and quicker access to management to discuss affirmative action problems. And stunt and safety matters are to be considered by a joint union-management

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committee that is to establish stunt qualifications and improved safety and first aid standards.

Although SAG and AFTRA negotiated the new agreement jointly, they remain legally separate and distinct unions. The possibility of their formally merging with one another has been discussed for some time.

Next year promises to be an especially busy one for the AMPTP, because the collective bargaining agreement of the American Federation of Musicians will expire in January, that of the Directors Guild of America next summer, and that of the Writers Guild of America at the end of next year. [Aug. 1983] [ELR 5:3:17]

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**Trial judge sets aside jury's verdict that Bee Gees' hit song "How Deep Is Your Love" infringed copyright of amateur songwriter**

Last February, a Federal District Court jury in Chicago found that the Bee Gees' hit song "How Deep Is Your Love" infringed the copyright to a song written by an Illinois antiques dealer named Ronald Selle. Selle had tried to sell his song, entitled "Let It End," to 14 music publishers and record companies, but had no success. Selles believed that one of those publishers or record companies must have given his song to the Bee Gees, even though the Bee Gees vehemently denied it. According to the Bee Gees, they wrote "How Deep Is Your Love" while secluded in a chateau in France; and during the trial they played tapes of them creating their song. Apparently, the jury agreed with Selles' theory, nevertheless.

Last month, however, the judge who heard the case along with the jury, Judge George Leighton, granted the Bee Gees' motion for judgment in their favor, despite the jury's verdict. Judge Leighton ruled that there had been

no evidence that the Bee Gees had ever seen the score of Selle's song or had ever heard it played. Such similarities as existed between the songs did not establish that the Bee Gees had access to "Let It End," the judge said.

If Judge Leighton's ruling is accompanied by a written decision, its details will be reported in the Entertainment Law Reporter just as soon as a copy is obtained. [Aug. 1983] [ELR 5:3:17]

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### **Carol Burnett's libel judgment against the National Enquirer is upheld by California Court of Appeal though amount is reduced to \$200,000**

The California Court of Appeal has affirmed Carol Burnett's libel judgment against the National Enquirer - but has done so on condition that she accept \$200,000,

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rather than the \$800,000 awarded her by the trial court. The appellate court upheld the \$50,000 awarded to Burnett for compensatory damages for emotional distress and mental anguish. But it said that the \$750,000 in punitive damages she had been awarded was excessive. The appellate court ruled that she must accept a \$600,000 reduction in punitive damages, from \$750,000 to \$150,000, or submit to a new trial.

This is the second time Burnett has had her award reduced. The jury originally awarded her \$1.6 million - \$300,000 in compensatory damages and \$1.3 million in punitive damages. Superior Court Judge Peter Smith, who tried the case, cut the jury's award to \$800,000 before entering judgment. (ELR 3:2:2)

The details of the appellate court's reasoning will be reported in the Entertainment Law Reporter as soon as a copy of its decision has been obtained. [Aug. 1983] [ELR 5:3:17]

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## **Raiders win eminent domain lawsuit filed against them by the City of Oakland**

The Oakland Raiders are no more. They are now the Los Angeles Raiders, and will remain such - barring a dramatic reversal at the appellate court level in one of the two cases the Raiders had to fight in order to move to Los Angeles in 1982.

The Raiders have shown themselves to be as successful in law courts as they are on football fields. Their most recent victory came in a California Superior Court where Judge Nat Agliano ruled in their favor, and against the City of Oakland, in an eminent domain suit Oakland had filed in an effort to condemn the Raiders as "property necessary to carry out (the city's) powers or functions."

This is the second time the Raiders have won a dismissal of Oakland's lawsuit. The case was first dismissed in response to a Raider motion for summary judgment. Last summer, however, that dismissal was reversed by the California Supreme Court which ruled that the acquisition and operation of a professional sports team "may be an appropriate municipal function." If so, Oakland would have the right to condemn the Raiders under California's eminent domain statute, the Supreme Court held. (ELR 4:17:4)

After a seven-week trial, however, Judge Agliano ruled that Oakland's condemnation of the Raiders was "not for a valid public purpose." The details of the judge's reasoning will be reported in the Entertainment Law Reporter as soon as a copy of his decision is obtained.

The Raiders moved to Los Angeles in 1982 without the authorization of the National Football League. Authorization by the NFL for such a move is required by the

league's constitution. And the Raiders were able to move without authorization only as a result of a Raiders victory in an antitrust suit against the NFL. (See ELR 1:9:6, 2:3:3, 2:17:5.) That victory is now on appeal to the Federal Court of Appeals in San Francisco, and a decision is expected at any time. [Aug. 1983] [ELR 5:3:18]

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### **Elvis Presley record bootleggers sentenced to jail by Federal District Judge in Los Angeles**

As a result of what is reported to be the largest bootleg record scheme ever prosecuted in the United States, four men have been sentenced to federal prison. The longest jail term was drawn by William Richard Minor who has been sentenced to eight-and-one-half years in custody and has been ordered to pay a \$90,000 fine. Minor was

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convicted of criminal copyright infringement, interstate transportation of stolen property and conspiracy, all in connection with a scheme in which more than 70 different Elvis Presley albums were manufactured and sold without the authorization of the owners of the copyrights to the songs recorded on the albums.

Paul Edmond Dowling and William Samuel Theaker also were convicted of criminal copyright infringement and conspiracy as well as mail fraud. Both were sentenced to 18-month prison terms and were ordered to pay fines of \$5,000 and \$15,000 respectively as well as to devote 1,500 hours to charitable work. Aca Alexander Anderson, who pleaded guilty before trial and cooperated with the government, was sentenced to one year in prison, with all but the first 40 days suspended, and was ordered to perform 2,000 hours of community service.

Authorities believe that the defendants netted more than \$1 million by selling the bootleg albums through catalogs and magazine ads. [Aug. 1983] [ELR 5:3:18]

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**Warner Amex Cable settles obscenity indictment stemming from movies shown on Playboy Channel in Ohio; Illinois ban on cable showings of X-rated movies is challenged in subscriber's lawsuit; Rhode Island liberalizes state law on cable carriage of adult films**

Cable television has taken sexy adult movies out of seedy motion picture theaters and has put them where many viewers believe they belong: in the privacy of their own bedrooms. As popular as this sort of programming has proved itself to be with cable subscribers, it is having to overcome some legal hurdles not faced by the

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likes of the Disney Channel. In many communities, franchising authorities and local prosecutors have imposed restrictions on adult fare, the legality of which is now being tested virtually from coast-to-coast.

Last month, these pages reported a Utah decision which declared unconstitutional a municipal ordinance prohibiting cable carriage of "indecent" - even if not pornographic - programming. (ELR 5:2:9) Also reported was the indictment of Warner Amex Cable of Cincinnati on charges that it disseminated obscene movies over its Playboy Channel. (ELR 5:2:18) This month, there are several new developments in this area worth noting.

First, Warner Amex has settled the charges filed against it in Ohio. It did so by agreeing that it will not present on its Cincinnati cable system any adult, sexually explicit X-rated programming (or unrated programming that would have received an X-rating under MPAA guidelines). In exchange, the indictment against

Warner Amex has been dismissed. Interestingly, the terms of the settlement leave the legality of Warner Amex's original actions unclear. The indictment was triggered by Warner Amex's showing of "Maraschino Cherry" and "The Opening of Misty Beethoven" neither of which was rated. However, Warner Amex has said that if the two movies had been rated, they would have received an R rating. If so, they would have been showable in Cincinnati even under the agreement now in place.

Elsewhere, in an unrelated matter, a cable subscriber in Vernon Hills, Illinois, has filed a lawsuit in Federal District Court in Chicago challenging the constitutionality of a Vernon Hills ordinance prohibiting cable companies from showing X-rated movies. The suit appears to be the first challenging bans on X-rated movies, as such. The Utah case reported last month involved "indecent" movies - including movies that might have been R-rated.

The Utah case did not challenge the ordinance's ban on cable carriage of obscene programming. The Vernon Hills case presents an intriguing issue concerning the use of the MPAA's X rating to ban movies from cable. X ratings are imposed on some movies that are not legally obscene. Thus, if only obscene movies may be banned from cable, an X rating by itself cannot be used to determine which movies may be banned. Interestingly, if the Vernon Hills ordinance is declared unconstitutional, it appears that the terms of the Warner Amex settlement in Cincinnati would be unconstitutional as well.

Meanwhile, in Rhode Island, the legislature is not waiting for its cable franchising statute to be declared unconstitutional. Rhode Island law used to provide that a cable franchise could be revoked if a cable system showed programs that were "offensive to commonly accepted standards of morality and decency of the

community." Although the wording of the statute was not identical to that of the Utah ordinance just recently struck down, the Utah court's reasoning clearly would have applied with equal force to the Rhode Island statute. The Rhode Island legislature has taken matters into its own hands, however, by amending the statute to provide that a cable franchise may be revoked only if the cable system carries programs that "are adjudged by a court of competent jurisdiction to be obscene." [Aug. 1983] [ELR 5:3:18]

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### **New York adopts, and California considers, cable-TV "lock box" law to deal with adult programming**

The state of New York has dealt with the issue of adult programming on cable-TV by adopting a statute requiring cable operators to offer their subscribers a "lock

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box" - a device that permits cable channels to be deactivated with a lock and key. The philosophy behind the statute is that adult programming on pay-TV channels presents a problem, if at all, only because youngsters who reside in subscribers' homes have access to such programming access their parents may not wish them to have. The solution: give parents the means to physically control what their children may watch. The New York statute takes effect January 1, 1984, and permits cable companies to charge subscribers who want lock boxes no more than 15% above the cost of acquiring and installing them.

The California legislature has a similar, lock box bill before it now. The bill is backed by the California Cable Television Association and thus is likely to be enacted. The California bill authorizes cable companies to charge subscribers for lock boxes no more than 50 cents per

month, subject to increases in proportion to the cost of living. [Aug. 1983] [ELR 5:3:19]

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### **New Jersey adopts statute prohibiting ticket scalping**

New Jersey has adopted a statute prohibiting ticket brokers from scalping admission tickets to events in that state. Under the new law, which takes effect August 11th, New Jersey-based brokers may not charge more than \$3 or 20% over the face price of the ticket, whichever is greater. The statute also requires New Jersey brokers to be licensed by the state's Division of Consumer Affairs, and makes the violation of the statute a crime.

New York adopted a similar anti-scalping law ten years ago. In fact, it was that law which lead many brokers to set up shop in New Jersey from where they continue to sell tickets to New York events - free of the



price limitations of the New York law. The new New Jersey statute will not affect the prices Jerseybased brokers charge for New York events, because the New Jersey statute applies only to events in that state. [Aug. 1983] [ELR 5:3:19]

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## WASHINGTON MONITOR

### **Supreme Court delays decision in Betamax case until next term**

The United States Supreme Court surprised the entire entertainment industry last month by failing to decide the Betamax case. The Court heard oral argument in the case in January, and a decision was expected in June. Instead, the Supreme Court issued a brief order resetting the case for a second round of oral argument in the fall.

Although rearguments are not unprecedented, they are unusual, thus suggesting that the Court is closely divided on the issues presented by the case, and that one or more of the justices may have some questions that were not answered in the initial briefs and arguments.

The case was originally filed in 1976 by Universal City Studios and Walt Disney Productions against Sony Corporation - the manufacturer of the Betamax home video recorder - and against Sony's advertising agency, several Sony retailers and a Betamax owner. The suit alleged that the videotaping of copyrighted television programming - even if done off-the-air, in the home, and for private, noncommercial uses only - constituted copyright infringement.

After a five-week trial in Federal District Court in Los Angeles in 1979, Judge Warren J. Ferguson issued a 102-page decision in which he held that home videotaping for private, non-commercial purposes did not

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infringe the copyrights to the programs taped. (ELR 1:11:1) Universal and Disney appealed, and in 1981, the two studios won a reversal in the Court of Appeals. The appellate court ruled that videotaping television programs does violate the Copyright Act even if done for private, non-commercial purposes. (ELR 3:13:1)

In response to the appeals court ruling, several bills were introduced in both houses of Congress designed to deal with the home taping issue. Some would have exempted home videotaping from the Copyright Act altogether, while others would have imposed a royalty on the sale of videotape recorders and blank tapes which would be distributed among producers whose programs are recorded.

When the Supreme Court agreed to hear Sony's appeal from the decision of the Court of Appeals, Congressional action on all of the home video recording bills came to a virtual standstill. As frequently happens under

these circumstances, Congress decided to wait for the Supreme Court to resolve the issue under current law before deciding how, if at all, that law should be revised. In all likelihood, the Supreme Court's decision to put off deciding the Betamax case until next term will result in further Congressional inaction on home video recording legislation, even though the Court's eventual decision could be almost a full year away.

The Electronic Industries Association, which supports Sony's position in the case, has announced that it will oppose any legislative efforts to moot the case by imposing royalties on video recorders or tapes. On the other hand, the Motion Picture Association of America and the Recording Industry Association of America have called for immediate Congressional action. In a prepared release issued the day the Supreme Court announced the Betamax case is to be reargued next term, MPAA president Jack Valenti commended bills that

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have been introduced by Senator Mac Mathias and Congressmen Don Edwards and Carlos Moorhead which would exempt home taping from copyright infringement on condition that royalties be paid by recorder and tape manufacturers.

"Protecting copyright is a precious American constitutional principle," Mr. Valenti said. "Creative works don't just spring full blown to life. They come from creative labor, from investment capital, from the fragile imaginings of thousands of artists, technicians, craftspersons and composers, authors and directors, who supply motion picture and television programs to the world. It is in the public interest to ensure continuous production of quality entertainment available to everyone."

Then, in an allusion to the fact that virtually all video recorders sold in the United States today - including those that carry American brand names - actually are manufactured in Japan, Mr. Valenti added, "It would be

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terribly wrong if Japanese manufacturers are allowed to reap billions of dollars by exploiting the creative labors of American craftsmen and not paying a portion of those profits to the artists without whose product VCRs are a useless piece of electronic gadgetry." [Aug. 1983] [ELR 5:3:20]

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### **Senate approves Record Rental Bill**

The full United States Senate has passed a bill designed to prevent record stores from renting audio disks and tapes without the permission of copyright owners. The bill, S.32, would amend the "first sale doctrine" of current copyright law - a doctrine which essentially provides that the purchaser of a copyrighted work, including a record, may do anything with it except those things specifically prohibited by the Copyright Act. The

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current Copyright Act does not bar the rental of copyrighted works. Senate passage of S.32 follows subcommittee hearings and approval of the bill (ELR 5:1:20, 5:2:20). In order for the bill to become law, it must now be passed by the House of Representatives as well.

Originally, S.32 was being considered along with a companion measure, S.33, designed to prevent the unauthorized rental of video tapes and disks. Although that bill deals with an issue that is technically distinct from the home videotaping issue being litigated in the Betamax case (see prior story), S.33 is more controversial than S.32, and thus action on S.33 was deferred by the Senate Copyright Subcommittee pending the Supreme Court's decision in the Betamax case. Now that the Supreme Court has put off deciding the Betamax case until next term, the fate of S.33 is unclear. It may remain mired in the controversy over home videotaping,

or it may be taken up by itself, if and when S.32 is enacted into law. [Aug. 1983] [ELR 5:3:20]

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## **FCC proposes deregulation of television**

Fresh from its victory in the Court of Appeals, which upheld almost all of its 1981 deregulation of radio (ELR 5:2:20, 2:22:6), the Federal Communications Commission has indicated its intention to deregulate television in the same fashion. Late in June, the FCC voted to propose the elimination of current guidelines for the amount of nonentertainment programming that should be broadcast by TV stations as well as guidelines limiting the amount of commercial time they broadcast each hour. In addition, the FCC has proposed the elimination of its current requirement that TV stations ascertain the needs of the communities they are licensed to serve.



The FCC also has asked for comments on what sort of a logging requirement would be "appropriate" if its other deregulation proposals are adopted. When the FCC deregulated radio in 1981, it eliminated the need for radio stations to maintain logs altogether. It was on this issue that the FCC lost in the Court of Appeals, however. As a result, the FCC also has initiated a proceeding designed to determine what sort of logging requirement for radio stations would meet with the approval of the Court of Appeals. [Aug. 1983] [ELR 5:3:21]

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## DEPARTMENTS

### **Book Note:**

**Producing for Motion Pictures and Television: A Practical Guide to Legal Issues, compiled and edited by Vance Scott Van Petten**

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Last May, the Los Angeles County Bar Association sponsored a one-day symposium on producing movies for theaters and television. The symposium was conducted by the Association's Intellectual Property and Unfair Competition Section, and was unusual in two respects. Instead of attempting to cover in a single day everything from acquiring properties to distributing completed movies, the program focused on the legal issues that arise strictly in connection with getting films produced and "into the can." There are clearly enough of these issues to consume a full day and more, and yet they are frequently glossed over in overly ambitious programs of this sort.

In order to organize the panelists' discussion, a clever hypothetical was prepared featuring a movie-in-the-making entitled "Let's Make a Deal - The Stars' War." Along the way, the movie's unnamed producer confronts

a flock of legal issues - though not an atypically large flock - ranging from acquiring book and life-story rights to the use of film clips and characters from old movies, to filming in the U.S. and abroad using the services of American and foreign cast and crew members. Naturally, the producer hopes to release a sound track album and has been offered several deals for distribution to theaters, on pay-TV, on network television and to home video. The hypothetical worked well to focus the program on the kinds of concerns that producers actually face day-to-day.

The symposium coordinators also took exceptional care in preparing the program syllabus. Rather than simply gather together an assortment of contracts and cases, the Association enlisted Vance Scott Van Petten, of the firm of Irwin & Rowan, to edit a collection of materials that could stand on its own as a guide and reference work. The syllabus, like the program itself, is organized

around the "Let's Make a Deal . . ." hypothetical and includes several articles written especially for the syllabus. Ronald Gertz, Anita Ross Van Petten and Vance Van Petten contributed a chapter on Clearance of Rights. Richard Fraade wrote a chapter on The Use of Foreign Talent. Paul Supnik authored a chapter on Guild and Union Considerations. Steven Katz contributed a chapter on Production Insurance and Completion Guarantees. And Daniel Riviera, Donald Tractenberg and Bennett Newman wrote about Production Hiring and Accounting, the Flow of Revenue, and Net Profit Participation. Each of these articles is then illustrated with exhibits consisting of contracts and forms.

In all, the volume runs more than 400 pages and is bound in an attractive glossy paper cover. Copies are available directly from the Los Angeles County Bar Association, P.O. Box 55020, Los Angeles, California 90055, at a cost of \$40 each. [ELR 5:3:22]

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## **The Movie Business Book, edited by Jason E. Squire**

Prentice-Hall has just published a new book edited by Jason E. Squire entitled "The Movie Business Book." The book is aimed at a much wider audience than entertainment lawyers and executives (as demonstrated by its relatively modest price: \$24.95 in hardcover and \$13.95 in trade paperback). The book will be of interest to entertainment lawyers, however, especially those new to the motion picture industry and those looking for an overview.

"The Movie Business Book" has more than 40 authors, several of whom are themselves entertainment lawyers. The late Norman Garey contributed two pieces. One is entitled "The Entertainment Lawyer," and in it he describes the kind of work he did for his clients. Then,

perhaps prophetically, he notes, "One danger of the close working relationship between lawyer and client is the lawyer's temptation to assume the persona of the client. There is sometimes a seductive sense of the power to be derived from those acts of guidance and decision making ... that shape a prominent client's life. As exhilarating as this can be, it can also take a toll on the practitioner's own sense of self." In another piece, Mr. Garey details the Elements of Feature Financing.

Gary Concoff writes about Foreign Tax Incentives and Government Subsidies. Richard Zimbert discusses Business Affairs and the Production/Financing/Distribution Agreement. Norman Rudman explains Over-Budget Protection and the Completion Guarantee. Michael Mayer reviews the fine points of the Exhibition License. And Gordon Stulberg covers Film Company Management.

In addition to these lawyers, industry executives, agents, producers, directors and writers contribute their own perspectives on the movie business. In all, the book is divided into eleven sections covering The Creators, The Property, The Money, The Management, The Deal, The Shooting, The Selling, The Distributors, The Exhibitors, The Audience and The Future.

"The Movie Business Book" is available in book stores or from Prentice-Hall, Inc., Englewood Cliffs, New Jersey 07632. [ELR 5:3:22]

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[ELR 5:3:23]