BUSINESS AFFAIRS

"Miracle on Spring Street" - Or How a Seven-Year-Old Nonprofit Foundation Known as the Los Angeles Actors' Theatre Raised More Than $12 Million in a Recession Year to Build a Performing Arts Complex on a Seedy Street in Downtown L.A.

by Lionel S. Sobel

If all goes as now planned, the Los Angeles Actors' Theatre will open its next season on March 1st of 1985 in a brand new, 75,000 square foot, multi-million dollar complex located at 5th and Spring Streets in downtown Los Angeles. Those who are not familiar with the Los Angeles Actors' Theatre or with the city of Los Angeles may not appreciate the significance of this information.

But those who know either are likely to be impressed and perhaps a little surprised.

The Los Angeles Actors' Theatre was founded by Ralph Waite only eight years ago as a California non-profit corporation exempt from taxation under section 501(c)(3) of the Internal Revenue Code. During its first three seasons of operation, LAAT was not only "non-profit," it was virtually non-revenue producing. In the belief that theater should be available to everyone, admission to LAAT productions was literally free. At the end of each performance, a hat was passed through the audience for donations. Until 1978, LAAT's operating expenses were largely covered by grants and by its founding artists. From its first season to its current season, LAAT's principal productions have been presented in a 174-seat theater on Oxford Avenue in Hollywood. For the past four years, it also has used a 99-seat theater at Los Angeles City College for a free playwright's summer workshop festival. And last year, it opened a second, 40-seat theater at its Oxford Avenue location.

Over the last eight years, LAAT has staged more than 85 productions and has won critical acclaim from the Los Angeles Drama Critics Circle and other organizations. From 1978, when LAAT began charging for admission, until last year, its annual attendance has grown from 22,500 to almost 28,000 and its earned revenues have increased from less than $49,000 to more than $136,500. Still in all, LAAT's transition from the operator of three small theaters to the operator of a major theater complex will be dramatic, with at least part of the drama stemming from the location of the new complex.

Spring Street Redevelopment

In its heyday, the intersection of 5th and Spring Streets was the heart of Los Angeles' financial district. The Pacific Coast Stock Exchange, major brokerage firms, big banks and L.A.'s established law firms all had offices close by. Those days were long ago, however. The financial district has moved farther west, closer to the Harbor Freeway, and Spring Street has been abandoned by all who are likely to be interested in purchasing theater tickets at any price. Indeed, by 1975, buildings along the Spring Street corridor between 2nd and 9th Streets were 60% vacant. Occupancy levels have increased somewhat since then - there was a 41% vacancy factor as of a year ago - apparently as the result of a redevelopment plan adopted by the Los Angeles City Council and renovations done pursuant to it. LAAT's Performing Arts Complex appears to be the central feature of that redevelopment plan, a plan that contemplates the construction of a State Office Building, senior citizen rental housing and a condominium project, and renovations and expansions of existing buildings including the Design Center furnishings mart located in the former Title Insurance Building at 4th and Spring.

The LAAT Performing Arts Center will house three permanent theaters, a flexible developmental performance space, a three-floor art gallery and lobby, an outdoor streetside cafe, two inside restaurants, two bars, an arts bookstore, offices and rehearsal and workshop space. Two-thirds of the 75,000 square foot complex will be new construction. The balance will be an extensive rehabilitation of the former Security Bank Building. The Bank Building was sold by Security several years ago, and until recently had been used as a wholesale stereo store and warehouse. It has since been certified as an historic structure by the California Office of Historic Preservation and by the United States Department of the Interior. This certification was critical to the financial package that will enable LAAT to build the Performing Arts Center. The package has been described by Los Angeles Times Drama Critic Dan Sullivan as "not so much a deal as a small financial system" having "the complexity of a Bach double fugue." Sullivan's assessment is not an overstatement. To unravel the packages complexities, and to appreciate their own artistic and dramatic qualities, it is necessary to start at the beginning and to proceed step by step.

Four Sources of Financing

Financing for the LAAT Performing Arts Center was raised from four sources. While all four were absolutely essential to the project, the Community Redevelopment Agency of the City of Los Angeles deserves credit as the first among equals. The Community Redevelopment Agency is a public corporation formed in 1948 by the

Los Angeles City Council. It is responsible for the elimination of slums and blight, revitalization of older neighborhoods, and the encouragement of economic development. In order to do these things, it has the power to acquire and dispose of property within redevelopment areas, to facilitate the development of commercial and industrial property, and to issue notes and bonds to finance redevelopment projects. The Agency also receives funds from federal and local sources.

In the case of the Performing Arts Center, the Community Redevelopment Agency got the ball rolling by purchasing the Security Bank Building and an adjacent parking lot for $1.46 million. It also paid the prior owners an additional $400,000 for relocation and business interruption expenses. The Agency then sold the Bank Building to the Los Angeles Actors' Theatre for one dollar, and it leased the land to LAAT for 55 years at a rental of one dollar per year. In other words, for all practical purposes, LAAT acquired - virtually for free - real estate that had just cost the Community Redevelopment Agency almost $1.9 million to acquire.

Private Investment

LAAT then formed a limited partnership called the Los Angeles Actors' Theatre Performing Arts Center, Ltd. LAAT itself is the general partner, and it conveyed its interests in the bank building and the land lease to the limited partnership. The initial limited partner was Alan J. Block, president of LAAT's board of trustees and an investment counselor by profession. Mr. Block and LAAT Producing Director Bill Bushnell conceived and implemented the financial package. Once the limited partnership was formed, 17 limited partnership interests were sold for $80,000 each, payable in three separate installments: $10,000 in 1983, $45,000 in 1984, and

$25,000 in 1985. A total of $1.36 million was thereby raised.

A second set of private investors also contributed funds for the project. In effect, they lent the limited partnership some $4.825 million for 24 years at 12 3/4% interest. This portion of the financial package was actually the most complex, because technically it was not structured as a straightforward loan. Instead, this set of investors actually purchased something called "Certificates of Participation" giving the investors the right to receive installment payments from the Community Redevelopment Agency that the Agency otherwise would have made to the limited partnership. The Agency is obligated to make such payments because it has purchased the Performing Arts Center from the limited partnership for $4.825 million. The Agency itself of course has no use for the Center, so it has sold the Center back to the limited partnership for $4.825 million. The transaction is similar to a sale-and-lease-back, but in this case it is more properly described as a sale-and-sale-back. As a result of the transaction, the limited partnership is required to make installment payments to the Agency as a result of the buy-back. The Agency is required to make identical installment payments on its purchase; but instead of making those payments to the limited partnership, the Agency will make them to the holders of the Certificates of Participation. The net effect of the transaction is that the limited partnership will repay the $4.825 million loan received from the second set of private investors. But instead of repaying the loan directly to the investors, the limited partnership's payments will be channeled through the Community Redevelopment Agency. The advantages of doing it this way are found - as you may have suspected -in obscure provisions of the Internal Revenue Code. Those advantages will be explained below, but before they are, it will be helpful to outline those elements of the financial package that were provided by public sources.

Public Investment

Some of the money came, indirectly, from the federal government. The Department of Housing and Urban Development made a $2.4 million Urban Development Action Grant to the Los Angeles Community Development Agency. The Agency then lent that money to the limited partnership on extremely favorable terms. Unless attendance reaches 90% of the Center's seating capacity for a year, no interest is due until the Performing Arts Center has been occupied for 10 years, and thereafter interest is payable at the rate of only 3% per year; principal is not due untit the year 2006. Success will have its price however, because if attendance does reach 90% of seating capacity in any year, interest will be at the rate of 5%

for that year, and a $100,000 principal repayment will have to be made.

In addition to giving LAAT the Security Bank Building and land that had cost the Community Redevelopment Agency $1.86 million, and in addition to lending the limited partnership the $2.4 million the Agency had been granted by the Department of Housing and Urban Development, the Agency did two more things to aid the financing of the Performing Arts Center. The Agency tent LAAT $150,000 of the Agency's own money, interest-free, for "start-up" funds. LAAT is to repay this loan in 1985 from its income after LAAT's other expenses are paid. The agency also agreed to put an additional $1.5 million of its own money in a Reserve Fund, the interest on which will help finance the construction of the Performing Arts Center, and the principal of which will indirectly serve as security for the payments due on the Certificates of Participation.

The limited partnership will not itself produce plays. Its sole purpose is the development and ownership of the Performing Arts Center. LAAT - the nonprofit corporation that is the general partner of the limited partnership - is the entity that actually will produce plays in the Performing Arts Center. As a result, the final link in the financing chain is a lease agreement between the limited partnership and LAAT giving LAAT the right to use the Center. In exchange, LAAT is required to pay rent to the limited partnership. The amount of rent LAAT must pay is equal to the amount the limited partnership must repay on the Certificates of Participation and on the HUD-grant loan. In addition, LAAT is required to pay the property taxes on the Center, plus 6% of LAAT's earned income (before expenses) in excess of $4.6 million per year.

Risks and Rewards

The participants in this intricate package have incurred certain risks and enjoy the possibility of reaping potential rewards. In a single stroke, the Performing Arts Center will catapult the Los Angeles Actors' Theatre from the minor-league ranks of many small L.A.-area theaters to the major-league ranks of the Music Center, the Schubert, and the Huntington Hartford. The risk for LAAT is that it will be unable to earn or raise enough money to meet its obligations and thus be forced out of business. That of course is a risk it faces now. Furthermore, in its present facilities, LAAT never would have had an opportunity to become a significant player in the Los Angeles theater market. Its present facilities are simply too small and uninviting.

The Performing Arts Center will revitalize the Spring Steet corridor as few if any, other projects could, and thereby will enable the Community Redevelopment Agency and the Department of Housing and Urban

Development to fulfill their charters in an unusually visible and dramatic fashion. The risks for these agencies are virtually nil. Neither is obligated beyond the funds already committed to the Center. And while those funds might have been used for other projects, there is no reason to suppose that any other recipient would have made better use of the money than LAAT.

The two groups of private investors have the most to lose - namely, their investments - but they also have a lot to gain. The risks incurred by the private investors stem for the most part from the possibility that LAAT will be unable to meet its obligations. LAAT commissioned a feasibility analysis by the Harrison Price Company and had Laventhol & Horwath make financial forecasts. Based on information, assumptions and estimates supplied by LAAT, it appears that LAAT will be able to meet its obligations. But as the reports of both companies point out, " some assumptions may not materialize and unanticipated events and circumstances may occur" and "therefore the actual results achieved may vary from" the forecasts.

Imponderables

One of the major imponderables is LAAT's ability to fill theater seats. Until now, LAAT has had no more than 313 seats to fill at any one time. By contrast, the Performing Arts Center will have 1242 seats - almost four times as many as LAAT has been operating. In 1982, LAAT's total revenues (from ticket sales, contributions and grants) was $533,000. But in 1985, it will have to exceed $4.8 million. That is a tremendous leap in a town like Los Angeles where competition for the entertainment dollar is keen. In the L.A. theater market alone, the Performing Arts Center will face competition not only from existing theaters, but also from a planned expansion of the Music Center that may add another three to five theaters to that complex; from a proposed Variety Arts Theatre at Plaza Figueroa; from a planned renovation of the Embassy Auditorium; from a planned renovation of the Philharmonic Auditorium; from new theaters in Hollywood planned by the Nederlander Company; and from a proposed Dance Gallery theater in the Bunker Hill area of downtown. On the other hand, Los Angeles is far from saturated with legitimate theaters, at least by New York standards. And many people believe that adding legitimate theaters to Los Angeles will have a synergistic rather than competitive effect for some time to come.

Tax Advantages for Certificates

Against the possibility they may lose their money, the private investors will reap immediate tax advantages. It appears that the reason that Certificates of Participation and the sale-and-sale-back arrangement were used, rather than straightforward loans, was to make the interest paid to the Certificate holders taxfree. Section 103(a) of the Internal Revenue Code provides that interest paid on obligations of states or political subdivisions is exempt from federal income tax. The obligation of the Community Redevelopment Agency to make payments on the Certificates is expressly limited to funds it receives from the limited partnership in connection with the buy-back arrangement. Nevertheless, it appears that interest actually paid by the Agency will be exempt. In effect, the Certificates are equivalent to industrial development bonds that have been used by cities for years to raise money, by offering tax-free interest, for industrial development.

Some time ago, Congress determined that cities were abusing their ability to issue such bonds, and thus the

Internal Revenue Code was amended to take away the tax-free nature of interest on industrial development bonds, as a general rule. Certain exceptions to the general rule were left however. The Certificates issued to raise money for LAAT's Performing Arts Center were tailored to fit one of the exceptions. Interest paid on "small-issue" industrial development bonds continues to be tax-exempt. Small-issue bonds are those used to raise money to build facilities costing less than $10 million (not including Urban Development Action Grant funds). The Performing Arts Center Certificates thus qualify as "small-issue" industrial development bonds, and as such, the interest payable on them is exempt from tax. The Certificates do qualify, however, only because they were issued prior to January 1, 1983. By virtue of a recent amendment to the Internal Revenue Code, interest paid on industrial development bonds issued after 1982 for the purpose of raising money for entertainment facilities no longer qualifies for taxexemption. The Performing Arts Center obviously is an entertainment facility, and thus the entire financial package for the Center's development had to be put together and funded by last December 31st. It was, but just barely, adding yet another note of high drama to the entire project.

Tax Benefits for Limited Partners

The limited partners will enjoy all of the tax benefits associated with real estate partnerships, such as the ability to take deductions for such things as interest and real estate taxes paid by the partnership, and depreciation. In addition, this limited partnership will enjoy one further and somewhat unusual tax benefit - an investment tax credit for rehabilitating certified historic structures. The credit allowed is equal to 25% of the cost of rehabilitating certified historic structures. In this case, the partnership expects to spend more than $2.2 million rehabilitating the Security Bank Building. As a result, the total credit will exceed $550,000. The credit amounts to $32,000 for each $80,000 limited partnership interest. Even if the partnership realizes earnings as projected, cash distributions are not expected to begin until 1986 and are expected to be modest. If all goes as projected, cash distributions to the limited partners will amount to only $30,000 between 1986 and 1994, though tax savings for partners in the 50% tax bracket may net them a positive return on their investment nevertheless. The real bonanza for the limited partners, if there is to be one, will come if and when the partnership sells the Performing Arts Center. Assuming the Center is sold in 1994, and assuming it appreciates at the rate of 5 1/2% per year, Laventhal & Horwath have projected that the after-tax proceeds from such a sale could amount to as much as $324,000 per partnership interest. If so, and if other projections are met as well, the partners will enjoy an after-tax rate of return of more then 39% per year on their investments. Not bad for an investment that brings with it the added, if strictly psychological, benefit of knowing that ones money served culture and the arts as well as commerce.

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[ELR 5:5:3]

RECENT CASES

Bee Gees' motion for judgment notwithstanding the verdict is granted in action alleging that "How Deep Is Your Love" infringed previously copyrighted

musical composition; trial court finds that despite the substantial similarity of the pieces, evidence did not establish access by the Bee Gees to the allegedly infringed composition

Federal District Court Judge George N. Leighton has granted the Bee Gees' motion for judgment notwithstanding the verdict in a copyright infringement action brought against the musical group by Ronald H. Selle. The jury in the case had found that the song "How Deep Is Your Love," composed by Barry Gibb, infringed Selle's copyrighted song, "Let It End." Judge Leighton, however, stated that it remained an "undisputed fact" that the Bee Gees never had access to Selle's work. The striking or substantial similarity of the two musical compositions, without proof of access, was ruled insufficient to establish copying by the Bee Gees.

The court reviewed the creative development of the two musical compositions, noting that Selle, an antiques dealer and part-time musician, was inspired by a melody one morning in the fall of 1975. He then composed lyrics for the song, and obtained a copyright in November 1975 for "Let It End." Subsequently, 11 copies of tapes of the song and the lead sheet of the music were sent to II music recording and publishing companies. Eight of the companies returned Selle's material; three did not. Judge Leighton pointed out that "Let It End" never was reproduced by any music company and never was recorded by any recording company or artist. And the lead sheet to the song never was published or sold. Selle's song was publicly performed only two or three times by his own band at Chicago-area engagements.

Brothers Maurice, Robin and Barry Gibb, who comprise the Bee Gees, an internationally-known musical group, have composed more than 160 songs although they do not read or write music. Generally' after the Bee Gees put a song on tape, a member of their staff prepares the necessary written scoring. "How Deep Is Your Love" was created in this manner, according to Barry Gibb and musician Blue Weaver, during a 1977 writing session in the Chateau d'Herouville in France. Prior access to Selle's work was denied by the Bee Gees, by Polygram Distribution, Inc., the distributor of the cassette tape of "How Deep Is Your Love," and by Paramount Pictures Corporation, the distributor of the film "Saturday Night Fever." On March 7, 1977, a lead sheet of "How Deep Is Your Love" was filed for issuance of a United States copyright.

In order to establish his claim of copyright infringement, Selle relied on the testimony of Professor Arrand Parsons of Northwestern University. According to Parson, the first eight bars of "Let It End" (containing 34 notes) and of "How Deep Is Your Love" (containing 40 notes) have 24 notes that are identical in pitch and symmetrical positions. Out of 35 rhythmic impulses in Selle's work and 40 in the Bee Gees' piece, 30 are identical. In the last four bars of both songs, 14 notes in each work are identical in pitch; and of the 14 rhythmic impulses in the last four bars of both songs, 11 are identical. Furthermore, both the first eight bars and the last four bars occur in the same position in each composition. In Parsons' opinion, the two songs were "strikingly similar."

Selle argued that the "overwhelming" similarity of the works - which even prompted Maurice Gibb to identify a tape of the first two phrases of Selle's song as "How Deep Is Your Love" established inferred access to his work so as to warrant the court's support of the jury verdict in his favor.

The Bee Gees discounted Dr. Parsons' testimony stating that in their view, he was not a qualified expert;

hence, rebuttal testimony by an expert witness would not have been appropriate and was not presented. The group reiterated that Selle had failed to prove that they had the opportunity either to have seen the score of Selle's song, or to have heard it played.

Access is "the opportunity that an alleged infringer has to see or hear the copyrighted work," stated Judge Leighton, and access "may not be inferred through mere speculation or conjecture ... The possibility that one of the three companies which did not return [Selle's] musical materials furnished [the Bee Gees] with the opportunity to hear [Selle's] song, or see a score sheet of the music, is pure conjecture." Therefore, concluded Judge Leighton, access could not be logically or permissibly deduced from proof of striking similarity.

Since jury verdict was against the "manifest weight" of the evidence, Judge Leighton granted the Bee Gees' motion for judgment notwithstanding the verdict and, in the alternative, for a new trial.

Selle v. Gibb, Case No. 78 C 3656 (N.D.Ill., July 8, 1983) [ELR 5:5:8]

New York Court of Appeals refuses to enjoin photographer's use of Brooke Shields' photographs; court rules that Shields was not entitied to disaffirm unrestricted consent signed by her mother; in separate action, Federal District Court refuses to issue injunctive relief pending a hearing on Shields' claim that photographer violated her federal constitutional right of privacy

Brooke Shields may not yet have reached the pinnacle of her career, but her action against photographer Gary Gross has been heard by the highest court in New York.

The action concerned photographs taken by Gross in 1975 when Shields was 10 years old. In one of the photographs, Shields posed nude in a bathtub. In 1980, when several of the photographs appeared in a French magazine called "Photo," Shields, stating that the photos embarrassed her because "they are not me now," brought an action against Gross under sections 50 and 51 of New York's Civil Rights Law. Shields sought compensatory and punitive damages and an injunction permanently enjoining Gross from further use of the photographs.

The trial court noted that consents executed by Shields' mother when the photographs were taken were unrestricted as to time and use; and thus the court dismissed Shields' complaint. Nevertheless, the court did enjoin

Gross from using the photographs in "pornographic magazines or publications whose appeal is of a predominantly prurient nature." (ELR 3:21:4)

An appellate court modified the trial court ruling by permanently enjoining Gross from using the pictures for purposes of advertising or trade. The appellate court decision was based on Shields' common law right to disaffirm the 1975 consents. (ELR 4:17:7)

Judge Simons of the New York Court of Appeals now has held that Teri Shields' consent was binding on Brooke and could not be disaffirmed. While at common law, an infant may disaffirm a contract, the New York Legislature, by adopting section 51 of the Civil Rights Law, abrogated this right by providing within the statute the method for obtaining an infant's consent, stated the court. Since Teri Shields' consents complied with the statutory requirements, they were valid and could not be disaffirmed. Furthermore, the consents were not voided by the parties' failure to comply with the statutory requirement of obtaining prior court approval of an infant's contract. The applicable statute covers only performing artists, such as actors, musicians, dancers and professional athletes. The procedure for obtaining prior court approval would be "impractical" for a child model who may work sporadically, for many different photographers and for relatively modest fees. Judge Simons therefore modified the appellate court's order by striking the injunction against the use of the photographs for purposes of advertising and trade.

Judge Jasen, in dissent, said he would have reaffirmed the state's compelling interest in affording "extraordinary protection to minors." Judge Jasen characterized the majority opinion as ruling that once a parent consents to the invasion of the privacy of a child, the child is forever bound by that consent and may never redress the continued invasion of his or her privacy. This position, in

Judge Jasen's view, flouts the state's long-standing rule that a minor enjoys an almost absolute right to disaffirm a contract entered into by the minor or by the minor's parent on his or her behalf. Allowing the right of disaffirmance has been a means to resolve the inequity of a contract entered into by an infant who may not understand the scope of his or her rights, or who may be under the complete influence of an adult who is not acting to protect the minor's rights. The Shields claim did not involve the undoing of a written consent so as to affect prior benefits derived by a person relying on the validity of the consent, noted Judge Jasen, but rather the use of a vintage photograph which allegedly would cause future humiliation, embarrassment and distress to Brooke Shields.

Judge Jasen also observed that there was no indication that the Legislature, by requiring consent from a minor's parents in section 50, intended to abrogate the minor's right to disaffirm the consent, particularly given the state's strong policy concern with protecting the interests of children. Other statutory provisions which in certain circumstances do abolish a minor's right to disaffirm a contract, contain specific language directly referring to the infant's common law rights. There is no such reference in the Civil Rights Law and "no reason why [Shields] must continue to bear the burden imposed by her mother's bad judgment," concluded Judge Jasen.

In a separate federal court proceeding filed, signifi cantly, on the first business day after the New York Court of Appeals denied Shields' motion for reargument, Shields once again attempted to obtain an injunction barring Gross from licensing the right to make and sell artistic prints based on the selfsame nude photographs which were at issue in the New York state court action. Shields argued in "carefully and elaborately prepared papers," that the distribution of the photographs would infringe her federal constitutional right of privacy.

Federal District Court Judge Leval has denied Shields' motion for a preliminary injunction on two grounds, the first being that an equitable remedy was not available to Shields due to the unfair timing of the federal court action. Judge Leval noted that during the two years occupied by the state court proceedings, the New York courts had granted Shields interim injunctions forbidding Gross from displaying the photographs. Shields could have sought the adjudication of her federal constitutional rights at any time during those two years, at a time which did not involve added expense and risk to Gross. With the commencement of another action in federal court, Gross now "runs the risk that by the time [Shields] runs out of courts and legal theories and exhausts the temporary restraining orders, preliminary injunctions, stays pending appeal, reconsideration and certiorari. the market for [Gross'] pictures will have disappeared."

The court therefore ruled that while Shields may maintain her action in federal court, a status quo injunction would not issue due to the "inequitable strategy" waged by Shields' counsel. If Shields eventually prevails on the merits of the action, she may obtain damages and possibly a permanent injunction.

Judge Leval also found that Shields failed to show a likelihood of success on the merits and the presence of "serious questions for litigation with the balance of hardships tipping decidedly in her favor." Initially, there is little precedential support for a cause of action alleging a constitutional right of privacy. Furthermore, even if such a cause of action exists, it is unlikely that a court would agree to the entry of an injunction which would require the prior restraint of the publication of a photograph. With respect to the balance of hardship requirement, Judge Leval noted that there already has been substantial dissemination of the nude photographs of Shields and that Shields' recent commercial activity and film appearances "[have] been far more sexually suggestive than the photographs which have been shown to the court - photographs of a prepubescent girl in innocent poses at her bath."

Without ruling on the question of irreparable harm, Judge Leval did find that Shields failed to show a balance of hardships tipping decidedly in her favor. On the other hand, Gross' "victory" in the state courts has been a financial disaster for him. This substantial harm would be compounded by further injunctive relief, concluded Judge Leval in ruling that Gross was entitled at last to be free of court restraint.

Shields v. Gross, 461 N.Y.S.2d 254, 448 N.E.2d 108 (N.Y. 1983); Shields v. Gross, 563 F.Supp. 1253 (S.D.N.Y. 1983) [ELR 5:5:9]

Specific performance of screen credit agreement is awarded by California appellate court

In 1969, Terry Sanders entered into an agreement with Tamarind Lithography Workshop, Inc. to write, direct and produce a film on the subject of lithography. Although Sanders completed his film entitled "Four Stones for Kanemitsu," a dispute arose between Tamarind and Sanders regarding the 1969 agreement. Litigation ensued. In 1973, however, the parties were able to settle their differences and entered into a written Settlement Agreement. In the Settlement Agreement, Tamarind agreed that Sanders would receive screen credit for the film in the following form: "A Film by Terry Sanders."

Tamarind, however, did not live up to the Settlement Agreement and failed to include Sanders' screen credit in the prints of the film it distributed. Once again, litigation ensued. After the trial of this second lawsuit, the jury awarded Sanders $25,000 as damages for Tamarind's failure to provide him with screen credit. In addition, Sanders requested that the trial court award him specific performance of his right to receive screen credit. The lower court refused to grant specific performance and instead only the $25,000 as monetary damages. Sanders appealed.

On appeal, Sanders did not challenge the $25,000 awarded by the jury. Sanders agreed that $25,000 was adequate to compensate him for injuries he sustained as a result of the past exhibitions of the film. However, Sanders argued that he had not been compensated at all for injuries he would sustain as a result of future exhibitions of the film. Therefore, specific performance of his rights under the Settlement Agreement was necessary and appropriate.

In response, Tamarind argued that the $25,000 awarded by the jury compensated Sanders for all damages suffered by him. Moreover, Tamarind argued that the jury was specifically instructed that if they found a breach of the Settlement Agreement, they were then required to award Sanders all his damages, past and future, arising from such breach.

Associate Justice Stevens of the California Court of Appeal, recognized that the instructions given to the jury were ambiguous and it was not clear whether the $25,000 award was intended to compensate Sanders for both past and future injuries. Nevertheless, Justice Stevens ruled that the legal remedies available to Sanders for harm resulting from future exhibition of the film without his filmmaker's credit were inadequate as a matter of law.

The court reasoned that Sanders' future harm could not be quantified and that he would be forced to bring numerous lawsuits to recover his damages. Thus, there was no adequate remedy at law. Accordingly, the court awarded specific performance by issuing an injunction which prohibited any further showing of the film unless it contained Sanders' screen credit.

Tamarind Lithography Workshop v. Sanders, 142 Cal.App.3d 552, 191 Cal.Rptr. 126 (1983) [ELR 5:5:10]

Toy manufacturer is permanently enjoined from distributing toy facsimiles of racing car featured on "The Dukes of Hazzard" television program

The "General Lee" once again has outdistanced an unlicensed competitor in the high-stakes field of toy merchandising. The "General Lee" is a racing car which is featured in "The Dukes of Hazzard" television program and in an ever-increasing number of federal court opinions (see ELR 3:16:5). The car also was the subject of various licensing agreements entered into between Warner Bros., Inc., the producer of "The Dukes of Hazzard," and toy manufacturers seeking to distribute facsimiles of the car. When Gay Toys, without having obtained a license, began to distribute toy cars resembling the authorized imitations, Warner Bros. requested a preliminary injunction from the Federal District Court in New York City. The court refused to grant injunctive relief, but this decision was reversed by a Federal Court of Appeals. With some reluctance, District Court Judge Whitman Knapp now has followed the Court of Appeals ruling and has granted partial summary judgment to

Warner Bros. permanently enjoining Gay Toys from manufacturing or distributing any imitation of the "General Lee" or any other element of "The Dukes of Hazzard" program.

Judge Knapp noted that in cases where no copyright, trademark or patent protection can be claimed as in this case - the Lanham Act has been used by parties seeking to enforce restrictions on the distribution of unlicensed merchandise. It is usually argued that consumers require the assurance that facsimile toys are "sponsored" by a program's producer. The court stated that Warner Bros. had failed to present a factual basis for such an argument. And in a footnote comment, Judge Knapp envisioned the possibility that if the matter comes before his court again on remand, an inquiry then might be conducted to determine whether well-informed consumers indeed would demand "sponsored" toys or would prefer the lower prices which might result from unlimited competition and the elimination of a producer's royalty.

Furthermore, Gay Toys contended that while the Lanham Act prohibits false designations of origin and false description, the company had engaged in no deceptive practices but had sought only to share in the market created by the success of "The Dukes of Hazzard." Nevertheless, according to Judge Knapp's reading of the Court of Appeals decision, these factors were irrelevant since the Court of Appeals "conclusively presumed - from the conceded fact that the facsimiles manufactured by [Gay Toys] are immediately associated by children with [Warner Bros.,] show - both the desire of [Warner Bros.'] audience for sponsored toys and the deliberate creation by [Gay Toys] of sufficient confusion to warrant invocation of the protection of the Lanham Act." The Court of Appeals thus recognized Warner Bros., creation of a monopoly on any market created by the popularity of its show, Judge Knapp concluded in issuing the requested injunctive relief in accordance with the Court of Appeals' opinion.

Warner Bros., Inc. v. Gay Toys, Inc., 533 F.Supp. 1018 (S.D.N.Y. 1983) [ELR 5:5:10]

Federal District Court ruling that the film "Caligula" is not obscene under Georgia state law was improper, rules Federal Court of Appeals; case is remanded for determination of obscenity as a matter of federal constitutional law

A Federal Court of Appeals has ruled that Hinson McAuliffe, did not exceed his authority in threatening to prosecute persons associated with the exhibition in

Fulton County of the film "Caligula," the rights to which are owned by Penthouse International, Ltd.

Penthouse had sought to enjoin prosecution by McAuliffe, or further threats thereof, and also sought a declaratory judgment that "Caligula" was not obscene under the Georgia obscenity statute. A Federal District Court found that "Caligula" was not obscene under state or federal law and, apparently assuming that this declaratory judgment would restrain McAuliffe, did not issue an injunction.

However, the Court of Appeals, after viewing the film, noted that a reasonable prosecutor could have believed that there was probable cause to believe that parties exhibiting "Caligula" would be violating Georgia's obscenity statute as constitutionally applied. Hence, McAuliffe was not necessarily acting in "bad faith" merely by threatening to prosecute the film's exhibitors. Absent the requisite showing of bad faith, the Court of Appeals also refused to enjoin the prosecutor's conduct with respect to the film's exhibition.

The court stated that Penthouse would be entitled to injunctive relief only if it could prove that "Caligula" was not obscene as a matter of federal constitutional law. Issuing an injunction on any other basis would mean that the District Court was bypassing the state's criminal justice system. This would be an unwarranted intrusion into state affairs, stated Federal Court of Appeals Judge Tjoflat, particularly in this case in which local community standards play such an important role. The case therefore was remanded for a determination of the question of whether "Caligula" was obscene as a matter of federal constitutional law.

In dissent, Judge Lynne noted that both an advisory jury and the District Court found, after applying contemporary community standards, that "Caligula" did not appeal to the prurient interest, and stated that "it would be anomalous to suggest that it is possible to adjudicate the question of whether material is obscene under the Georgia statute without resolving at the same time whether such material is protected by the First Amendment with the [definition of obscenity in Miller v. California (413 U.S. 15 (1973).]"

Penthouse International, Lid v. McAuliffe, 702 F.2d 925 (11th Cir. 1983) [ELR 5:5:11]

Federal Communications Commission investigation of media pastor did not violate First Amendment

For many years Reverend W. Eugene Scott was the gregarious dispenser of virtually continuous programming via television and radio stations owned by the Faith Center Church, of which Scott is the president and pastor. Several years ago, those stations became the subject of an investigation by the Federal Communications Commisssion. The FCC was looking into charges made by a former employee of one of the church's television stations that Scott had solicited and received funds for projects which were never undertaken, that the stations had failed to log paid religious programming as commerical broadcasting, and that Scott had misstated the amount of his personal salary. Eventually, the FCC designated for a hearing the station's application for license renewal. Scott brought an action for injunctive relief and for damages against five employees of the FCC alleging that they had violated his First Amendment rights to the free exercise of religion by inquiring into his personal donations to the church.

A Federal District Court granted summary judgment to the government employees; and this ruling has been upheld by a Federal Court of Appeals.

The Court of Appeals confirmed that Scott did indeed have standing to assert his claim despite the contention of the government that the target of the investigation was the television station owned by the church, rather than Scott. The essence of Scott's claim was that his religious beliefs require secrecy as to church donations, and thus the injury arising from the actual or threatened disclosure of such donations during the FCC investigation was found sufficient to confer standing on Scott. The court rejected, however, Scott's argument that the government had acted in concert with California state officials, who also were investigating Scott, so as to deprive Scott of protected rights or to deny him equal protection of the law.

The court also rejected Scott's contention that the government, by informing the press and the public of the investigation of charges of fraud against Scott, interfered with his religious obligation to convert nonchurch members. The government stated that it did not provide information to the public concerning the allegations made against the church, but merely confirmed that an investigation was in progress. Scott's conclusory allegations regarding the disclosure of information by the government were found insufficient to warrant denial of the government's motion for summary judgment.

The court then considered Scott's primary argument that his church contributions were "sacrifices," and that the disclosure of the contributions would violate their sacred nature. Initially, the court stated that the FCC was not required to demonstrate a compelling government interest prior to investigating an allegation of fraud by a licensee that is owned by or affiliated with a religious organization. Such a requirement was not supported by precedent, would be impracticable and might raise other First Amendment obstacles, stated the court. However, if a conflict with free exercise rights arises during an investigation, the FCC then might be required to demonstrate a compelling government interest before proceeding. While agreeing that the FCC's demand for disclosure of his contributions might interfere with Scott's First Amendment rights, the court nevertheless found that in this case Scott had failed to show an invidiously discriminatory basis for the alleged conspiracy on the part of the government employees to deprive him of his rights.

The FCC, on the other hand, had shown "a compelling interest in preventing the diversion of funds contributed for specific, identified purposes, especially when such funds are obtained through the use of the public airwaves." Furthermore, the government's "narrow and limited" investigation of Scott's pledge and donation records was necessary to carry out this compelling interest and did not unjustifiably violate Scott's First Amendment rights.

Scott v. Rosenberg, 702 F.2d 1263 (9th Cir. 1983) [ELR 5:5:12]

Eastern Air Lines wins limited injunctive relief in connection with competing airline's use of the term "air shuttle" in its advertising

Eastern Air Lines has been granted an injunction prohibiting New York Air Lines from using the words "air shuttle" and "shuttle" in New York Air Lines' advertising, unless New York Air uses appropriate disclaimers to describe the company's competing airline service.

Eastern is the owner of the registered service mark "Air Shuttle," a phrase which Eastern has used since 1961 in connection with its intensive air service between

New York and Washington, D.C., and between New York and Boston.

In 1980, New York Air began operation in the New York/Newark, Boston and Washington markets. In order to introduce its service, New York Air placed more than $5.8 million of advertising in 1982. The advertising either referred to the Eastern air shuttle by way of comparison or described the New York Air service as a shuttle service. Eastern contended that New York Air's use of the words "shuttle" and "air shuttle" constituted trademark infringement and unfair competition in violation of the Lanham Act and that New York Air's advertising was false and misleading.

Federal District Court Judge Milton Pollack first noted that the words "shuttle" and "air shuttle" are generic in that they describe the nature and class of transportation service provided by Eastern. The fact that the word "shuttle" has acquired connotations associated with the features provided by Eastern's service, such as guaranteed seating, back-up planes, no reservation requirement, frequent hourly service and on-board ticketing, did not make those words any less generic. Furthermore, even if the word shuttle were found to be descriptive instead of generic, the mark would not be entitied to trademark protection since Eastern had not shown that the word has acquired a secondary meaning, i.e, Eastern did not establish that the primary significance of the terms shuttle and air shuttle was the producer - Eastern -rather than the product.

Eastern also argued that New York Air had appropriated the good will endowed upon the terms shuttle and air shuttle by Eastern's labor, skill and money. But "the expenditure of extraordinary efforts and money in the promotion of a generic word does not automatically entitle the investor therein to any protection and does not necessarily create any legally protectable rights ...

Investment in a trademark that might become generic is at the risk of the user," noted Judge Pollack. Furthermore, New York Air had not yet advertised its services as an air shuttle; the company had used only the word shuttle accompanied by its own identifying mark or corporate name.

Eastern's investment in its service, while insufficient in itself to prevent New York Air's use of the word shuttle was taken into account in determining whether the company's advertising was misleading. An Eastern survey of shuttle route consumers' reactions to a New York Air advertisement purporting to compare the services provided by the competing carriers revealed that a significant number of consumers believed that New York Air provided a guaranteed flight to all prospective passengers, including back-up service in the event that a New York Air flight was filled to capacity. New York Air does not provide such service. Nevertheless about 94%

of frequent flyers thought that New York Air did provide such service, after reading a New York Air advertisement that said "New York Air offers all that Eastern offers, plus more." The creators of the advertisement had intended to link New York Air, via the comparative format of the advertisement, to services associated with Eastern. And this impression was misleading and subject to injunction, stated Judge Pollack. The court cautioned that New York Air may not use the word "shuttle " to mislead the public into believing that the company provides features which have become associated with Eastern's shuttle services if New York Air does not provide similar features.

Eastern's further claims of misappropriation of commercial goodwill by New York Air and violation of New York's A nti-Dilution Act were rejected by the court.

Eastern Air Lines, Inc. v. New York Air Lines, Inc., 559 F.Supp. 1270 (S.D.N.Y. 1983) [ELR 5:5:12]

Prosecutor's statement during public affairs TV program regarding judge's conduct was capable of a defamatory meaning, rules Pennsylvania appellate court in reversing lower court ruling granting summary judgment to prosecutor and broadcaster

On September 23, 1979, Philadelphia television station WKBS-TV, Channel 48, which is owned by Field Communications, broadcast a public affairs program entitled "On Target - The Bowe Case." The participants in the program discussed the trial of police officer Thomas Bowe who had been charged with the murder of a 19-year-old Philadelphia youth. Bowe's partner, Officer Daryl Bronzeill, also was tried on various charges in connection with the incident, but Judge Joseph P. Braig, who presided at the trial of Officer Bronzell, had declared a mistrial on the ground of "intentional prosecutorial misconduct." One of the "On Target" guests was Lloyd George Parry, an Assistant District Attorney and Chief of the Police Misconduct unit of the District Attorney's Office of Philadelphia County. Parry did not try the Bronzeill matter, but during the program Parry stated "Braig is no friend of the police brutality unit. I don't care who we sent in to try that case, in my opinion, that case was going to get blown out." Judge Braig filed a complaint against Parry and Field alleging that this statement was defamatory in that he believed the words "blown out" to mean "illegal, unethical and corrupt." The trial court held that the complained-of comment was capable of a defamatory meaning and that no absolute privilege protected Parry as an Assistant District Attorney. However, the lower court entered summary judgment on behalf of Parry and Field Communications on the basis of its finding that as a matter of law Braig could not prove actual malice on the part of either Parry or Field.

A Pennsylvania Superior Court has reversed and remanded the matter on the ground that the evidence established a genuine question of fact such that a jury could find the existence of actual malice with convincing clarity as to both defendants. The court first found that Parry's statement was not privileged as a protected expression of opinion although the quantifier "in my opinion's was used. The following factors were then noted as relevant to the determination of the existence of actual malice: Parry's remarks were not related to the subject matter of the program, i.e., the Bowe case, and had nothing to do with Parry's duties as Assistant District Attorney; Parry never asked for the recusal of Judge Braig in the Bronzeill case or sought review of Judge

Braig's decision or conduct; the prosecutor in the Bronzeill case previously had been cited for misconduct in at least one other case; and Parry's self-conducted "survey" of Braig was revealed to be incomplete and inaccurate. In all, the evidence was sufficient to permit a jury to decide whether Parry might have entertained "serious doubts" about the truth of his defamatory statement.

The court also ruled that a jury might conclude that actual malice was present in Field's decision to rebroadcast the "On Target" program on September 29, 1979. Among the factors relevant to a jury's determination of this issue would be: the rebroadcast occurred after Braig conveyed his objections to Parry's statement to the station manager; the station manager's decision to rebroadcast the program was made after he "went over and over" a tape, and thus a jury might infer that the station manager had serious doubts concerning the truth of the statements; and the station's failure to deliver a tape of the program to Braig, as he had requested, prior to the September 29th rebroadcast.

In a partial dissent, Judge Popovich stated that he would not have reversed the decision to grant summary judgment to Field Communications because Field was merely the conduit of the information and there was no showing of actual malice on the part of the company.

Braig v. Field Communications, 456 A.2d 1366 (Pa.Sup. 1983) [ELR 5:5:13]

NBC is granted access to audio and video tapes admitted into evidence during "Grandma Mafia" criminal case

A Federal District Court in California has granted an application by the National Broadcasting Company to copy all video and audio tapes admitted into evidence during a massive criminal trial, involving alleged conspiracies to sell cocaine. The court concluded that the possible harm that could arise from the copying of the tapes was "too speculative and insubstantial" to overcome the common law right of access to judicial records.

In support of his decision, Federal District Court Judge Tashima cited the case of Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978), in which the United States Supreme Court held that applications to copy taped evidence must be evaluated in light of the common law right of access to inspect and copy judicial records and documents, but that such applications are not supported by First Amendment guarantees of freedom of the press nor Sixth Amendment guarantees of a public trial. In three of a series of recent Court of Appeals decisions addressing the access-fair trial balance, the courts agreed that there exists a "strong presumption" that access should be allowed. The presumption may be overcome only by a finding that there is a "substantial probability" that the grant of access will cause articulable harm to the defendant's right to a fair trial or some other protected right.

In this case, noted Judge Tashima, the defendants argued that the publicity generated by the tapes would interfere with their right to trial by an impartial jury. But the jury had been instructed to avoid all publicity about the case and there was no reason to believe that the jury would disregard this instruction. This was not the type of case, stated the court, that was likely to become a "media-inspired circus" or that would be the subject of pervasive or prejudicial media coverage, despite its designation in early press reports as the "Grandma Mafia" case.

The fact that the trial of one of the co-defendants was severed and that his trial was scheduled to follow the trial of his co-defendants still did not present a substantial probability of prejudice to the severed defendant so as to justify denial of NBC's application.

United States v. Mouzin, 559 F.Supp. 463 (C.D.Cal. 1983) [ELR 5:5:14]

City of Mesquite ordinance restricting operation of video arcades violated Texas Constitution, rules Federal Court of Appeals; but local arcade regulations are upheld in New York, Massachusetts and Illinois

Guided by the video game genie which was uncorked in the case of Aladdin's Castle, Inc. v. City of Mesquite, this report will follow the farflung maze of court rulings dealing with local ordinances regulating coin-operated amusement centers - a maze which leads to a tentative consensus that the validity of such ordinances usually depends upon the specificity with which they are drafted, and upon the identification of a legitimate government interest.

Aladdin's Castle is the senior and most "Pong"-like case in the field in terms of its progress through the court system. The case involved a Mesquite, Texas ordinance which prohibited persons under 17 from playing coin-operated games unless accompanied by a parent or guardian. Aladdin's Castle, Inc., a national owner-operator of video game centers, sought and obtained an amendment of the ordinance, which amendment permitted younger children, under certain conditions, to use the coin-operated games. Aladdin's Castle then spent $80,000 developing a video game center in the area. However, the city subsequently refused to approve Aladdin's operating license on the ground that Aladdin's parent company, Bally Manufacturing Corporation, had been indicted in Louisiana on charges of participating in racketeering and gambling activities, even though Bally was acquitted of all charges.

Aladdin sued for and was granted injunctive relief in state court. The trial court judgment ordering the issuance of a license to Aladdin was upheld by a state appellate court. Mesquite then passed an ordinance which eliminated Aladdin's exemption from the 17-year-old age restriction and which contained a refined definition of the phrase "connection with criminal elements."

Aladdin's response was to sue in Federal District Court seeking injunctive relief to prohibit the city from enforcing its new ordinance. The District Court upheld the age restriction as rationally related to a]egitimate state interest but found that the ordinance's language concerning "connection with criminal elements" was unconstitutionally vague. A panel of the Fifth Circuit Court of Appeals agreed with the vagueness finding but declared that the 17-year-old requirement violated the due process and equal protection guarantees of both the Federal and Texas constitutions.

The genie leads inexorably to the United States Supreme Court which found that the "connection with criminal elements" provision of the Mesquite ordinance, while possibly unconstitutionally vague as a licensing standard, was constitutional as a directive to the local police. With respect to the age restriction issue, the Supreme Court remanded the matter to the Federal Court of Appeals for a review of the basis on which it invalidated the ordinance, in particular, whether the ordinance was invalidated on independent state grounds under the Texas constitution.

On remand, the Court of Appeals stated that the ordinance indeed was invalidated on independent state grounds. The court pointed out that the power of cities such as Mesquite over places of public amusement is limited under Texas law to the regulation of location and conduct. Mesquite's ordinance - a defacto prohibition of any activity sanctioned by state law - exceeded these limits, declared the court and therefore was void.

The court also stated that the Texas constitution grants broader protection to substantive economic rights than does the Federal constitution. Ordinances affecting such rights must meet strict requirements of reasonableness and substantiality. But Mesquite's ordinance was aimed "too far from the schoolhouse gates." There was no reasonable and substantial relationship between the provisions of the ordinance and its stated purposes of truancy prevention and prevention of gambling and narcotics use, because no evidence had been presented as to the manner in which the video game center would be conducive to unlawful activity. In all, the ordinance's legitimate police purposes were negligible, while its financial consequences for Aladdin's Castle were severe since the company would likely not continue its business in the area. Hence, as in its earlier opinion, the Court of Appeals found the 17-year-old age provision of the ordinance unconstitutional.

In Tommy and Tina Inc. v. Department of Consumer Affairs of the City of New York, a New York trial court upheld a Department of Consumer Affairs regulation governing the city's licensing of video games. The regulation required that "common shows" be located at least 200 feet from a school. Tommy and Tina, Inc. operated a pizza restaurant and four video games were located on its premises. A license was issued for the video games but a subsequent investigation revealed that the restaurant was 167 feet 5 inches from a public elementary school. The restaurant challenged the method of measurement used by the Department, but the court found that the regulation was not unconstitutionally vague simply because it failed to specify a method of measurement.

It also was argued that the Department had exceeded its authority to protect the public health, safety and welfare by regulating the access of minors to video games since the purpose of the regulation - the prevention of truancy - was not the responsibility of the department. The court rejected this argument. Justice Harold Tompkins found that video games are not a form of speech protected by the First Amendment. Hence, since the licensing regulation was part of the city's overall zoning scheme for common shows - a legitimate exercise of the city's police power - and since a rational basis for the regulation was shown - the protection of school children from the "temptation of truancy" - the revocation of the restaurant's common show license was not arbitrary or capricious and the petition seeking review of the revocation was denied.

In Massachusetts, the case of 1001 Plays, Inc. v. Mayor of Boston resulted in a state supreme court ruling affirming the denial of a party's application for a license to operate an entertainment center featuring video and pinball games. The licensing division of the mayor's office based its denial of the application on its conclusion that the center would unreasonably increase traffic and noise and would increase the incidence of disruptive conduct in the area of the proposed center. The trial court and the supreme court agreed that this conclusion was based on substantial evidence.

In Illinois, a Federal District Court (in a decision issued in 1981 but not published until 1983) upheld the constitutionality of a Des Plaines municipal ordinance prohibiting electronic games and automatic amusement devices in all but licensed liquor establishments and prohibiting persons under 21 from operating such games without a parent or guardian present. The court stated that it was within the home rule and statutory powers of Des Plaines "to protect minors from coin operated games."

City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982); Aladdin's Castle, Inc. v. City of Mesquite 701 F.2d 524 (5th Cir. 1983); Tommy and Tina Inc. v. Department of Consumer Affairs, 459 N.Y.S.2d 220 (Sup. 1983); 1001 Plays, Inc. v. Mayor of Boston, 444 N.E.2d 931 (Mass. 1983); Rothner v. City of Des Plaines, 554 F.Supp. 465 (N.D.Ill. 1981) [ELR 5:5:14]

United States Supreme Court rules that former Arizona State University football player may proceed with civil rights action against former coaches

Several years ago, Kevin Rutledge, a former football player for Arizona State University, asserted a variety of common law and statutory claims in both federal and state proceedings against the University and its officials arising out of incidents that allegedly occurred while Rutledge was a member of the school's football squad. One of his claims was that the University's athletic director, head football coach and assistant football coach had engaged in a conspiracy to intimidate and threaten potential witnesses in Rutledge's federal court lawsuit in violation of 42 U.S.C. section 1985(2). The statute derives from an 1871 law which was designed to protect witnesses in civil rights controversies. The athletic officials vigorously argued that Rutledge's claim was not racial in nature, and that he had failed to allege that the purported conspiracy was motivated by a "racial, or ... otherwise class-based, invidiously discriminatory animus."

However, the United States Supreme Court, in affirming a Court of Appeals opinion (ELR 3:16:5), has ruled that the requirement of class-based animus does not apply to the portion of section 1985(2) that prohibits interference with federal officers, federal courts or federal elections, and therefore Rutledge may proceed with his action.

Kush v. Rutledge, Case No. 81-1675 (U.S.Sup.Ct., April 4, 1983) [ELR 5:5:16]

Briefly Noted:

Invasion of Privacy.

A newspaper's publication of a photograph of prison inmates participating in a continuing educational program does not infringe their right of privacy, a New York court has ruled. "University Without Walls," a program instituted at the Great Meadows Correctional Facility in New York, was the subject of an article published in the New York Times. The article included a photograph of several unidentified inmates. One of these inmates claimed that the state, through the prison superintendent, maliciously permitted the photograph to be published without the inmate's consent thereby violating his right of privacy. The court noted that the constitutional right relied upon "encompasses only the most personal and intimate matters" and found the photograph to be outside of its focus. Although New York does not recognize a common-law right to privacy, sections 50 and 51 of the New York Civil Rights Law "proscribe use of a person's picture for advertising purposes or for the purposes of trade" without that person's written consent. In this instance, the court found that the inmate was underexposed because the photograph was used in connection with an article of public interest and not for trade or advertising purposes.

De Lesline v. State, 458 N.Y.S.2d 79 (App.Div. 1982) [ELR 5:5:16]

Master Recording Rights.

The New York Court of Appeals has held that the unauthorized use of a master phonograph recording is a "conversion" and is subject to a three-year statute of limitations. The song "Get A Job," recorded by the

Silhouettes, was produced by a Philadelphia disc jockey in 1957 who, that same year, leased "exclusively and in perpetuity, all rights in the Master to Ember Records." The producer claimed that an oral agreement accompanying the written lease provided that in the event Ember liquidated its business, the master tape would be returned to him. In 1965 Ember liquidated its business and sold its master recording catalogue to Bell Records, a predecessor to Arista Records. Bell released the song "Get A Job" that same year and has continued to republish the song. In 1973, MCA Records, pursuant to a licensing agreement with Arista, used the master tape in the soundtrack for the motion picture "American Graffiti." The court found that the allegedly unauthorized continued use of the master tape did not constitute a continuing trespass, which would have created successively accruing causes of action for statute of limitations purposes. "Interference with a person's property constitutes a trespass while a denial or violation of the plaintiff s dominion, rights, or possession, is the basis of an action for conversion." The court held that the conduct of Arista and MCA in 1965 and thereafter amounted to a total denial of the plaintiff s claimed ownership rights, and therefore the claim was time-barred.

Sporn v. MCA Records, Inc., 448 N.E.2d 1324, 462 N.Y.S.2d 413 (N.Y. 1983) [ELR 5:5:16]

Theater Tax.

In a decision dating from 1981, but not published until 1983, an Ohio appellate court upheld a City of Springdale ordinance imposing a three percent tax on cinema admissions. The tax was not facially invalid as a denial of equal protection stated the court. It was noted that a factual dispute might have arisen if evidence were presented that other forms of entertainment existed in the city so that the application of the tax only on movie theaters was impermissibly discriminatory. However, this claim was not made. And a taxing authority may classify entities subject to taxation if there are reasonable grounds for such distinctions. The fact that "large masses of people" attend movie theaters so as to require additional government services in offhours would justify a tax designed to offset the cost of such services, concluded the court.

National Amusements, Inc. v. City of Springdale, 443 N.E.2d 1016 (Ohio App. 1981) [ELR 5:5:16]

Pay Television.

A Federal District Court in Florida has refused to dissolve a preliminary injunction which barred a Florida motel owner from using an earth station to receive the satellite signal of the television programs being transmitted by Rainbow Programming Services Company to its affiliates and from distributing the signal to rooms rented to motel tenants. The motel owner argued that the protection provided by Section 605 of the Communications Act was not available to a pay television service which transmits a signal "intended to be received by the public." But, as in Chartwell Communications Group v. Westbrook, 637 F.2d 459 (6th Cir. 1980; ELR 2:19:1) and National STV v. S&H TV, 644 F.2d 820 (9th Cir. 1981; ELR 2:9:4), District Court Judge Winston E.Arnow ruled that if Rainbow's broadcast were not intended for the use of the general public, even though it was intended to be received by the general public, the protection afforded by Section 605 would apply. The court also concluded that Section 605's protection is not limited to pay television services which encode or scramble their signals.

Rainbow Programming Services Company v. Patel, Case No. PCA 82-6009 (N.D.Fla., Jan. 18, 1983) [ELR 5:5:17]

Labor Relations.

The constitution of the American Federation of Musicians sets out a system for the selection of delegates by affiliated locals to AFM conventions. The Chicago Federation of Musicians, with over 11,000 members out of the 300,000 members of the AFM argued that the system of the delegate selection violated the Labor-Management Reporting and Disclosure Act of 1959 by giving small locals disproportionately greater representation than large locals. A Federal Court of Appeals in Illinois has ruled that the AFM's delegate selection system is reasonable, and that proportional representation at conventions of national or international unions is not required. Furthermore, the AFM constitution does allow for the expression of "true majority will" through roll call votes for changes in bylaws, such as dues increases. The court accordingly rejected a challenge brought by two Chicago Federation members seeking to nullify a dues increase approved at the 1980 AFM convention.

Denov v. Chicago Federation of Musicians, Local 10-208, 703 F.2d 1034 (7th Cir. 1983) [ELR 5:5:17]

Previously Reported:

As previously reported (ELR 5:2:18), the Directors Guild victory in the antitrust suit filed against it by Home Box Office (ELR 3:19:1) has been affirmed by a Federal Court of Appeals in New York. The appellate court's decision was explained in a one-sentence, per curiam opinion which read, in its entirety, as follows: "The judgment below is affirmed for substantially the reasons given by Judge Sofaer in holding that the actions and agreements of the Guild are protected by the 'statutory' and 'non-statutory' exemptions of labor union activities from the antitrust laws. Home Box Office, Inc. v. Directors Guild of America, 531 F.Supp. 578 (S.D.N.Y. 1982)." The appeals court decision has been published at 708 F.2d 95 (2d Cir. 1983).

The decision of the Court of Appeals in Board of Regents of the University of Oklahoma v. National

Collegiate Athletic Association, previously reported at ELR 5:3:9, has been published at 707 F.2d 1147 (10th Cir. 1983). The NCAA's petition for certiorari to the Supreme Court is pending.

The new California statute requiring employers of writers and artists "for hire" to provide the same benefits that are required for conventional "employees" is Chapter 1332 of the 1982 California Statutes. It amended section 3351.5 of the California Labor Code; it amended section 621 of the California Unemployment Insurance Code; and it added section 686 to the California Unemployment Insurance Code.
[ELR 5:5:17]

IN THE NEWS

AFTRA and SAG announce tentative settlement of Tuesday Productions' antitrust action against the unions

The American Federation of Television and Radio Artists and the Screen Actors Guild have reached a tentative agreement to settle the antitrust action filed against AFTRA five years ago by Tuesday Productions. The settlement terms have not been announced but presumably will include a substantial monetary payment to Tuesday by the unions.

The dispute among the parties arose when Tuesday, a San Diego based non-union producer of music for commercials, filed unfair labor practice charges against AFTRA with the National Labor Relations Board. Tuesday claimed that AFTRA was illegally boycotting the company by conspiring with major advertisers and ad agencies not to do business with a non-union company. Subsequently, Tuesday filed a lawsuit repeating its charges that AFTRA was engaged in an unlawful conspiracy to restrain trade in the market for the production of radio and television commercials, and that the union was attempting to fix prices for commercials.

In May 1982, a jury found AFTRA liable for violating the antitrust laws and ordered AFTRA to pay Tuesday more than $9.3 million in treble damages, plus attorneys fees, amounting to a total award of more than $10.5 million. After being denied a stay of execution, national AFTRA and its New York, Los Angeles and San Diego locals filed Chapter 11 bankruptcy to protect their assets while appealing the judgment.

In February 1982, Tuesday had filed antitrust claims in the United States District Court in San Diego, this time against 29 AFTRA locals. A motion to dismiss the claims was denied because, Judge J. Lawrence Irving stated, there were indications of a conspiracy between the national union and its local affiliates to carry out the alleged illegal boycott. Judge Irving also ordered the consolidation, for pretrial procedures, of the case against the 29 locals and the antitrust action which Tuesday had filed in 1982 against the Screen Actors Guild.

When the settlement agreement is executed, it is expected that Tuesday will cease all proceedings against AFTRA and SAG, and that AFTRA will withdraw its pending appeal of the initial $10.5 million judgment. [Oct. 1983] [ELR 5:5:18]

MPAA sues State of Wisconsin for unauthorized prison screenings of videocassettes

The Motion Picture Association of America has sued the State of Wisconsin, claiming that prison authorities in that state have been renting videocassettes licensed for in-home use, and exhibiting the programs to prison inmates. Such a public showing, without authorization from the copyright owner, would constitute copyright infringement, according to the MPAA.

In 1982, the California Attorney General's Office issued an opinion supporting the MPAA position (ELR 3:24:3). The opinion stated that prison screenings are "public" performances and are not a fair use of copyrighted material. Wisconsin apparently has informed the MPAA that it disagrees with the California opinion, and that Wisconsin prisons will continue to exhibit the videocassettes, resulting in the initiation of the lawsuit. [Oct. 1983] [ELR 5:5:18]

MCA and Motown Records settle lawsuit filed by Motown's former independent record distributor

Recently, Motown Records ended its longstanding and virtually unique practice of distributing its product via independent distributors, and entered into a distribution agreement with MCA Inc. Several independent distributors filed lawsuits challenging the Motown-MCA pact. In one such case, Associated Distributors sought to enjoin Motown's "defection" claiming that no reasonable advance notice was given prior to the termination of its agreement with Motown. A court in Phoenix, however, denied Associated's request for a preliminary injunction, stating that once the Motown-MCA agreement was terminated, it could not be revived, and that Associated had suffered no irreparable damages.

Schwartz Brothers, a Maryland-based distributor, also brought an action against Motown for breach of oral contract. The court in this case granted Schwartz' request for a temporary injunction blocking Motown's departure from the independent distributor. But in August, Motown and MCA reached an out-of-court settlement with Schwartz, the terms of which have not been made public. MCA, accordingly, has commenced its exclusive distribution of Motown product. [Oct. 1983] [ELR 5:5:18]

WASHINGTON MONITOR

Justice Department will not object to formation of Tri-Star Pictures joint venture

The Justice Department has decided that the formation of Tri-Star Pictures - a joint venture of Home Box Office, CBS and Columbia Pictures - will not lessen competition in the distribution of pay television services to cable, or in the licensing of movies to pay television. As a new movie studio, Tri-Star will produce and distribute movies and provide HBO with exclusive pay television rights to the resulting movies. Assistant Attorney General William Baxter, head of the Justice Department Antitrust Division, stated that the joint venture actually may increase competition among motion picture producers and distributors by creating a new competitor in the industry.

In reaching its decision, the Justice Department reviewed HBO's existing relationships with various programming suppliers. HBO has an agreement with Orion Pictures that gives HBO the exclusive pay TV rights to approximately 30 films to be produced by Orion in exchange for HBO financial support. HBO also has obtained exclusive pay-TV rights to 50% of Columbia's films in production in-house prior to June 30, 1986, again in return for assistance in financing the films. These financing arrangements, and a series of agreements between HBO and other independent motion picture producers involving pay-TV rights, will not result in an anticompetitive effect, in the government's view, because of the presumably adequate quantity of theatrically successful films which will remain available for licensing by HBO's competitors. Furthermore, other programming services have the ability to follow HBO's practice of investing in film production in order to obtain exclusive pay TV rights.

The possibility of collusion at the production or distribution level of the motion picture industry was not likely in this venture, stated Baxter, because the joint venture includes only a single pay-TV programmer, HBO, and only one of the six major distributors, Columbia. "Moreover, the nature of the financial arrangements between Columbia and HBO does not encourage

Columbia to collude with its producer or distributor competitors," concluded Baxter. [Oct. 1983] [ELR 5:5:19]

FCC decides that networks were not coerced into adopting "family viewing hour"

The Federal Communications Commission has decided that the three major television networks adopted the now-abandoned "family viewing hour" voluntarily. The policy, which was added to the National Association of Broadcaster's Television Code in 1975, provided, in part, that entertainment programming "inappropriate for viewing by a general family audience" should not be broadcast during the first hour of network programming in prime time or in the immediately preceeding hour. The Writers Guild, the Directors Guild, the Screen

Actors Guild and Tandem Productions brought an action against the NAB, the three networks and the FCC contending that the family viewing policy violated the First Amendment and various federal administrative and antitrust statutes.

A Federal District Court in California ruled in favor of the Writers Guild parties. The court concluded that the family viewing hour was adopted by the NAB and by the networks in response to threats, influence and pressure by the Chairman of the FCC, and that this improper pressure was a per se violation of the First Amendment. However, in 1979, a Federal Court of Appeals vacated the judgment of the lower court on the ground that the FCC was required to consider the Writers Guild claims prior to any court action. The Court of Appeals expressed its belief that the ultimate judicial resolution of the questions raised in the action would be aided by the

FCC's "thorough consideration" of the matter. (ELR 1:14:1)

After four presumably "thorough" years, during which the NAB's Television Code was dissolved, the FCC has determined that it did not make any improper attempts to coerce the NAB or the networks into adopting the family viewing policy. Rather, in response to growing public concern about violent and sexually-oriented television programming, the FCC urged industry self-regulation as an alternative to government regulation. The networks then independently chose to support the family viewing hour, the FCC has concluded. [Oct. 1983] [ELR 5:5:19]

DEPARTMENTS

Book Note:

"Entertainment Law: Legal Concepts and Business Practices" by Thomas D. Selz and Melvin Simensky

Law book publishers have responded, in textbook fashion, to the tremendous number of lawyers that have entered the profession in the last decade. There are now major treatises for virtually every legal specialty. Until now, however, entertainment lawyers have not had a book to call their own. There have been treatises covering particular substantive topics of importance to entertainment lawyers, of course. Nimmer on Copyright comes immediately to mind. And there have been form books for the entertainment bar. But litigators with cases outside the copyright area, or draftsmen looking for background information and guidance unavailable in form books, have not had a single reference to turn to.

That void has now been filled by Thomas D. Selz (of Frankfurt, Garbus, Klein & Selz in New York City) and

Melvin Simensky (of Gersten, Savage & Kaplowitz in New York City). Their three-volume treatise entitied Entertainment Law: Legal Concepts and Business Practices will become a basic text for the profession, one that will be referred to for background information, conceptual insight, research assistance, and doctrinal guidance.

The reason that entertainment law is one of the last specialties to receive its own treatise is that in reality there is no one body of law applicable to the entertainment industry. Indeed, the very premise on which the Entertainment Law Reporter was founded more than four years ago is that the entertainment bar is concerned with a wide range of legal subjects as they all bear on a single industry. Selz and Simensky share that view and add an additional dimension to the definition of "entertainment law" - a dimension which the pages of this Reporter began to reflect only last June. To Selz and

Simensky, "Entertainment law ... is a combination of legal principles and business practices. The business realities of the entertainment industry give flesh to skeletal legal principles, thereby creating a body of law referred to as entdrtainment law."

Selz and Simensky's treatment of "business practices and realities" is what makes their treatise so unique and so valuable. Their book divides itself naturally into four parts. The first part describes the industry and each of what the authors refer to as its five "branches": movies, television, theater, music and publishing. Here Selz and Simensky document two of the features which make the entertainment industry unique: the huge investments that are required in essentially one-of-a-kind products, and the high risks that are associated with efforts to sell those products. Given these features, a number of apparently unrelated industry practices can be seen as the outgrowth of efforts by industry members to do nothing more than reduce their investments and shift their risks.

In the second part of their treatise, Selz and Simensky explore the law, economics and practices of billing and credits. Anyone who has ever spent countless hours negotiating screen-credit provisions for a movie or TV personal services contract, or anyone who has ever litigated a credit or billing dispute, will savor this part of the treatise. It demonstrates that billing and credits are as important as clients instinctively feel and insist they are, and it rationalizes the legal principles governing the use and abuse of such credits.

The third section of the treatise covers those areas of law, apart from copyright, that are most apt to concern entertainment litigators: unfair competition, right of privacy, right of publicity,, libel and remedies. Here Selz and Simensky employ a traditional treatiselike format and tone. The emphasis is on the law, as revealed and made in published opinions. The advantage their book offers over other treatments of these subjects is threefold. Its point of view is that of the entertainment lawyer, rather than the tort generalist or even the media law specialist. Its citations to entertainment industry cases and law review literature appear exhaustive. And its chapters are finely subdivided and well subtitled to facilitate the book's use as a research aid.

The fourth part of the book, one that takes up an entire volume by itself, is devoted to sample forms. While not as exhaustive as some other sources for entertainment forms, this section includes a wellrounded sampling of forms used in the production of movies, television programs and plays, in music recording and publishing, and in book publishing.

Entertainment Law: Legal Concepts and Business Practices is published by Shepard's/McGraw-Hill, P.O. Box 1235, Colorado Springs, Colorado 80901. Its cost is $150.00 plus $4.15 postage and handling, and it may be ordered by phone at (800) 525-2474. (In Colorado, call collect 475-7230, ext. 318.) The treatise has loose-leaf pages bound with post-binders, and annual supplements keeping it up to date are anticipated. [ELR 5:5:20]

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[ELR 5:5:22]