RECENT CASES

"E.T." is home-free in copyright infringement action brought by author of theatrical play; Federal District Court finds no substantial similarity between movie and play

The origin of 1982's most successful alien - E.T. - remains a mystery since the being did not derive from a one-act play written by Lisa Litchfield, Federal District Court Judge Cynthia Holcomb Hall has ruled.

Litchfield wrote the play, entitled "Lokey from Maldemar," in 1978 and performances of the play were given in Los Angeles in that year. The play subsequently was submitted to Universal City Studios, Inc., but was rejected in October 1979 as unsuitable for firm treatment. As described by Judge Hall, "Lokey" was a musical play about the adventures of two aliens, Fudinkle and Lokey, who are temporarily stranded near the North Pole when their spacecraft is immobilized by gravity. The aliens encounter two children and their father, a research scientist. Lokey then demonstrates standard-issue extra-terrestrial powers such as psychokinetic control over objects and advanced healing ability. The children, in turn, display their terrestrial charm. After engaging in further adventures in Japan and in the Andes Mountains, the aliens reunite with the children to bid farewell. Lokey and Fudinkle then return to their spacecraft.

"E.T.," which was released by Universal, is the story of a small alien accidentally left behind when his compatriots are forced to hastily leave Earth. E.T. meets a family in California and is introduced to the appurtenances of American life, such as beer, Halloween and Sesame Street. The alien displays psychokinetic powers and healing by touch. However, E.T.'s condition begins to deteriorate and the alien revives only when the flighty spacecraft responds to his "phone home." After escaping from scientific investigators, E.T. bids farewell to his terrestrial friends.

In determining whether "Lokey from Maldemar" and "E.T." were substantially similar, Judge Hall noted the two relevant tests: (1) an "extrinsic" test, turning on objective criteria, such as the subject matter and setting and (2) an "intrinsic" test, based on the subjective "response of the ordinary reasonable person." And Judge Hall concluded that there is no substantial similarity between "E.T." and "Lokey from Maldemar" under either test. "Vast differences" were found in the plot, themes, dialogue, mood, setting, pace and sequence of the works. The plots and sequences of the works were similar only at a general level for which copyright protection is not available. Furthermore, Litchfield had described the screenplay version of her work as a "social satire," whereas "E.T." did not "purport to employ the overt and complex symbolism found in (Litchfield's) work," noted Judge Hall.

Moreover, the character E.T. did not infringe Litchfield's copyright, because neither Lokey nor Fudinkle was "distinctively delineated" as required to warrant copyright protection. Lokey was described in the 1978 play as a "bald, egg-headed, graygreen, five foot tall boy" and in the 1980 screenplay as a "tall, gray hued skin, hairless alien. . ." Fudinkle was a giant firefly (1978) or a three foot tall talking bug with a flashing phosphorus tail (1980).

"Lokey" also did not meet the instrinsic similarity test. This test does not require proof of exact repetition or reproduction. It is shown if a work captures the "total concept and feel" of a piece. But Steven Spielberg and Universal demonstrated that no reasonable jury could conclude that "E.T." and "Lokey" were substantially similar in their expression of ideas. Judge Hall therefore granted summary judgment to E.T.'s producers on the issue of copyright infringement between the "Lokey" play and the movie "E.T." and also on Litchfield's claim of infringement via the merchandising of E.T. products. Pendent state claims for breach of implied-in-fact contract and breach of confidence were dismissed for lack of subject matter jurisdiction.

Litchfield v. Spielberg, Case No. CV 82-3867-CHH (C.D.Cal., June 16, 1983) [ELR 5:4:3]

Federal District Court refuses to enjoin broadcast of movie "Witches' Brew" because producer did not establish the rescission of prior assignment of his copyright to the film and because injunction would violate First Amendment

"Unilateral rescission" has replaced "tail of newt, eye of frog" as an ingredient in a lawsuit concerning the ownership of the copyright in the motion picture and screenplay "Witches' Brew."

In July 1978, Richard Shorr registered "Witches' Brew" with the Copyright Office. In September 1978, Shorr transferred his interest in the "Witches' Brew" motion picture and unpublished screenplay to Green Isle Enterprises, Inc.-Piranha Films, Ltd., a joint venture doing business as Joshua Lightman Company. The joint venture, in July 1981, licensed these rights to Viacom International, Inc., and Viacom, in turn, licensed certain rights to Spotlight.

Shorr recently filed an ex parte application for a writ of seizure in the Federal District Court in Los Angeles, alleging that the scheduled television broadcast of "Witches' Brew" would infringe his copyright. Viacom and Spotlight, in documents filed in opposition to Shorr's application, brought to the attention of the court the fact that in 1979, Shorr had filed two state court actions against Green Isle, the joint venture and other parties. The trial court had dismissed Shorr's Sixth Amended Complaint in which he sought a determination that he was the owner of the motion picture "Witches' Brew." Another state court action in which Shorr and Green Isle are attempting to obtain possession of certain elements of the film is still pending. Viacom and Spotlight also noted that in August 1980, Shorr recorded with the Copyright Office a document entitled "Rescission of the Assignment Agreement."

District Court Judge Cynthia Holcomb Hall has denied Shorr's application on the ground that Shorr has not established the validity of his purported 1980 unilateral rescission of the 1978 assignment to the joint venture. Under California law (Civil Code section 1689(b)), rescission may be effected either by mutual agreement or by unilateral action. Unilateral rescission is effective only in certain circumstances, noted Judge Hall, such as when consent is obtained by fraud or mistake; if the consideration given for the contract fails; or if the contract is unlawful or void. But rescission does not occur "automatically"; one must obtain a judgment that there are valid grounds for a unilateral rescission. Shorr has not yet obtained such a judgment and the court therefore refused to accord any legal validity to the purported 1980 rescission.

The court also determined that granting an injunction against the broadcast of the movie would constitute an impermissible prior restraint on the media in violation of the First Amendment. Shorr alleged that his reputation as a film producer and director would be injured by the broadcast. However, even if Shorr possessed a valid copyright and could demonstrate such an injury to his professional reputation, these interests were "too insubstantial" to warrant the imposition of a prior restraint, concluded Judge Hall.

Schorr v. Viacom International, Inc., Case No. CV 83-2682-CHH (C.D.Cal., May 2,1983) [ELR 5:4:3]

Dispute between concert promoter and musicians must be resolved by arbitration before American Federation of Musicians' own executive board, New York court rules

A concert promoter, Jerry Kravat Entertainment Services Inc., entered into a collective bargaining agreement with the American Federation of Musicians (AFM) in connection with a concert tour. The promoter then entered into two separate contracts with a group of 10 musicians. These two contracts were on the AFM's standard form contract. AFM Bylaws require all union members to use such a standard form contract. The AFM standard form contract contains an arbitration clause which calls for the arbitration of disputes before the AFM's own Executive Board.

As a result of a dispute, the musicians filed grievances against the music promoter and initiated arbitration. In response, the music promoter attempted to stay arbitration. The promoter argued that the arbitration agreement between it and the 10 musicians was invalid because the agreement provided for the AFM's own Executive Board to be the sole arbitrator. The promoter argued that the AFM's Executive Board would be biased in favor of the musicians and thus, the contract allowed the union to be the "judge of its own cause." In the view of the music promoter, the arbitration agreement was a contract of adhesion, especially since all union members had to use the AFM standard form contract containing the arbitration clause and most, if not all, noteworthy musicians are members of the union.

Judge Schwartz of the New York Supreme Court disagreed with the promoter's position and held that as long as the relationship between the arbitrator (the AFM's Executive Board) and the parties to the arbitration (the musicians) was disclosed before the contract was made, the arbitration clause is valid. In making this ruling, Judge Schwartz distinguished a prior New York case which invalidated an arbitration clause which designated the employer's Board as the arbitrator in a dispute between employer and employee. In Re Cross & Brown Co., 4 A.D.2d 501, 167 N.Y.S.2d 573. The court found Cross distinguishable because in Cross, the employer was actually one of the contracting parties, whereas in the present case, the AFM was not one of the contracting parties.

In arriving at his decision, Judge Schwartz alluded to a 1981 case decided by the California Supreme court, Graham v. Scissor- Tail, Inc. (ELR 2:21:3), and expressly chose not to follow it. The Scissor-Tail case involved identical facts, including the exact same AFM standard form contract entered into between concert promoter and musician. In Scissor-Tail, the California Supreme Court ruled that an arbitration agreement calling for the AFM's Executive Board to serve as the arbitrator was invalid. The California court reasoned that such an agreement was unconscionable and constituted a contract of adhesion.

Jerry Kravat Entertainment v. Cobbs, 459 N.Y.S.2d 993 (1983) [ELR 5:4:4]

Pat-down searches of rock concert patrons by police officers are ruled unconstitutional by Washington Supreme Court

The Washington Supreme Court has affirmed a trial court decision holding that warrantless patdown searches by police officers of patrons attending rock concerts are unconstitutional. The ruling arose out of an action filed by four individuals who attended a July 1, 1979 concert performed by the Grateful Dead at the Seattle Center Coliseum. The Seattle Police Department, since 1971, had been conducting warrantless pat-down searches on nearly every individual entering the Coliseum to attend a concert in order to counter the problems caused by patrons bringing alcoholic beverages or weapons into the concerts. But there were no written regulations which set forth the city's search practices or which guided the police officers in conducting searches.

The police department determined which concerts would be characterized as rock concerts during which the search procedures would be in effect. The trial court granted the four patrons' motion for summary judgment and issued an injunction against searches of rock concert patrons unless there was probable cause to believe that an unlawful act was being committed. The individual patrons were awarded attorney fees and costs of about $18,000.

Justice Dolliver of the Washington Supreme Court rejected the city's contention that warrantless searches at rock concerts are analogous to such searches at courthouses and airports.

The dangers posed by unruly rock concert patrons are far less substantial than those which justified suspending the warrant requirement in courthouse and airport searches. And those searches also are conducted in a far less intrusive manner than the intensive pat-down procedures employed by the Seattle police. The court cautioned that "the damage to the understanding of constitutional guaranties of freedom from unreasonable searches on the part Of (young rock concert attendees) is incalculable."

The court suggested that the Seattle Center seek other alternatives to manage potentially unruly patrons, such as providing a checkroom for handbags or arranging for additional security inside the concert hall.

Jacobsen v. City of Seattle, 658 P.2d 653 (Wash. 1983) [ELR 5:4:4]

20th Century-Fox wins annulment of workers' compensation award to studio driver because of possibility that his psychological injury was due to Fox's

rejection of his screenplay rather than his employment

When Kevin Conway took a job at Twentieth Century-Fox as a studio transportation driver and accountant, he considered it a vehicle to further his career as a screen-writer. In 1977, after four months on the job, Conway received a workers' compensation award for injury to his psyche allegedly due to the stress and strain of his em-ployment. Conway testified that his nervous breakdown resulted from his having to work for "a very dangerous alcoholic" and his having to cover up alleged embezzle-ment occurring in his department.

Fox's version of the story was that Conway's nervous breakdown resulted from Fox's rejection of his screen-play which was unrelated to his employment duties and therefore not compensable through workers' compensation.

In reviewing the workers' compensation award, the Court of Appeal noted that "a finding of industrial injury is proper only where the employment plays an 'active' or 'positive' role in the development of the psychological condition." Furthermore, such a finding must be supported by substantial evidence including both competent lay and medical evidence. The court held that the workers' compensation board failed to sufficiently detail the reasoning for its decision and that the medical evidence relied on did not provide substantial evidence to support a finding of industrial injury. In fact, the psychiatrist's testimony implied that Conway's injury was "due to his hope that Fox would accept his screenplay, a totally nonindustrial matter." Consequently the court concluded that it was not Conway's employment that drove him to suffer his psychiatric injury, and thus his workers' compensation award was annulled.

20th Century Fox Film Corp. v. W.C.A.B., 190 Cal.Rptr. 560 (Cal.App. 1983) [ELR 5:4:5]

EMI's action challenging California's assessment of franchise tax on its subsidiary, Capitol Industries-EMI, Inc., is dismissed by Federal District Court due to lack of subject matter jurisdiction.

A 200-year-old echo of the cry "no taxation without representation" is resounding in the California courts.

EMI Limited, a United Kingdom corporation that does no business in California, is the parent corporation of Capitol Industries-EMI, Inc., a Delaware corporation with its principal place of business in California. EMI has been engaged in a lengthy tea party with the California Franchise Tax Board over the computation of Capitol's tax according to the state's unitary method of taxation (see ELR 3:23:3). EMI alleged that it is injured by the assessment because, as majority shareholder, the value of its investment will decrease if Capitol must pay the tax. But the possibility of such an injury did not give EMI standing to sue in its own behalf, a Federal District Court has ruled. The primary injury and the primary right to sue are Capitol's.

The United States-United Kingdom Income Tax Convention also was found inapplicable since EMI was not being taxed and the provisions regarding taxation of subsidiaries created rights, if at all, in favor of Capitol.

In support of its claim of standing, EMI cited the demands for information made by the Franchise Tax Board. Such demands might endow EMI with limited standing to challenge the Board's right to obtain information from EMI, stated the court. But the demands in this case were addressed to Capitol, not to EMI.

The court therefore granted the Franchise Tax Board's motion to dismiss for lack of subject matter jurisdiction.

EMI Limited v. Bennett, 560 F.Supp. 134 (N.D.Cal. 1982) [ELR 5:4:5]

Milwaukee Brewers are liable for Wisconsin use tax on acquisition of promotional items and printed admission tickets

The Supreme Court of Wisconsin has found the Milwaukee Brewers baseball club liable for the payment of a use tax on its purchase of admission tickets and promotional items such as baseball bats and jackets. These items, which were acquired by the Brewers from out-of-state vendors, were not for resale, stated the court, and their acquisition by the club therefore was a taxable event.

The Brewers had argued that the promotional items were tied to the price of admission and thus were subject to the sales tax. They argued, in other words, that admission to a game and the bat or jacket were two taxable items which were being sold to game patrons for one flat price. But the price of admission to athletic events is taxed as a service, rather than as a product, under a Wisconsin statute which also provides that "no part of the charge for the service may be deemed a sale or rental of tangible personal property." In the court's view, the Brewers were giving away the promotional items in question to fans of a specified age who had to use their tickets to gain admission to the game and who did not pay more than the usual admission charge. The club therefore was the user or consumer of the items and is liable for the payment of the use tax.

The court took a similar position as to the club's purchase of printed admission tickets despite the small value of the individual tickets. The sale of a ticket was the sale of a taxable service, not the sale of tangible personal property made out of cardboard, ruled the court.

In a dissenting opinion, Justice Steinmetz stated that he would have held that the acquisition of admission tickets by the club did not constitute a retail sale since the cost of an admission ticket is subject to the sales tax on the price of admission to a game. Justice Steinmetz also would have held that the promotional items were not acquired in separate retail sales since the items were included in the price of admission on which a sales tax was paid.

Wisconsin Department of Revenue v. Milwaukee Brewers Baseball Club, 331 N.W.2d 383 (Wisc. 1983) [ELR 5:4:6]

San Diego television station's request for waiver of network non-duplication rule is remanded to the Federal Communications Commission by a Federal Court of Appeals

A Federal Court of Appeals in Washington, D.C. has ordered the Federal Communications Commission to reconsider a San Diego television station's application for a waiver of the Commission's network non-duplication rule, 47 C.F.R. section 76.92(g).

The rule requires cable systems to protect the exclusive rights to network programming granted by the major television networks to each of their affiliates, within the affiliate's market. Cable systems must delete network programs broadcast by a distant station when those programs duplicate programs broadcast by local network affiliates. The basis of the rule is that a local station's audience might be diluted if there were program duplication, resulting in a possible decline in the station's advertising revenue.

In 1978, the FCC adopted an exception to the network non-duplication rule. The exception provided that a cable system would not be required to delete the duplicating signal of a station that is "significantly viewed" in the cable system's community. Such stations are over-the-air competitors of local stations and thus are treated as local rather than distant stations. "Significantly viewed" stations in a given county are those that are listed in a 1972 FCC cable television report.

KCST-TV is a UHF station in San Diego and is an affiliate of the NBC television network. Until 1978, San Diego cable systems were required to delete Los Angeles station KNBC-TV's network programs whenever those programs duplicated KCST's programs. Under the

1978 exception, however, San Diego cable systems need not delete KNBC's programs because in 1972 KNBC was deemed to be significantly viewed in San Diego County. However, the ABC and CBS affiliates in San Diego retain their network non-duplication protection because KABC and KNXT, the other two Los Angeles network affiliates, did not achieve "significantly viewed" status in the 1972 report.

In April 1978, KCST sought special relief from the FCC, requesting that the "significantly viewed" exception not be applied. KCST produced Arbitron reports indicating that, according to the applicable FCC standards, KNBC was no longer significantly viewed in San Diego County. KCST also argued: that the rule placed the station at a competitive disadvantage in that the two VHF network affiliates in San Diego have continued to receive non-duplication protection; that KNBC is not a local San Diego station, and is not a competitor of San Diego stations; and that the waiver would lead to increased program diversity because cable systems would be free to substitute wholly different programming for the KNBC programs that would be deleted.

The FCC's Cable Television Bureau denied KCST's petition, stating that "signals listed by the Commission as significantly viewed are not subject to subsequent deletion." Thus, the showing that KNBC is no longer significantly viewed in San Diego was irrelevant to the waiver application, The Bureau also held that a station must produce evidence of the economic impact of the rule to receive special relief, and that KCST had not done so.

The FCC denied KCST's petition for review of the Board's decision.

Federal Court of Appeals Judge Tamm, in ordering the remand of the matter, first noted that the FCC had not provided a means for deleting a station from its 1972 list because the Commission sought to avoid disruption of established viewing patterns, and to guarantee that cable systems would not be required to drop a signal once its carriage had begun. This premise, however, primarily served certain station carriage rules rather than the network non-duplication rules at issue. Furthermore, the programming of the deleted station still would be available to viewers via their local affiliates. The court concluded by finding that in refusing to grant a waiver to KCST upon a showing that KNBC was not significantly viewed, unless KCST also established the economic impact on the station, the Commission had arbitrarily placed a substantial burden on KCST. Judge Tamm therefore remanded the matter for further consideration pursuant to suggested guidelines.

Judge Scalia, in a lengthy dissent, refused to call the commission's action "arbitrary, capricious or abusive of discretion." Judge Scalia pointed out that the public interest served by the non-duplication rules is the prevention of deterioration in local broadcast service caused by the financial distress or the failure of licenses. If a local station is in need of protection from the competition of a significantly viewed station, the local station may qualify for a waiver on the ground of economic injury that would be detrimental to broadcast service. Otherwise, a station may not be deleted from the significantly viewed list, in Judge Scalia's view.

KCST-TV Inc. v. Federal Communications Commission, 699 F.2d 1185 (D.C.Cir. 1983) [ELR 5:4:6]

New York educational cooperative is held liable for statutory damages of $250 for each infringement of copyrights held by Encyclopaedia Britannica and other suppliers of instructional programming

A Federal District Court in New York has refused to modify a permanent injunction issued in June 1982 which barred the Board of Educational Services in Erie County from engaging in the systematic practice of making off-the-air videotapes and derivative copies of works copyrighted by the Encyclopaedia Britannica Educational Corporation and other suppliers of instructional materials (ELR 4:17:3).

The Board, citing the doctrine of fair use, sought the court's permission to temporarily videotape and use the materials for a period of one school year. But the court refused to grant such permission. The court pointed out that all of Britannica's copyrighted works, as well as the works of the other copyright owners, are available for short or long term lease. Therefore, any temporary use of an entire program by the Board, even for a term of less than one year, would interfere with the marketability of the programs. Furthermore, the Board's primary purpose in seeking temporary use of the programs merely was to engage in "time shifting." Given these factors, the court found that it would not be reasonable to apply the fair use doctrine to permit the Board to use the suppliers' materials even on a temporary basis.

As in its prior opinion, the court denied Britannica's request for attorneys' fees. Although the Board's theories of fair use and estoppel were found to be without merit, the defenses were not insubstantial and the issue of off-the-air videotaping of copyrighted television programming remains an unsettled area of law.

In calculating damages, the court granted Britannica's request for minimum statutory damages of $250 under the Copyright Act of 1909 for each copying and performance infringement for each of 19 works at issue. The court considered but rejected Britannica's argument that its exclusive right to vend its works was infringed. The right to vend generally has been interpreted to mean the right to sell. The Board did supply videotape copies to its school district subscribers, and televised the copyrighted works to classrooms via its cable transmission system. But in doing so, the Board actually was providing services to teacher-participants rather than selling videotapes. (Under the Copyright Act of 1976, a copyright holder also has the right to "distribute" his or her work; and this may provide a copyright owner with greater rights than found in the 1909 Act, which the court believed itself obligated to apply in this case.)

Britannica further argued that each time one of the company's 19 copyrighted works was copied by the Board, it also was shown in a classroom, resulting in a public performance copyright infringement, and that a performance infringement also occurred upon each cable television broadcast of the works by the Board. The court agreed and declared that the performances via videotape and cable were "public" even if New York statutes restrict the types of persons who can enter classrooms. It was concluded that separate copying infringements occurred when the Board created videotape copies from the 19 master copies of Britannica's works. Furthermore, separate performance infringements occurred when each videotape copy was delivered to a school and shown in a classroom, and each time the Board cablecast one of the works to a classroom.

The Board had engaged in direct, rather than contributory infringement, stated the court and individual Board employees who were sued by Britannica either caused or materially contributed to the infringements. Therefore, all of the Board-associated parties were found jointly and severally liable for costs and damages.

Encyclopaedia Britannica Educational Corp. v. Crooks, 558 F.Supp. 1247 (W.D.N.Y. 1983) [ELR 5:4:7]

Audiovisual display of video games is copyrightable; court upholds injunction prohibiting infringement of copyrighted "Pac-Man" and "Galaxian" games via alteration of games' circuit boards

"Galaxian" and "Pac-Man" have repelled another attack by Artic International, Inc., the distributor of printed circuit boards for use inside video game machines. One of the circuit boards speeds up the rate of play - how fast the sounds and images change - of "Galaxian" when inserted in place of one of the machine's circuit boards. Another of Artic's circuit boards stores a set of images and sounds almost identical to that stored in the circuit boards of Midway Mfg. Co.'s "Pac-Man" video game. A Federal District Court granted Midway's motion for a preliminary injunction barring Artic from manufacturing or distributing circuit boards that can be used to play video games substantially similar to those protected by Midway's copyrights (ELR 4:2O:2) and this order has been upheld by a Federal Court of Appeals.

The court first considered whether video games are appropriately classified as audiovisual works protected under the 1976 Copyright Act. Section 101 of the Act defines audiovisual works as "works that consist of a series of related images which are intrinsically intended to be shown by the use of ... projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied." If this definition refers only to a set of images displayed in a fixed sequence, video games would not qualify as audiovisual works, since each time a video game is played, a different sequence of images appears on the screen of the video game machine. But the court chose to follow its earlier, broader construction of the phrase 'series of related images" as referring to any set of images displayed as some kind of unit. (See WGN Continental Broadcasting Co. v. United Video, Inc., 693 F.2d 622 (7th Cir. 1982) (ELR 4:13:3))

The court also acknowledged that the particular sequence of images that appears on the screen of a video game machine when the game is played is not the same work as the set of images stored in the machine's circuit boards. In deciding whether the creative effort made in playing a video game is enough like writing or painting to make each "performance" of a video game the work of the player and not the game's inventor, Chief Justice Cummings stated that "playing a video game is more like changing channels on a television than it is like writing a novel or painting a picture." The most a game's player can do is choose one of the limited number of sequences the game allows the player to choose.

Artic also argued that video games are not copyrightable because the circuit boards in which games are fixed are patentable. But the design of the circuit boards was not the subject matter of Midway's copyrights. The copyrights were claimed, correctly, in the audiovisual works - the images and sounds stored in the circuit boards.

Another unsuccessful argument raised by Artic was that Midway's copyrights were invalid because the works they protected were published without the required copyright notice. Midway purchased the rights to its games in 1979 and 1980 from a Japanese company that invented the "Pac-Man" and "Galaxian" games. The copyrights were valid, ruled the court, because Midway registered its works in the United States in 1980 - within five years of the date they were originally published in Japan.

Artic warmed up to its final argument - which was that the sale to Midway's licensees of circuit boards that speed up the rate of play is not an infringement of Midway's copyrights. But the court noted that speeding up the rate of play of a video game is like playing back a phonograph record recorded at 33 RPM at a speed of 45 or 78 RPM. Unlike the market for speeded-up 33s, however, there is an "enormous demand" for the speeded-up video games. The right to respond to this demand by creating derivative works based upon the copyrighted work belongs to Midway. A speeded-up version of a prerecorded musical performance might not warrant legal protection, but "A speeded-up video game is a substantially different product" from the original game, and the right to develop such a product belongs to the copyright owner, concluded the court.

Midway Mfg. Co. v. Artic International, Inc., 704 F.2d 1009 (7th Cir. 1983) [ELR 5:4:8]

Federal Court of Appeals upholds RICO Act convictions of basketball game fixers in Boston College point shaving scandal disclosed in Sports Illustrated article

The bribery scandals that permeated college basketball in the 1950s and 1960s were a major factor considered by Congress when it drafted legislation to combat sports bribery. The resulting line-up of federal statutes has been used by a Federal Court of Appeals in affirming the convictions of several participants in the point shaving scandal at Boston College during the 1978-79 season.

The point shaving scheme was conceived by "small time gambler" Rocco Perla and his brother Anthony who were known as the "Pittsburgh Connection." Rocco Perla recruited his high school friend, Richard Kuhn, a starter on the Boston College team. The game plan called for Kuhn to control the point spread in selected games, thereby allowing the conspirators to place winning bets with bookmakers. For example, if bookmakers determined Boston College to be a seven-point favorite in a particular game, Kuhn was to make certain that Boston College's victory was by less than seven points.

The Perla brothers then contacted a local friend, Paul Mazzei, "The Middleman," who in turn contacted Henry Hill, a reputed underworld figure from New York. By recruiting Hill, the Perla brothers succeeded in aligning themselves with Hill's reputed underworld "Boss," James Burke. Burke and Hill, the "New York Connection," were responsible for creating a bookmaking syndicate and provided protection for the conspirators in the event the bookmakers discovered they were being swindled.

A game against Providence on December 6, 1978, served as the test run for the scheme. Kuhn, however, was unable to control the point spread and the scheme fell short. Following the Providence game, two of Kuhn's teammates, Jim Sweeney and Ernie Cobb, were recruited to insure the future success of the scheme. Although the group was successful in six out of nine games involved, they were not quite as successful in the Court of Appeals. Burke, the Perla brothers, and Kuhn each were convicted on charges of RICO conspiracy (Racketeer Influenced and Corrupt Organizations), 18 U.S.C. Sec. 1962(d), conspiracy to commit sports bribery, 18 U.S.C. Sec. 224, and interstate travel with the intent to commit bribery, 18 U.S.C. Sec. 1952. The sentences ranged from four to twenty years; Kuhn, the only ballplayer sentenced, received a ten-year prison term.

The scandal at Boston College surfaced after Sports Illustrated (SI) published an article written by Henry Hill in collaboration with Douglas Looney, entitled "How I Put The Fix In," which was a first hand account of the scheme. Hill, having been implicated in other criminal matters, agreed to testify for the government in exchange for full immunity. As Hill was the government's "All-Star witness," the defense counsel sought production of all relevant material held by SI relating to Hill and Looney's article. At trial, Time Inc., parent company of SI, succeeded in quashing the suboena relying on the First Amendment reporters' privilege. Time, Inc., argued that "broad-ranging production of SI documents would be unreasonable and unnecessary." The Court of Appeals noted that the only important evidentiary purpose served by production of these documents would be to impeach the credibility of Henry Hill, and that purpose did not defeat the First Amendment privilege. The jury had been apprised of Hill's extensive criminal past, knew that he was offered full immunity for his testimony and therefore, the SI material, even if relevant, "would serve a solely cumulative purpose."

The conspirators further maintained that the SI article generated widespread adverse publicity, thereby jeopardizing their right to a fair, impartial trial. The court noted that a jury "need not deliberate in a sterile chamber ... to satisfy this constitutional guarantee," and it held that criminal convictions will not be overturned on grounds of adverse publicity absent a showing of actual prejudice as a result of the publicity.

Paul Mazzei, in a separate appeal, contended that the elements of the RICO offense were not sufficiently met by the government. A RICO violation is evidenced by "the conduct of (an) enterprise's affairs through a pattern of racketeering activities." The statutory definition of "enterprise" is a "group of individuals associated in fact although not a legal entity." A recent U.S. Supreme Court case held that the "enterprise" is not the "pattern of Racketeering activity," that is, each is a separate element which must be proved by the government. Mazzei, relying on this case, claimed that to establish a RICO violation, "there must be proof that the alleged enterprise was distinct from the alleged pattern of racketeering activity." The court, however, held that proof of these separate elements need not be distinct as long as the quantum of proof offered is sufficient to satisfy both elements of the offense.

United States v. Burke, 700 F.2d 70 (2d Cir. 1983); United States v. Mazzei, 700 F.2d 85 (2d Cir. 1983) [ELR 5:4:9]

Federal District Court denies summary judgment to sports attorney and agent Robert G. Woolf in action brought by hockey player arising out of negotiation of 1974-1975 player contract

After a professionally successful 1973-1974 season with the Pittsburgh Penguins of the National Hockey League, hockey player Andrew C. Brown re-engaged noted sports attorney and agent Robert G. Woolf to to negotiate Brown's contract for the 1974-1975 season. During the negotiations, the Penguins offered Brown a two-year contract at $80,000 per year. Brown rejected the offer, allegedly because Woolf asserted that he could obtain a long-term, no-cut contract for Brown with a deferred compensation feature with the Indianapolis Racers, which at the time was a new team in a new league.

Brown signed a five-year contract with the Racers. But the team was skating on thin ice and soon began having financial difficulties. The team's assets were seized and the organization defaulted in its obligation to Brown - the remaining $615,000 due on his $800,000 contract.

The hockey player then brought an action against Woolf alleging constructive fraud and breach of fiduciary duty in the negotiation of the Racer contract. Brown contended that Woolf negotiated two reductions in Brown's compensation, including the loss of a retirement fund while Woolf received his full $40,000 fee from the Racers. Brown also asserted that Woolf had failed to conduct any investigation into the financial stability of the Racers, failed to investigate the possible consequences of the deferred compensation package in the Racer's contract, and failed to obtain guarantees or collateral. In addition to compensatory and punitive damages, Brown sought to impose a trust on Woolf's $40,000 fee on the ground of alleged constructive fraud.

A Federal District Court in Indianapolis has found that sufficient material factual questions were raised to render summary judgment inappropriate in the action. Judge Steckler pointed out that the formulizations of constructive fraud under Indiana law are "rife" with questions of fact, such as the existence or nonexistence of a confidential or fiduciary relationship and the question of reliance on false representations, and that he was not pursuaded that no factual questions remained unresolved so that Woolf was entitled to judgment as a matter of law.

Brown v. Woolf 554 F.Supp. 1206 (S.D.Ind. 1983) [ELR 5:4:9]

Failure to satisfy requirements of securities act in connection with incorporation of company formed to sponsor flagpole sitting venture results in $170,000 judgment against law firm

For want of an offering memorandum, a daring endeavor to establish a world record for flagpole sitting was prematurely toppled. The flagpole venture was undertaken, appropriately, by Hightower Productions, Ltd. Hightower's plan was to employ an individual to live in a specially constructed perch from April 1, 1975 until New Years Eve, at which time he would descend in Times Square in New York before a nationwide television audience. The principals in Hightower hired the law firm of Wartzman, Rombro, Rudd and Omansky, P.A., to get their project off the ground. They advised Paul Wartzman that they needed to sell stock to the public in order to raise the $250,000 necessary to finance the project.

After the articles of incorporation were filed for Hightower, a flagpole tenant - "Woody Hightower" - was selected and settled into his sky home. Television appearances were scheduled and Hightower anticipated the advent of lofty commercial enterprises. But two weeks after Woody's ascent, Wartzman informed Hightower that no further stock could be sold because the law firm had failed to prepare an offering memorandum and had failed to assure that the corporation had made the required disclosures to prospective investors in accordance with the Maryland Securities Act. Hightower lacked the $10,000 to $15,000 necessary to hire a securities specialist and decided to discontinue the flagpole project.

Instead, Hightower filed suit against Wartzman alleging breach of contract and negligence for the firm's failure to create a corporation authorized to raise the necessary capital.

A jury returned a verdict in favor of Hightower for just over $170,500, and this verdict has been upheld by a Maryland appellate court.

Judge James S. Getty noted that where a breach "has prevented an anticipated gain and made proof of loss difficult to ascertain, the injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed." Wartzman had argued that by awarding Hightower all of the company's expenditures and obligations, the jury had made the law firm a guarantor for all costs incurred in the venture. But, said the court, Wartzman had the opportunity, which he did not pursue, to prove any loss that Hightower might have incurred if the contract had been performed; and this opportunity precluded a finding that Hightower was a guarantor of the venture.

Furthermore, Wartzman knew or should have known that Hightower would be depending on its ability to sell stock to fund the promotion as public interest in its venture increased. The failure to properly incorporate the company was not collateral, because Hightower had incurred substantial obligations in reliance on its capacity to raise funds via the sale of stock.

The amount of damages awarded may have exceeded the guidelines set forth by the trial court, stated Judge Getty, which guidelines restricted the inclusion of shareholders' investments and accrued salaries as items of recoverable damages. But Wartzman did not seek a modification of the verdict, arguing, unsuccessfully, on appeal only that reliance damages were improper.

Hightower also was not obligated to mitigate damages by spending the additional $10,000 to $15,000 to employ a securities specialist, because this fee as well as the additional funds required for the company to continue operations pending the necessary restructuring of the corporation were not within Hightower's financial capabilities.

Wartzman v. Hightower Productions, Ltd., 456 A.2d 82 (Md.App. 1983) [ELR 5:4:10]

American publisher's unilateral cancellation of prepublication agreement to purchase 25,000 copies of "Rock 'N' Roll Babylon" breached contract with British publisher of book

A prepublication agreement to purchase 25,000 copies of a book was a contract for services, rather than for the sale of goods, a Federal District Court in New York has ruled. As a result, the court awarded the $25,000 contractual deposit to the book's British publisher.

In July 1981, W.H. Smith Publishers, Inc., after reviewing a dummy manuscript for a book entitied Rock 'N' Roll Babylon, made a down payment of $25,875 to Plexus Publishing Limited, a British publishing company. This amount was to be applied to the purchase of 25,000 copies of an American edition of the book. The agreement provided that upon delivery of the complete text of the manuscript and illustrations, Smith had the right, within a 30 day period, to review the material. If Smith were advised by its lawyers that the work contained material that was libelous or might infringe a copyrighted work, the agreement provided that Plexus "shall either make or cause to be made such changes or deletions as may be necessary ... to make the work fit and acceptable for publication, or else ... (Smith) shall have the absolute right to terminate this Agreement and recover" the amounts paid to Plexus.

Subsequently, Smith received the completed manuscript of the book. In August 1981, Smith informed Plexus that, in the opinion of its lawyer, the manuscript contained libelous matter and that Smith was exercising its right to terminate the agreement. Plexus challenged Smith's right to cancel the agreement and recover the deposit since Plexus had not been given an opportunity to correct the passages which Smith found objectionable.

Federal District Court Judge Edward Weinfeld stated that "There can be no question that (Smith) breached the agreement by its unilateral cancellation." Smith was obligated to allow Plexus an opportunity to revise the manuscript and had the right to cancel the contract only if Plexus failed to make the changes suggested by Smith's attorney.

The court rejected Smith's contention that it was entitied to a refund of its down payment (less $500) pursuant to Article 2 of the New York Uniform Commercial Code, because Plexus resold the book to another American publisher. When the parties entered the agreement, the final product was not ready for immediate public distribution. The book still required rewriting and editing, design and art work, picture research and selection and printing. There was a "sale aspect" to the Smith/Plexus transaction, but the "predominant and essential feature" of the agreement was the services to be performed by Plexus. Therefore the Commercial Code did not apply.

Smith's claim of unjust enrichment on the part of Plexus also was unwarranted, stated Judge Weinfeld, since at the time Smith breached the agreement, it informed Plexus that Plexus was free to negotiate with another American publisher for the property, which Plexus proceeded to do, Even without such consent by Smith, there was no basis for a claim that a benefit was conferred on Plexus under a mistake of fact or law such that it would be unjust for Plexus to retain the deposit.

W.H. Smith Publishers, Inc. v. Plexus Publishing Limited, 557 F.Supp. 546 (S.D.N.Y. 1983) [ELR 5:4:11]

Creator of recipes for best selling "Pritikin" diet book does not have an interest in book's royalties, rules Federal Court of Appeals in refusing to grant retroactive application to the work-for-hire provisions of the Copyright Act of 1976

The weighty issue of the compensation due to the creator of the recipes which were published in the book The Pritikin Program for Diet & Exercise recently was addressed by a Federal Court of Appeals in New York.

In 1977, Patrick McGrady, the writer of the Pritikin work, hired June Roth to devise recipes which would comply with the Pritikin dietary specifications. According to Roth, it was agreed that she would receive a $3,000 advance on her share of the book's royalties. McGrady, however, claimed that he stated in a letter to Roth that Nathan Pritikin preferred a $3,000 flat fee. Roth eventually received $3,100 for her work in three payments delivered in November 1977, March 1978 and March 1979. When the book was published in the Spring of 1979, it became a best seller and Pritikin and McGrady realized royalties in excess of one million dollars. Roth. exercised her dismay at her trim fee by filing a lawsuit claiming that she had never entered into a valid contract concerning payment for the recipes, and that if any such agreement had been made, it was rendered invalid by the Copyright Act of 1976.

A Federal District Court concluded that Roth had entered into a binding contract in 1977 as a writer-for-hire, and possessed no interest in the book's royalties.

Federal Court of Appeals Judge Irving R. Kaufman, in affirming the District Court's ruling dismissing Roth's action, pointed out that the first check mailed to Roth included the notation "one-third payment for recipes." Roth apparently never questioned this notation. Roth also testified that McGrady never explicitly stated that the $3,000 fee represented an advance on royalties, but that she had so construed their conversation. Hence, the District Court's findings were not clearly erroneous so as to require reversal, stated Judge Kaufman.

Roth also had argued, unsuccessfully, that she was entitled to share in the royalties earned by the Pritikin book as an author because the agreement with McGrady did not comport with the work-for-hire requirements of the 1976 Copyright Act. The Act defines a work for hire as "a work specially ordered or commissioned for use as a contribution to a collective work ... if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire." While Roth and McGrady indeed had an oral rather than a written agreement, the agreement was entered into in 1977. Roth's claim that the Act, which did not become effective until January 1978, should be applied retroactively was found to be "wholly unsupported by the congressional intent." Section 301 of the Act did not "purport to determine who holds a copyright for works created before January 1978. It merely clarifies the rights of individuals owning copyrights on that date, whomever they may be," declared Judge Kaufman.

Roth v. Prilikin, Docket No. 83-7013 (2d Cir., June 20, 1983) [ELR 5:4:11]

Publishers are held not liable for defamation in reprinting Federico Fellini statements concerning American producer

In the book Fellini on Fellini, the noted director recalled that about 38 1/2 years ago, he met an American soldier named Roland Geiger who was stationed in Italy. Geiger helped to arrange the distribution of Roberto Rossellini's "neo-realist" film "Open City" in the United States in 1945, soon after the film was made. Geiger later returned to Italy where he participated in the production of about two dozen films, including "Paisa," another early Rossellini work. However, according to Fellini, Geiger was a "halfdrunk" soldier whose involvement with neo-realism began when Geiger stumbled over one of Rossellini's electric cables. Fellini also stated that Geiger was "a nobody and didn't have a dime."

Geiger filed an action against Fellini's publishers, including Dell Publishing Company, Inc., and the editors and translator of the book, seeking damages for injury to his reputation, lost business opportunities and mental anguish. A Federal District Court in Massachusetts, applying New York law, has granted summary judgment to the publishing parties.

Fellini on Fellini concerned matters "arguably within the sphere of legitimate public concern, 'stated the court, and Geiger therefore was required to show gross irresponsibility on the part of the publishing parties in order to establish liability.

The court also noted that the allegedly defamatory statements were first published in 1961, in Italian, and that the collection of articles comprising the book was first published in 1974, in German by a Swiss publisher. The "seasoned" character of Fellini's comments, when considered along with the director's nature and his participation in the events described, precluded a finding that Dell acted with "gross irresponsibility" in republishing the statements concerning Geiger. And Geiger had failed to produce any evidence indicating that the publishing parties had or should have had reason to question the authenticity of Fellini's story.

Geiger v. Dell Publishing Co., Inc., 560 F.Supp. 12 (D.Mass. 1983) [ELR 5:4:12]

Colorado Supreme Court upholds libel judgment in favor of family members as a result of broadcaster's assertion that they "deserted" severely disabled

bomb squad officer; divided court rules that statement was not constitutionally protected opinion

The delicate and divisive task of deciding whether a broadcaster's news report contained an actionable defamatory statement or a constitutionally protected statement of opinion befell the Colorado Supreme Court in a lawsuit brought by the former wife of a member of the Denver Police Bomb Squad.

In 1972, Jack Burns was severely injured while attempting to disarm a bomb. Burns' wife had filed for divorce several months prior to the explosion, but Yvonne Burns returned to care for her husband during his recovery. However, in 1974, Yvonne Burns was granted a divorce.

In 1976, KMGH-TV, the local affiliate of McGraw-Hill Broadcasting Company, Inc., aired a news feature entitled "Dangerous Occupations." After describing

Burns' accident and its aftermath, the reporter stated "In addition, his wife and five children have deserted him since the accident."

Yvonne Burns filed an action alleging that the use of the word "deserted" in the broadcast was defamatory. The jury awarded $75,000 to Mrs. Burns and $25,000 to each of the children. The trial court ordered that they accept a reduction in the award to $25,000 for Yvonne Burns, and $5,000 for each of the children or face a new trial. The Colorado Supreme Court has ordered the case remanded to the trial court for further findings with respect to the jury's verdict. The trial court had stated that it was "shocked" by the size of the verdict and that the verdict was not appropriate in view of the evidence presented at trial. But if the verdict were the result of "bias, prejudice or passion," the trial court was required to grant a new trial. If the verdict was not influenced by such extraneous factors, but damages still were "manifestly excessive" in light of the evidence, then the trial court's order reducing the award would stand. The remaining alternative would be to reinstate the original jury award.

After dispensing with several procedural points the Colorado Supreme Court considered whether the allegedly defamatory statement was a constitutionally protected expression of opinion. A lower appellate court had refused to "say categorically that the word "deserted' as used in the context of the broadcast at issue, carried solely opprobrious connotations." But the jury finding that the term "deserted" possessed a defamatory connotation was a reasonable conclusion based on the context of the story, observed the Colorado Supreme Court. Burns was required to show that she was prejudiced in the eyes of a "substantial and respectable minority" of the community. The appellate court's position - that a statement is protected opinion if it can be concluded that a word may have more than one meaning was overbroad, in the Colorado Supreme Court's view. Justice Erickson stated that free speech protection does not extend to attacks on an individual's reputation merely because it is asserted that the attack is an "opinion." Certain factors which might assist in recognizing when speech is protected opinion include-. the use of such cautionary phrasing as "in my opinion"; the context of the statement; and the circumstances surrounding the statement including the medium of dissemination and the target audience.

The Supreme Court cited with approval authority which states that a party may recover for defamation if the expressed opinion implies the existence of undisclosed or assumed defamatory facts, of which the listener is unaware. In this case, reasonable people could have believed that the reporter had inside knowledge of facts which would support the charge that Yvonne

Burns "deserted" her husband, or that the statement was a statement of fact. The jury also was reasonable in finding that Yvonne Burns had been libeled by the false representation of her relationship with her husband, ruled the court.

The record also contained "ample evidence" to support the conclusion that the broadcast was aired with reckless disregard of its truth or falsity. The reporter should have been aware that Jack Burns would present a one-sided view of his relationship with his former wife and an investigation of other sources to corroborate or refute the statement therefore was warranted. The reporter stated that the words used in the story were an "accurate portrayal" of the family's situation. But the word "deserted" in the context of a marital relationship has an "emotional, derogatory ... and obvious pejorative connotation," stated the court. Without underlying factual support, the use of the term was evidence of recklessness, particularly when the reporter knew that the description was untrue.

In dissent, Justice Dubosky pointed out that the broadcast's statement was nondefamatory and could not have been published with reckless disregard of its truth. In determining whether a publication is defamatory, "it is not enough that the particular recipient of the communication attaches a defamatory meaning to it. If the defamatory meaning is not intended, it must be a reasonable construction of the language." Justice Dubosky refused to find that the term "desertion" is today a term of universal derogatory connotation. The word accurately described Jack Burn's circumstances in 1976 - his wife and five children had left him. At most, the term was "rhetorical hyperbole" and therefore unconditionally privileged.

Justice Dubosky also questioned the majority's fact/opinion analysis, again noting that the statement was an allegation of fact - the reporter did not express an opinion as to why his family had left Burns.

As to actual malice, the reporter had a good faith belief that the'use of the word "deserted" was an accurate, nonderogatory characterization of the family's departure and did not have serious doubts about the truth of the statement. This was not a case in which a reporter conducted a grossly negligent investigation, fabricated facts or failed to contact obvious sources of information. Justice Dubosky therefore would have affirmed the judgment of the court of appeals that the trial court erred in denying McGrawHill's motion for a directed verdict.

Justice Lohr also disagreed with the majority's conclusions. In Justice Lohr's view, the use of the term "desertion," even assuming a defamatory connotation, was no more than the expression of a debatable value judgment. The broadcast contained no suggestion that the statement was based on some "inside knowledge" of "undisclosed circumstances," stated Justice Lohr. And even if the majority were correct in stating that the desertion comment was not a constitutionally protected statement of opinion, Justice Lohr would have ruled that Yvonne Burns did not establish that the statement was made with actual malice. There was no showing, by clear and convincing evidence, that the reporter entertained a serious doubt about the truth when selecting the word "deserted" to describe, on one occasion, the separation of a family.

Burns v. McGraw-Hill Broadcasting Company, Inc., 659 P.2d 1351 (Colo. 1983) [ELR 5:4:12]

Hawaii Supreme Court reverses decision granting summary judgment to UPI in defamation action but

affirms summary judgment in favor of television and radio stations and newspapers

In February of 1977, KHON-TV in Hawaii broadcast a report stating that the head of the local crime "syndicate" then sat on an important state board. Subsequently, the Valley Isle, a Maui tabloid, published a story in which a then-deceased local activist, George Helm, Jr., was reported to have previously identified Larry E. Mehau as the "Godfather" of Hawaii's criminal underworld. When a UPI reporter learned of the story, he called the Maui News and had a staff member read portions of the Valley Isle story to him. The reporter also attempted, unsuccessfully, to confirm the statements in the Valley Isle article. UPI then transmitted a news release to its subscribers based on the Valley Isle article and on a statement by Helm's father. The story attracted both widespread media attention and actions for defamation brought by Mehau and Moses W. Kealoha, members of the State Board of Land and Natural Resources. A Hawaii circuit court granted motions for summary judgment in favor of several media defendants except for the Valley Isle.

The Supreme Court of Hawaii has upheld the lower court's ruling with respect to all of the media defendants except UPI. The court noted the First Amendment's commitment to uninhibited debate on public issues and the need to avoid self-censorship by the news media. But Justice Nakamura stated that there was evidence in the record from which a jury could find that the news service had acted with reckless disregard for the truth in transmitting its article. The quotes from the Valley Isle story and from Helm's father were "strung together in a fashion that focused on Mehau ... And by innuendo and inference the dispatches further implicated Mehau in the death of George Helm, Jr., linked Mehau with 'the mainland syndicate,' and involved him in 'all the corruption that was happening.'" These accusations if untrue, concededly were defamatory.

UPI's manner of treating information obtained from another source, the fact that the Valley Isle was a new publication apparently given to "sensationalizing" the news, and the anonymity of the authors of some of the crucial accusations published by the Valley Isle were factors which could lead to a finding by a jury that UPI's republication of the Valley Isle's charges of criminality was not made in good faith.

However, the court refused to find that the Tribune-Herald, a UPI subscriber, was in the same position as UPI. The Tribune-Herald had no reason to question the reliability of UPI as a news gatherer. If the Tribune-Herald were required to engage in prior investigation, this would be a clear instance of "inducement" to media self-censorship, stated Justice Nakamura. The Tribune-

Herald did make unsuccessful attempts to reach Mehau for comment when the UPI dispatch was received. Other than noting these efforts, the article in the Tribune-Herald was the text transmitted by UPI. The newspaper "neither slanted nor embellished what was taken off the wire." Thus, there was no basis for a possible jury finding of actual malice, stated the court.

Summary judgments in favor of another newspaper, a radio station and two television stations also were upheld. These defendants primarily reported on the controversy created by the stories of the others, and their reports were largely confined to covering public reaction to those stories. The court concluded that a jury could not reasonably have found that any of these defendants had acted with actual malice.

A dissenting justice would have denied summary judgment to the Tribune-Herald on the same grounds as those relied upon by the majority in discussing UPI's liability. The Tribune-Herald's headline on the UPI-derived story read "Godfather Named." This could have been construed as implying that there existed a "godfather," and that the story identified him. But the story contained no basis for this implication and "there was no indication that the persons making the charge had any facts or personal knowledge relevant thereto." A responsible investigation of the allegations prior to the publication of the story would not have jeopardized the public interest in receiving the information contained in the article. Given Mehau's position and the serious nature of the story's charges, a jury could find that the allegations were "inherently improbable" and that there was an obvious basis for doubting the accuracy of the charges, concluded Judge Tsukiyama.

Mehau v. Gannett Pacific Corporation, 658 P.2d 312 (Ha. 1983) [ELR 5:4:14]

Fraud, deceit and libel claims against Los Angeles Magazine arising out of publication of April 1980 article were time-barred under Uniform Single Publication Act, rules California appellate court

California's Uniform Single Publication Act provides that no person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded on any single publication, such as any one issue of a magazine. The statute has been applied by a California appellate court to uphold, as time-barred, the dismissal of causes of action for fraud and deceit, as well as for libel, brought by the family of Bernard Sabbath Strick against Los Angeles Magazine.

The allegedly libelous article, entitled "Anatomy of a Highrise Murder," was published in the April 1980 issue of the magazine. The Stricks commenced an action for libel on March 27, 1981. A trial court granted Los Angeles Magazine's motion for summary judgment (ELR 4:9:6) on the basis of the following evidence: 95,951 subscriber copies of the April 1980 issue were received for mailing by the United States Postal Service on March 21, 1980; about 15,000 copies of the issue were on display on March 26, 1980 for sale to the public; a wholesale magazine distributor received 29,500 copies of the magazine from the publisher on March 19, 1980 and testified that the majority of these copies were delivered to retail outlets on March 26, 1980.

In response to the Stricks' petition for a writ of mandate, the California Court of Appeal ruled that the evidence supported the trial court's determination that the one-year limitations period barred the Stricks' libel action. The causes of action for fraud and deceit also were time-barred as the type of "tortious" conduct subject to the same statutory limitation as libel actions. To hold otherwise, stated the appellate court, would "thwart the policy enunciated by the Legislature concerning mass communications ..." the harm allegedly caused by the claimed fraud and deceit was "inextricably linked" to the contents of the article. To permit the Stricks to submit proof of harm on these claims, which proof would necessarily involve the contents of the article, would impair the Act's purpose of avoiding the potential difficulties of multiparty lawsuits, indefinite liability and endless tolling of the statute of limitations.

The Stricks' petition for a review of the trial court order therefore was denied.

Strick v. Superior Court, Case No. 2 Civ. 66470 (Ca.Ct.App., June 15, 1983) [ELR 5:4:14]

Television news report entided to fair report privilege in defamation action brought by innocent person who was videotaped as he was being wrongly arrested for bank robbery

When WPVI-TV broadcast several news reports in June of 1979 about a local bank robbery, the videotape accompanying the reports showed Jack Williams, Jr., in handcuffs, being placed in a police van. Williams' picture appeared as the report stated, "Both men will be charged with the bank robbery." Williams' name was not mentioned during any of WPVI's broadcasts.

Williams, who had not been involved in the robbery, was soon released from police custody, and brought an action against WPVI alleging that the broadcasts conveyed the meaning that he was an apprehended bank robber. The complaint set forth counts of defamation, intentional infliction of emotional distress and interference with prospective contractual relations, and sought compensatory and punitive damages of $10,000. Federal District Court Judge Raymond J. Broderick has granted summary judgment to Capital Cities Communications, Inc., the operator of WPVI-TV, on all of Williams' claims.

The court found that Capital was entitled to the "fair report privilege" under Pennsylvania law, and that WPVI had not abused the privilege. There was no evidence that the broadcast was made for the purpose of harming Williams. The report was fair and substantially accurate in its account of the robbery, and later reports correctly gave the names of the men who were formally charged with the crime. The broadcast was not distorted and did not include an), statement implying the probable guilt of any of the arrested parties. And WPVI's privilege to broadcast the fact of Williams' arrest was not lost merely because he was not involved in the robbery.

Although Williams' picture was shown when the complained-of statement was made, the statement did not render the broadcast substantially inaccurate.

The court noted that even if the fair report privilege was not applicable in this case, Williams had not raised an issue of material fact concerning the falsity of the broadcasts. Hence, summary judgment was appropriate on this ground as well.

Summary judgment also was found available to Capital on constitutional grounds since the broadcast was a press report on a matter of legitimate public interest soon after the incident occurred.

Williams also had filed his action against WCAUTV, operated by CBS, Inc. But WCAU's report on the robbery and police action neither pictured nor mentioned Williams and summary judgment therefore was entered in favor of CBS as well.

William v. WCAU-TV, 555 F.Supp. 198 (E.D.Pa. 1983) [ELR 5:4:15]

Magazine's publisher, rather than its editor, is granted authority to continue publication pending resolution of trademark infringement and unfair competition claims concerning magazine's title

The monthly magazine Courier Diplomatique, after a short but eventful publishing history, will be operated by its publisher, Baldev Duggal pending a final determination of Duggal's claims of trademark infringement and unfair competition against Sundaram Rama Krishna, the editor of the magazine, Federal District Court Judge Harold H. Greene has ruled.

Duggal and Krishna entered into a joint venture in October 1981 pursuant to which Duggal agreed to form a corporation that would own and publish the magazine. Krishna apparently conceived of the magazine and its name, prepared the November 1981 pilot issue, and edited the magazine from January 1982 to May 1982. Duggal and Krishna ended their relationship in May, but Krishna continued to publish Courier Diplomatique under the same name, thereby prompting Duggal's lawsuit. In response to Duggal's claims, Krishna contended that the November 1981 pilot issue was his sole venture, and that he was the owner of the trademark "Courier Diplomatique." The court ruled, however, that Krishna and Duggal already had agreed to publish the magazine together before the pilot issue appeared in November 1981 and that Duggal was at least a part owner, if not the sole owner, of an entity called Courier Diplomatique, Inc. Although the earliest writing between the parties was a two-page letter dated December 29, 1981, this letter agreement referred to an earlier understanding between Duggal and Krishna. Furthermore, Duggal and Krishna had conferred frequently in October and November 1981; Duggal had obtained, as agreed, a certificate of incorporation; and also had paid about $2500 toward the printing costs of the November 1981 pilot issue. The fact that Duggal's name did not appear on the masthead of the November issue was of minor significance. It was the joint efforts of Duggal and Krishna that turned Krishna's idea into a product in commerce, and made it capable of bearing a trademark, noted Judge Greene, who also determined that it was "highly probable" that the mark at issue would be found to belong to Courier Diplomatique, Inc.

Secondary meaning in the mark was established by the fact that advertisers had come to identify the magazine with its corporate source - not with its editor. The fact that Duggal had spent over $100,000 in advertising

Courier Diplomatique while Krishna invested only $18,000 was found relevant.

Testimony indicated that advertisers were confused by Krishna's continued publication of the magazine since only the corporate sponsor changed - the cover and format of the magazine remained basically the same. Indications of Krishna's wrongful intent also were considered by the court in reaching its finding that a likelihood of confusion existed.

The court therefore found it likely that Duggal would succeed on the merits of his claims, and that irreparable injury might occur if Krishna continued publishing the magazine known as Courier Diplomatique. The magazine's content and resources have declined since May 1982, noted the court, with the result that Duggal might come to be associated with an "arguably inferior" magazine. Hence, in addition to issuing a preliminary injunction barring Krishna from using the mark "Courier

Diplomatique," the court ordered the magazine returned to Duggal, with any income received to be placed in escrow pending the final adjudication of trademark ownership. Judge Greene concluded by pointing out that "if there is no magazine by the time the case is decided, or if its quality and good will have deteriorated, no remedy at law would provide adequate relief."

Duggal v. Krishna, 554 F.Supp. 1043 (D.D.C. 1983) [ELR 5:4:15]

New York courts uphold journalists' privilege not to disclose information; but Missouri court refuses to quash grand jury subpoena seeking outtakes from local CBS television station

A journalist's privilege not to disclose information acquired in the course of news gathering has been affirmed in three New York trial court opinions.

In one action, Wilkins v. Kalla, a cotton mill worker sued his former employer alleging that he contracted brown lung disease as a result of the negligence and malfeasance of the employer, West Point Pepperell. On February 4, 1979, the CBS program "60 Minutes" broadcast a news report entitied "Brown Lung." West Point Pepperell attempted to compel the production by CBS of outtakes, notes and other non-broadcast material relating to the segment, and also sought to take the deposition of the producer of "60 Minutes" and of Dan Rather.

A New York County judge ruled that the information sought was privileged under First Amendment standards, and that West Point Pepperell had not shown that the unpublished information from a nonparty journalist was crucial to the company's defense and was unavailable from other sources.

Even if discovery were justified under the First Amendment, the court stated that any subpoena issued to CBS would be quashed as contrary to the newsperson's privilege afforded by New York's Shield Law, Section 79-h of the New York Civil Rights Law. The statute provides that journalists may refuse to disclose "any news or the source of any such news" obtained in the course of their professional activities. The statute extends not only to confidential sources, but to all unpublished information; it is an absolute privilege for journalists against the disclosure of unpublished material. West Point Pepperell argued that the Shield law did not apply to the material requested by its subpoena because the material was not "news." But the "60 Minutes" report con cerned matters of public concern or public interest well within the "broad and pervasive protection" of the Shield Law, ruled the court.

Section 79-h also was applied by an upstate New York court in quashing a subpoena served on Richard Beach, an employee of General Broadcasting Corporation which operates Channel 6 WRGB. In Matter of Grand Jury Investigation, a local prosecutor contended that Beach had obtained information from an unnamed source regarding a sealed grand jury report. WRGB broadcast the information which included charges of a public official's misfeasance in office and a recommendation that he be removed from his position. It was argued that Beach was required to testify and name his source on the theory that if a public employee provided the information in the report, then Beach had witnessed a violation of the state's penal law. He therefore might be subject to prosecution himself.

The court observed that whether Beach had witnessed a crime was speculative, and hence he remained entitled to the absolute privilege of Section 79-h.

A Kings County court also has quashed subpoenas served on media nonparties, in this case - People v. Bova - on the New York Times and its reporter, Sheila Rule. The subpoenas, which sought material pertaining to Rule's interview with Dennis Dixon, a participant in a neighborhood altercation during which a young man was killed, were served by counsel for the individual who was indicted for the murder. The court found that the material had not been shown to be unavailable from other sources and was not highly relevant, necessary or critical either to preparing a justification defense or to providing a source of impeachment material, particularly since the story related to Dixon's reaction to the incident after several months had passed and did not focus on the incident itself.

The court noted that Section 79-h did not provide a basis for quashing the subpoenas. In order to raise a claim of privilege under the statute, the information must be imparted to a reporter under a "cloak of confidentiality," and the Dixon interview was not so encloaked. However, the First Amendment to the United States Constitution and Article 1, Section 8 of the New York State Constitution provided an independent basis for quashing the subpoenas, concluded the court.

In contrast to these New York decisions, a Missouri appellate court has refused to quash a grand jury subpoena requesting certain outtakes from a television broadcast. In July 1982, a St. Louis grand jury served a subpoena on CBS's KMOX-TV seeking all video and audio tapes of conversations between a KMOX reporter and certain individuals concerning the placement of video poker machines in local bars, restaurants and taverns. Portions of these tapes were broadcast on KMOX-

TV. CBS sought to quash the subpoena on the ground that forcing the station to provide unpublished non-broadcast tapes, called "outtakes," would constitute an interference with the station's ability to gather news and with its editorial process.

An appellate court issued a preliminary order in favor of CBS, but the court subsequently determined that the preliminary order was improvidently granted.

Missouri does not have a shield law, noted the court. And the various courts which have considered claims of reporter's privilege, have recognized the existence of a qualified privilege in a grand jury proceeding only in connection with a journalist's confidential sources or information. The secrecy of a grand jury proceeding eliminates the potential harmful effects of disclosure which accompany civil or criminal proceedings, stated the court.

The trial court's refusal to quash the subpoena therefore was not erroneous since CBS had not claimed that there were confidential sources or information involved in producing the tapes. The reporter had not promised the individuals that their conversations would be kept secret. And CBS did not establish that the grand jury was conducting its investigation of local gambling in bad faith or was engaging in impermissible harassment.

Wilkins v. Kalla, 459 N.Y.S.2d 985 (N.Y.Cnty. 1983); Matter of Grand Jury Investigation, 460 N.Y.S.2d 227 (Co.Ct. 1983); People v. Bova, 460 N.Y.S.2d 230 (Kings Co. Sup. 1983); CBS Inc. v. Campbell, 645 S.W.2d 30 (Mo.App. 1982) [ELR 5:4:16]

Briefly Noted:

Copyright.

A Federal Court of Appeals has upheld a trial court ruling (ELR 4:3:7) granting a directed verdict to Universal City Studios in an action brought by Ed Simmons and Morton Lachman alleging that the film "In God We Trust" infringed their copyright in the screenplay "Albert." A 1970 agreement granted exclusive ownership of all rights in the screenplay to a company known as CBM Productions. But Simmons and Lachman had argued that they regained the ownership of the copyright in the screenplay as a result of purported mutual rescission of the agreement. The court noted, however, that Simmons had not participated in certain negotiations concerning the alleged rescission, thereby precluding a finding of mutual rescission. Furthermore, there was no substantial evidence demonstrating a unilateral rescission based on material breach, particularly since Lachman did not restore or attempt to restore the consideration which he and Simmons had received.

Simmons v. Universal City Studios, Inc., Case Nos. 82-5514/5566 (9th Cir., May 31, 1983) [ELR 5:4:17]

Sports.

An injury sustained by a professional football player as a result of legitimate physical contact during scrimmage or actual play does not constitute an "accidential injury" as defined by the Workmen's Compensation Act of Maryland and therefore is not compensable, a Maryland Court of Appeals has ruled. The decisive issue in determining that an injury is "accidential" is whether the circumstances giving rise to the injury were unusual or unexpected occurrences in the course of the particular employment. The court noted that "whenever a person engages in an occupation requiring violent physical contact with others similarly inclined, he must expect that injury may arise therefrom." Although the court acknowledged that professional football players are within the scope of the Workmen's Compensation Act, it upheld the trial court's ruling that the injury in this case was not accidental.

Rowe v. Baltimore Colts, 454 A.2d 872 (Md.App. 1983) [ELR 5:4:17]

Alcoholic Beverage Regulation.

A decision by the California Alcoholic Beverage Control Appeals Board to revoke the liquor license of a night club found to discriminate against male customers has been upheld by a California appellate court. Los Angeles's Chippendale's night club presents male exotic dancing to an exclusively female audience. The club contends that men are denied entrance until after its shows are completed in order to foster uninhibited "vibrant and ative" interaction between the male performers and the female audience - an interaction claimed to be a form of communication protected by the First Amendment. The Department of Alcoholic Beverage Control has the authority to revoke a liquor license if it determines that continuance of a license would be contrary to the public welfare. The Unruh Civil Rights Act forbids business establishments from arbitrarily discriminating on the basis of sex, and was found to enunciate the appropriate public policy. The court stated that revocation of the club's license will not restrict protected speech but only the "privilege to sell alcoholic beverages while it is so engaged." Furthermore, the court held that the detrimental economic effects that may result from reduced female interest in the shows if men are permitted, are not determinative. The Department's decision requires Chippendale's to file a corporate declaration stating that it will refrain from future discrimination or be stripped of its liquor license.

Easebe Enterprises, Inc. v. Rice, 190 Cal.Rptr. 678 (Cal.App. 1983) [ELR 5:4:18]

Theater Property Tax Exemption.

The denial of a local property tax exemption to the Paper Mill Playhouse has been upheld by a New Jersey appellate court. The court found that the theater had not established, as required for the exemption, that its real property was "actually and exclusively used" for the "moral and mental improvement of men, women and children." The theater did promote interest in art, music and drama by its presentation of concerts, plays and dance performances. But the organization's primary activity was the presentation of "major productions" such as "Mouse Trap," "Jesus Christ Superstar," and "My Fair Lady," often starring nationally known performers. These productions and the manner in which they were selected, cast, designed, produced, merchandised and performed were virtually indistinguishable from the productions and activities of commercial theaters. The court noted that the Playhouse commands an audience of approximately 200,000 during its almost year-round operation, charges competitive ticket prices, conducts aggressive advertising, and selects productions on the basis of popular appeal rather than inherent cultural or educational value. The productions have generated a healthy profit for the theater. Further, the public does not participate in the theater's activities except in the role of spectators. In other words, this was not a case where the theater provided a substitute for community dramatic education. Thus, since the Paper Mill Playhouse conducts itself in "the nature of a commercial enterprise," the County Board of Taxation's denial of the theater's claim for exemption was correct, the court concluded.

Paper Mill Playhouse v. Millburn Township, 455 A.2d 1128 (N.J.App. 1982) [ELR 5:4:18]

Collegiate.

A Southern Illinois University football player's suit against the University's athletic program personnel and a football helmet manufacturer and seller, for injuries sustained as a result of an allegedly defective helmet, scored few points with a Federal District Court. The ballplayer's suit alleged negligence, breach of implied warranties, and strict liability in tort. The University personnel alleged that in accordance with a University indemnification policy, any judgment against them would be paid out of the state treasury and therefore the suit should be barred by the Eleventh Amendment. However, the court held that they were being sued in their individual capacities and that the indemnification policy was contingent upon the unavailability of judgment costs from any other source. It therefore refused to dismiss the suit on Eleventh Amendment grounds. The court did dismiss the warranty action against the University personnel stating that a claim for breach of implied warranties was inapplicable against nonmerchants. Similarly, the court held that they could' not be held strictly liable in tort "where they were not part of the original producing and marketing chain." The warranty actions against the helmet manufacturer and seller were dismissed for want of the requisite privity between them and the injured student who was held to be outside of the distribution chain. Although the court noted that under Illinois law, privity in suits for breach of implied warranties extends beyond the immediate buyer to include household members or guests, the court declined to include a football player within these statutory categories. The student's strict liability in tort claim was dismissed with leave to amend as to the manufac turer.

Hemphill v. Sayers, 552 F.Supp. 685 (S.D.Ill. 1982) [ELR 5:4:18]

IN THE NEWS

CBS Records obtains preliminary injunction barring retailer from importing Canadian-made copies of CBS albums including Michael Jackson's "Thriller"

CBS Records has obtained a preliminary injunction against a New York City record retailer named Jimmy's Music World which prohibits Jimmy's from importing Canadian-made copies of CBS albums. CBS filed suit against the retailer because of its alleged importation of Canadian-made copies of Michael Jackson's current best-seller, "Thriller."

The unauthorized importation of records acquired outside the United States is prohibited by the Copyright Act of 1976. Section 602 of the Act makes unauthorized importation an infringement of the copyright owner's exclusive right to distribute copies.

This case is reportedly the first in which CBS Records has sued a retailer, but it is not the first in which CBS has sought to enforce its right to prohibit unauthorized imports. Last year, CBS sued a New York record distributor named Important Record Distributors, Inc. The distributor thereafter agreed to a consent decree barring it from distributing imported albums by Blue Oyster Cult, Journey and Santana. (ELR 4:10:7) Several weeks ago, CBS Records also reportedly obtained a presuit agreement from a California record distributor named Audiosource Inc. in which the distributor promised not to import CBS product. According to CBS, Audiosource had been importing compact disk CBS albums from Japan. [Sept. 1983] [ELR 5:4:19]

New California law imposes sales tax on rental of home video cassettes

As of September 1st, California law imposes sales tax on the rental of home video cassettes. The rate is the same as that for other products, 6% or 6 1/2% of the rental fee depending on the county in which the transaction takes place. Prior to September 1st, California sales tax law exempted the rental of motion pictures. But that exemption was enacted with commercial transactions in mind, that is, distributor rentals of movies to motion picture theaters. The exemption did not anticipate the recent upsurge in home video movie rentals. As a result, California lawmakers concluded that the state had unnecessarily lost potential revenue, because under the pre-September 1st law, video rental stores paid a one-time only sales tax when they purchased cassettes, but did not collect sales tax when they rented those cassettes. Under the new law, video rental stores will not have to pay sales tax themselves when they buy cassettes, but they will have to collect the tax each time those cassettes are rented.

The new law was not intended to impose sales tax on distributor-movie theater rental transactions. Those transactions were to remain exempt. But apparently the wording of the new law is ambiguous, and cautious distributors and movie theater owners are concerned that California's Board of Equalization may attempt to collect sales tax on their rental transactions as well. As a result, the California legislature is considering an amendment to the new law making clear that distributor-movie theater rental transactions are to remain exempt. [Sept. 1983] [ELR 5:4:19]

New York State adopts laws to punish cable-TV pirates

As of September 1st, New York state law makes it a crime to intercept cable-TV service without paying for it. First time offenders who illegally intercept less than $100 worth of service may be sentenced to as much as 15 days in jail and may be fined $250. For second offenders, and first offenders who intercept more than $100 worth of service, the penalty escalates to as much as a year in jail and a $1,000 fine.

In addition, a provision has been added to New York law giving cable-TV operators the right to file civil suits against those who sell or use unauthorized signal decoders to enjoin them from continuing to do so and permitting cable operators to recover lost revenues from prior unauthorized uses.

It is estimated that in the state of New York alone, cable-TV operators have lost $30 million a year in revenues to cable pirates. On Long Island, which itself accounts for an estimated $ 1 0 million a year in lost revenues, cable operators have decided to offer "amnesty" until Labor Day to those who have been using unauthorized decoders. If they turn in their illegal decoders by then and order cable service, Long Island cable operators have said they will not seek prosecutions under the new law. [Sept. 1983] [ELR 5:4:19]

WASHINGTON MONITOR

FCC tentatively votes to repeal network financial interest rule and to modify syndication rule

The Federal Communications Commission tentatively voted last month to repeal its 13-year-old network financial interest rule and to significantly modify its syndication rule. The 3-to-1 vote came just more than a year after the FCC first proposed to eliminate those rules entirely (ELR 4:11:3). The FCC has asked for written comments on what has been referred to as a "compromise" between the desires of the three major networks, which want complete repeal of the rules, and the desires of the three major networks, which want complete repeal of the rules, and the desires of program producers and independent television stations, which want the rules retained intact. Such comments are due this month, and thus a final decision by the FCC is possible and expected sometime this fall. If the FCC does adopt the proposal it has tentatively voted to approve, the networks clearly will have benefited from the compromise, even though it is less than ABC, CBS and NBC hoped to achieve when the FCC began studying the rules' effects more than three years ago.

The financial interest rule which the FCC has tentatively voted to repeal was first adopted by the FCC in 1970 and has since barred the three major networks from acquiring financial interests in network programming produced by studios and independent television production companies. The networks have argued that the rule is no longer fair, assuming it ever was, because pay-TV networks which did not exist in 1970 now compete with ABC, CBS and NBC for desirable programming by offering license fees to producers based on the pay-TV company's ownership of a share of syndication income. Program producers, on the other hand, have argued that the rule is essential, because their profits depend on syndication income and because they feel they do not have enough bargaining power to resist network demands for significant shares of that syndication income.

The syndication rule, which the FCC also adopted in 1970, has barred the three major networks from acquiring television syndication rights to domestically produced programs. The FCC is no longer proposing to eliminate this rule entirely. But it has expressed its intention to cut back on the rule's prohibitions significantly. The revised syndication rule would continue to prohibit the networks from syndicating network prime-time entertainment series, but would permit the networks to syndicate made-for-TV and theatrical movies as well as other-than-primetime network programs. Furthermore, the networks would be permitted to syndicate non-network, firstrun television programs. And the FCC's current proposal contains its own "sunset" provision which specifies that all remaining restrictions would automatically expire in August of 1990, unless the FCC should then determine that the " public interest" requires their retention.

Earlier this year, the debate over repeal of the financial interest and syndication rules focused on the positive effect those rules are said to have had on the growth of independent stations. According to producers and independent stations, the rules have prevented the networks from blocking the syndication of old episodes of popular, long-running network series such as "M.A.S.H." As a result, the argument went, independent stations have been able to show reruns of popular series even while new episodes are being carried by the networks, and this has boosted independent station ratings and profits. It is argued that if the networks are permitted to own financial interests in series, or are permitted to get back into the business of syndicating their own series, the networks will "stockpile" old episodes of current series in order to avoid competition from independent stations. Or the networks will favor their affiliates over independents in the sale of network-controlled reruns.

The networks have argued that it would be impossible and economically foolish for them to do this. But in order to be certain they do not, the FCC's current proposal would require the networks to sell any syndication rights they might own in prime-time entertainment series to independent syndicators within six months after a series has ended its network run, or at the end of a series' fifth year of network run, whichever is earlier.

Producers and independent stations are not at all satisfied with this "compromise," calling it a "repeal in sheep's clothing." And they have pledged to carry on the legal battle to retain the rules in their present form. At this time, the FCC's final vote is not a foregone conclusion. FCC Chairman Mark Fowler and Commissioner Mimi Dawson are virtually certain to vote for the compromise, just as they cast tentative votes for it last month. Commissioner James Quello, who voted against the compromise last month, may do so again, unless he becomes convinced that the compromise will protect the profitability of independent stations. This then makes Commissioner Henry Rivera the possible "swing" vote. Last month he cast a tentative vote for the compromise but dissented from its "sunset" provision. If he should decide to cast his final vote against the compromise - because it contains a sunset provision, or for any other reason - the 2-to-2 vote would be insufficient to change the current rules. (The FCC was reduced from seven members to five last July 1st by an act of Congress; and there is currently one vacancy to be filled.)

Those who favor retention of the rules also have taken the matter to Congress where Representative Henry Waxman and Senator Pete Wilson, both of California, have introduced bills which would bar the FCC from taking any action to change the rules for at least five years. Congressman Waxman's bill looked as though it would be reported out of committee early in August - just before the FCC announced its proposed compromise. But opposition to the bill prevented its being voted on before Congress adjourned for its summer recess. Now that the FCC has tentatively indicated its intentions, it is likely both bills will receive renewed Congressional attention soon.

Even if the FCC should adopt the compromise, and Congress does nothing to reinstate the status quo legislatively, the networks will have one more hurdle to clear before they may acquire financial interests or syndication rights. The networks will have to win repeal or modification of consent decrees they signed a few years ago in response to antitrust lawsuits filed against them by the Justice Department (ELR 2:11:1). Those consent decrees impose restrictions on the networks that are similar to, and in some ways more severe than, the FCC's rules. If the FCC does adopt the compromise, however, it is likely the Justice Department will seek repeal or modification of those decrees, because the FCC compromise is very similar to one suggested by the Justice Department in comments it filed with the FCC earlier this year. [Sept. 1983] [ELR 5:4:20]

Justice Department approves Showtime/Movie Channel merger, but only after MCA and Paramount withdraw as proposed partners

After twice refusing to approve a proposed merger between Showtime and The Movie Channel, the Justice Department finally gave the merger its blessings last month - but only after the terms of the merger were radically altered from the initial deal. In order to win Justice

Department approval, MCA and Paramount had to withdraw as partners, thus leaving only one movie studio, Warner Brothers, in the venture, along with American Express and Viacom International.

The plan to merge Showtime and The Movie Channel was announced early this year. Showtime is owned by Viacom and is the nation's second largest pay-TV service. The Movie Channel is jointly owned by Warner Communications and American Express. Until recently, The Movie Channel was the nation's third largest pay-TV service but it has slipped to fourth behind Time Inc.'s Cinemax. As originally announced, Paramount and MCA were to become partners in the joint venture when Showtime and The Movie Channel merged. In June, however, the Antitrust Division of the Justice Department announced that it would file suit to block the proposed joint venture, and as a result, the merger was put on hold. (ELR 5:2:3)

Although the Justice Department objected to the merger as then structured, the Department left open the possibility that the merger could be restructured in a fashion that would win approval. In July, representatives of Warners, MCA, Paramount, Viacom and American Express met in Washington with Assistant Attorney General William Baxter, the head of the Justice Department's Antitrust Division, and presented a proposal they hoped would result in approval for the merger. The proposal reportedly contained three elements. First, they offered to agree in writing that Warners, Paramount and MCA would not license their own movies to the Showtime/Movie Channel joint venture on an exclusive basis. In other words, the three studios offered to promise to license their movies to other pay-TV services as well, presumably including Time Inc.'s HBO and Cinemax and other smaller pay-TV companies. Second, Warners, Paramount and MCA reportedly offered to agree to license their movies to other pay-TV services at the same rates they charged Showtime/Movie Channel. And third, they reportedly offered to agree that Showtime/Movie Channel would license pay-TV rights from other movie studios as well as from the three studios that were to have been its owners.

Late in July, the Justice Department issued a brief statement saying that despite the proposed partners' new offers, the Department "remains committed to filing a civil antitrust suit" if the merger were to proceed. Antitrust Division head William Baxter later explained that he opposed the merger because of the "participation of three major studios which collectively account for a significant portion of the movies licensed by the major pay-TV services." Mr. Baxter's concern was that by going into partnership with one another, the three studios could increase the prices they charge to pay-TV services and could make it more difficult for new pay-TV services to get started.

When the Justice Department refused to approve the merger a second time, it looked as though the merger was entirely dead. Shortly thereafter, however, Showtime and The Movie Channel considered merging without bringing in Paramount and MCA as new partners. As noted in these pages in July (ELR 5:2:5), a proposal to merge Showtime and The Movie Channel under their present ownership -Viacom, Warners and American Express - might have been approved by the Justice Department. In August, Showtime and The Movie Channel revised their plan of merger for a second time proposing to do just that: merge under their present ownership. And on Friday, August 12th, the Justice Department finally indicated that it would not object to such a merger. According to Mr. Baxter, the anticompetitive possibilities that concerned his Department when three studios were to be partners in the joint venture are not raised when only one studio is to be involved.

Although Mr. Baxter acknowledged that a merger of Showtime and The Movie Channel would increase concentration in the pay-TV service business, he concluded that market conditions and the absence of significant numbers of exclusive licensing arrangements with studios would enable other companies to start new pay-TV services if existing services took advantage of such concentration to engage in anticompetitive practices. [Sept. 1983] [ELR 5:4:21]

DEPARTMENTS

Book Note:

"Media Insurance: Protecting Against High Judgments, Punitive Damages, and Defense Costs" edited by John C. Lankenau

For several years now, the Practising Law Institute has been conducting annual communications law programs, portions of which have been devoted to recent developments in libel law. In addition, PLI has staged a few programs devoted exclusively to libel law. And in most of these programs, some but not a great deal of consideration has been given to insurance questions.

Last July, however, PLI sponsored a two-day seminar on media insurance in particular. And the course handbook prepared by program chairman John C. Lankenau is now available for purchase. Libel, privacy and related varieties of litigation have become so common that insuring against the costs and losses of such claims is now a virtual must for most publishers and broadcasters.

Obtaining and using media insurance is a more sophisticated proposition than obtaining and using auto or fire insurance. And for this reason, PLI's Media Insurance handbook is an especially practical volume. Though the handbook was prepared primarily for those who attended the program, its contents are sufficiently complete in themselves to be easily understood and used by those who did not attend.

An introductory chapter by James Goodale surveys recent media verdicts, their disposition on appeal, and the defense cost incurred - and in doing so makes clear the ever increasing need for insurance. Because actual damages are frequently difficult to prove or measure in libel and privacy cases, punitive and presumed damages receive more attention in such cases than in most other kinds. And a chapter by Jerome Dougherty reviews the law on these kinds of damages. The handbook then contains chapters by John Lankenau and John Bender concerning an issue of intense concern to those who are sued in media cases: public policy limitations on the insurability of punitive damages.

Harry Johnston contributes on in-house procedures that can be taken to reduce exposure to uninsured damage awards, and John J. Walsh offers counsel on trial tactics that may be used in defending against punitive damage claims. Raphael Cotkin and Robert E. Smith review rules of construction applicable to insurance policies. Richard Fagerberg covers libel policy deductibles and limits. And Larry Worrall offers advice on negotiating libel policies.

Risks that usually are not covered in basic libel insurance policies are outlined in chapters by Barbara Schlain and Henry Marcelle, along with advice on what sort of insurance is available to cover such risks. The issue of publishers providing insurance coverage for their authors is discussed in chapters by Irwin Karp and

Edward A. Miller. And last, but not least, Truman Eustis III and Ronald Guttman cover the role of in-house counsel in maintaining insurance coverage.

Media Insurance is course handbook Number 162 in the PLI series and is available directly from PLI, 810 Seventh Avenue, New York, New York 10019; phone (212) 765-5700. The cost is $35. [ELR 5:4:22]

In the Law Reviews:

Loyola Law School of Los Angeles has published Volume 2 of the Loyola Entertainment Law Journal. It is available for $10.00 per copy from Loyola of Los Angeles Entertainment Law Journal, 1441 West Olympic Blvd., Los Angeles, CA 90015. Volume 2 contains the following articles:

Evolution to Extinction? The Professional Corporation after T.E.F.R.A. by Steven R. Hirschtick and Sally A. Estes, 2 Loyola Entertainment Law Journal 1 (I982)

Some Lesser Known Provisions of the W.G.A. 1981 Theatricat and Television Minimum Basic Agreement by Naomi Gurian, 2 Loyola Entertainment Law Journal 19 (1982)

Practical Advice Concerning the Business and Legal Aspects of Video Taping Live Musical Performances by Richard E. Posell, 2 Loyola Entertainment Law Journal 35 (1982)

A Legal and Statistical Analysis of the National Football League Player Draft: Chicago, New York, Detroit, It's All the Same Pick by Ethan Lock and J. Michael Gratz, 2 Loyola Entertainment Law Journal 47 (1982)

Violence in Professional Sports: Is It Time for Criminal Penalties? by Richard B. Perelman, 2 Loyola Entertainment Law Journal 75 (1982)

The Service Mark Alternative to the Right of Publicity: Estate of Presley v. Russen by Herbert D. Wamsley and Patrick J. Heneghan, 2 Loyola Entertainment Law Journal 113 (1982)

Personal Managers and the California Talent Agencies Act: For Whom the Bill Toils by Adam B. Nimoy, 2 Loyola Entertainment Law Journal 145 (1982)

"At-Risk" Revisited: A Re-Examination of the Impact of the Tax Reform Act of 1976 on the Motion Picture Industry by W. Dennis Allred, 2 Loyola Entertainment Law Journal 165 (1982)

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Art in the Supreme Court Building by Gail Galloway, 30 Federal Bar News & Joumal 37 (1983)

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Appropriation of Personality: A New Tort? 99 The Law Quarterly Review 281 (1983) (published by Sweet and Maxwell Ltd., 11 New Fetter Lane, London EC4P 4EE England)

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Chilly Days for the Press by John A. Jenkins, 11/8 Student Lawyer 22 (1983)

Creditors' Rights Issues in Copyright Law: Conflict and Resolution by Charles Shafer, 11 University of Baltimore Law Review 406 (1982)

The Death of a Princess Cases: Television Programming by State- Owned Public Broadcasters and Viewers' First Amendment Rights by Jonathan Goodman, 36 University of Miami Law Review 779 (1982)

Betamax Before the Ninth Circuit: A Definition of Fair Use for the Technology Age? by Lowell C. Brown, 1982 Utah Law Review 615 (1982)

CBS, Inc. v. Federal Communications Commission: Recognition of Federal Candidates' Right of Access to Broadcasting Facilities by David L. Deisley, 1982 Utah Law Review 641 (1982)

The Demise of Civil Nuisance Actions in Obscenity Control by Rosalee C. Gorman, 14 Loyola University of Chicago Law Joumal 31 (1982)

Contributory Infringement Liability in Universal City Studios, Inc. v. Sony Corp.: "The One and Only" Pays for Our Sins, 14 Loyola University of Chicago Law Journal 79 (1982)

The Rising Tide of Libel Litigation: Implications of the Gertz Negligence Rule by Barry F. Smith, 44 Montana Law Review 71 (1983)

The New Anti-Female Violent Pornography: Is Moral Condemnation the Only Justifiable Response? by Mona A. Vivar, 7 Law and Psychology Review 53 (1982)

Sailor Music: Exposing the Gaps in 17 U.S.C. 110(5) by Robert J. Cash, 9 Rutgers Computer & Technology Law Journal 133 (1982)
[ELR 5:4:23]