RECENT CASES

California appellate court rejects claim of syndicator of "The Rookies" television series alleging that comments by ABC executive damaged the syndication value of the series

The plot elements: A network president's provocative comments about violence in programming. A successful television series sees its syndication profits shot down. Federal communications policies venture out of the courtroom and move among us. Corporate loyalty faces its greatest challenge. An episode of Dallas? Dynasty? Mr. Rogers' Neighborhood? No. These intriguing issues, and more, have been considered by a California appellate court in an action involving the syndication rights to the television series "The Rookies."

"The Rookies," a Spelling-Goldberg production, was exhibited on network television by American Broadcasting Companies, Inc. for five broadcast seasons beginning in the fall of 1972. In 1974, Worldvision Enterprises entered into an agreement with Spelling-Goldberg to acquire the syndication rights to "The Rookies." Under the agreement, as of the fall of 1977, Worldvision would be entitled to distribute the series to independent broadcasters and to network affiliates for broadcast during hours not committed to network programming. In 1975, Worldvision conducted a "preselling" campaign to introduce the series to television stations.

In another part of the forest, the Federal Communications Commission was busily engaged in efforts to reduce the exhibition of excessive sex and violence in television programming. Eventually, the networks announced that as of the Fall 1975 television season, the first hour of each night of prime time network entertainment would be designated a "family viewing" period.

ABC, in line with this announcement, changed the broadcast time of "The Rookies" from 8:00 P.M. to 9:00 P.M. because "certain episodes or programs of [the] series have contained and may continue to contain subject matter that all might not agree is appropriate for general family viewing." And in May 1979, Elton Rule, ABC's president, when speaking at an annual meeting of ABC's network affiliates, stated that "'The Rookies' has become a benchmark for family viewing. When we consider the 'appropriateness' for one time period or another of a series that occasionally deals with violent themes, we have something to measure it against."

Worldvision, claiming that after these remarks its customers were no longer interested in purchasing "The Rookies" and that the value of the company's syndication rights was thereby destroyed, brought an action against ABC for breach of fiduciary duty and negligent interference with prospective economic advantage. A Los Angeles trial court granted summary judgment for ABC. On appeal, Worldvision argued that an issue of fact remained as to the fiduciary duty owed to the company by ABC. This fiduciary obligation allegedly arose because several Worldvision executives were former employees of ABC, and had maintained a close working relationship with ABC since the early 1970's. The FCC re-enters the scenario at this point in the guise of its now-beleaguered 1970 rule prohibiting the major television networks from engaging in the domestic syndication of television programs. At the time, an ABC subsidiary known as ABC Films was engaged in syndication. As a result of the FCC rule, five ABC Film executives formed Worldvision and acquired the stock of ABC Films.

Judge Ashby of the California Court of Appeal found that no inference of a confidential relationship was raised by the fact that Worldvision's key employees were former employees of ABC Films. Furthermore, the fact that the parties did a great deal of business with each other and in the course of their business relationship "reposed trust and confidence" in each other did not impose a fiduciary obligation "in the absence of an act creating or establishing a fiduciary relationship known to law." The court also rejected Worldvision's argument that a fiduciary duty was created by ABC's control over property "contemporaneously owned" by Worldvision, because this was not a community property or remainder owner situation.

Worldvision also claimed that ABC owed the company a general duty of due care not to damage Worldvision's prospective economic interests. However, noted the court, there was no evidence that Rule's comment "was intended to harm [Worldvision's] syndication rights, that ABC bore any malice, ill will or hatred toward [Worldvision], or that the opinion was dishonestly held and given for an ulterior motive to harm [Worldvision]." The network affiliates had a special interest in obtaining information about ABC's broadcasting philosophy and the reasons for its scheduling decisions, and ABC was entitled to comment without malice on a matter of public interest, i.e., appropriate family television programming. The court pointed out that if ABC could be held liable on a negligence theory to the owners of syndication rights in each program broadcast by the network, programming decisions would be fraught with potential lawsuits by syndicators. In addition, when Worldvision purchased syndication rights prior to the termination of the network run, Worldvision could have assumed that ABC's decisions as to how to promote the program might affect the value of the program in syndication.

This was an "ordinary business risk," concluded the court in affirming the trial court ruling.

Worldvision Enterprises v. American Broadcasting Companies, Inc., 191 Cal.Rptr. 148 (Cal.App. 1983) [ELR 5:6:7]

Federal District Court in Illinois enjoins distribution of modification kit containing computer instructions substantially similar to those of Pac-Man video game

The scope of copyright protection which is to be accorded computer material is being chipped out as more and more courts confront video game infringement actions, and the opinions in these actions (and the ELR reports thereon) are becoming increasingly technical as the protectible element of expression in the material is pursued. A Federal District Court in Illinois now has ruled that certain ROMs present in PAC-MAN, a video game which is manufactured and marketed by Midway Mfg. Co., are protectible, and were infringed by a modification kit developed by Roger Strohon (aka Frederick Slayton).

ROMs, which may very well be built in a day, are the Read Only Memory chips upon which are imprinted the electronic circuitry containing both the visual data for a video game and the sequencing instructions that direct the play. Every PAC-MAN unit has on its circuit board a specified number of the silicon chips, including four "instruction ROMs" that contain the data to make game decisions such as where the characters move on the video screen and whether or not one character chases another. Two other ROMs contain information that causes the character images and other effects to appear on the video screen. Midway, which holds a "literary works" copyright for the computer programs stored on the six ROMs and a copyright for the audiovisual effects in the Pac-Man game claimed that Slayton's Cute-See modification kit infringed these copyrights.

The Cute-See kit was developed, as are similar speed-up or update kits, to complicate and accelerate the action of video games in order to increase the challenge presented to practiced players and thereby prolong the profitability of the machines. To achieve this purpose, the Cute-See kit utilizes a set of five ROMs with instructions for their installation in the Pac-Man circuit board. When played, the Cute-See game is similar in its maze/chase concept to PacMan. But the Cute-See characters do not resemble Pac-Man and its enchanting ghost monsters. This is due to the fact that operators are advised to remove the sixth Pac-Man ROM, with the result that the figures on the Cute-See game screen are only colored squares.

Let the games begin! SHIELD, the Video Game Industry Legal Justice Committee, in an amicus brief, argued that Midway's first sale of its Pac-Man game machines defeated Midway's right to control the use or alteration of the copyrighted portions of those machines by the operators who own them. Federal District Court Judge Will noted that the "final death blow" was dealt to this argument by the Seventh Circuit in Midway Mfg. Co. v. Artic International, Inc., 704 F.2d 1009 (7th Cir. 1983)(ELR 5:4:8), in which the court ruled that speed-up kits are derivative works and that the licensees who install the kits are direct infringers. In addition, the manufacturer of such kits was found to be a contributory infringer of Midway's copyrights. Hence, stated Judge Will, if the Cute-See kit infringes any of the copyrights connected with the Pac-Man game, regardless of the fact that Midway no longer owns the machines, the kit may not be distributed.

In turning to the infringement issues, the court first held that the Cute-See modification kit did not infringe Midway's audiovisual works copyright in the images and accompanying sounds displayed during the course of play of the Pac-Man game. The "distinctive, copyrightable features" of Pac-Man, primarily its central gobbler and ghost monsters, are not present in the Cute-See version of the game. Midway argued that if operators installed the five ROMs provided in the Cute-See modification kit without removing the remaining Pac-Man ROM, the Pac-Man characters still would appear in the audiovisuals of the game. Hence, according to Midway, Slayton would be liable as a contributory infringer based on the substantial similarity of the modified work to the original when the key ROM remained in place - an "entirely foreseeable" occurrence.

The court agreed that substantial similarity would be present if the ROM were not removed and that an operator who failed to remove the sixth ROM would be a direct infringer of Midway's copyright. Furthermore, if Slayton had directed or encouraged operators to leave the ROM in place, then Slayton's sales of the Cute-See kit would constitute contributory infringement. But the court determined that there was no competent evidence establishing that purchasers of the Cute-See kits would inevitably fail to follow the kit's instruction to users to remove the sixth ROM and disconnect the Pac-Man sound system. To hold Slayton liable for conduct of unrelated third parties which he actually discourages " would be an unwarranted extension of copyright liability for which no clear terminus is apparent," stated Judge Will.

As to the alleged infringement of the computer material, the court agreed with Midway that the audiovisual display and the computer program were not so "intertwined" as to preclude protection for the computer program. "The skill, ingenuity and effort that is required to design the computer program which operates the game is altogether different from the process of conceiving and designing the distinctive Pac-Man characters," stated the court.

The key question in the opinion now enters the maze: do the instruction ROMs contain a "copy" of the computer program that was developed to operate the Pac-Man game? Judge Will concluded "on the basis of less than thoroughly developed record," that Midway's ROMs were entitled to protection as a computer program and that the ROMs in Slayton's modification kit infringed Midway's copyrights. The court noted that the ROMs protection derived from the Computer Software Copyright Act of 1980 which amended the Copyright Revision Act of 1976. As a result of the amendment, section 117 of the Copyright Act provides that the owner of a copyrighted program may adopt the program for use "in conjunction with a machine" or copy the program for archival purposes. The protection of the Act is available both for "human readable" "source codes" and for "machine readable" "object code" instructions which are stored in the ROMs. As described by the court, the object code is a direct transformation of a computer program. Therefore, "To allow protection of the source code version of a program would be pyrrhic indeed if the object code version, the mechanical implementation of the same program . . . could be freely reproduced without constituting an infringement." The means of storing the object code - discs, magnetic tape or silicon chip - does not alter this result. A ROM chip is not the type of utilitarian object for which copyright protection is not available, but rather a combination of hardware and the software that contains computer instructions.

The court emerged from the thicket of letters with the conclusion that the Cute-See ROMs infringed the copyrighted Pac-Man ROMs. Midway established that 89% of the 16,000 bytes (units of information) in four of the Pac-Man ROMs were identically reproduced in the corresponding Cute-See ROMs. And over 97% of the instruction locations were identical. This degree of similarity was ruled substantial, especially because there was a "virtual impossibility that two programmers working independently would write so nearly identical programs. . . ." The fact that Slayton did not copy the data stored on two of the Pac-Man ROMs did not compel a different conclusion. The court compared the "piracy" of the programs stored in the four ROMS to the copying of one chapter of a novel or one volume of a multi-volume work.

The court also ruled that the sale of the Cute-See modification kit would constitute "false designation of origin" and unfair competition in violation of section 43(a) of the Lanham Act. This finding was based upon the inclusion in the kit of pressure sensitive graphics which were designed to obscure the name Pac-Man where it appears on Midway's game cabinet. The graphics did not, however, cover large-scale cartoon representations of Pac-Man and the ghost monsters. Midway has extensively advertised its game through the use of the cartoon representations, which representations were called fanciful and protectible by the court, even without proof of secondary meaning. Thus, the retention of the cartoons on the Cute-See game cabinet might mislead potential customers into concluding that the Cute-See kit was sponsored by Midway. The marketing of the Cute-See modification kit by Slayton was enjoined accordingly.

Midway Mfg. Co. v. Strohon, 564 F.Supp. 741 (N.D.Ill. 1983) [ELR 5:6:8]

Federal Communications Commission radio deregulation order is affirmed by Court of Appeals except section eliminating program log requirement

First the oil industry, then the airlines and now radio . . . . . The Federal Court of Appeals for the District of Columbia has allowed the deregulation mood of our lawmakers to reach the radio industry. Despite protests from public interest groups, the FCC's radio deregulation order passed through the court practically unscathed. The court has held that the FCC did not exceed its statutory authority or abuse its administrative discretion in eliminating its ascertainment procedures and guidelines for commercial and nonentertainment programming levels. The court did however remand to the FCC for further study that portion of its order dealing with program logs.

The FCC's deregulation order culminated three years of inquiry into the need and efficacy of its former regulations. Believing that increased competition and diversity necessitated a revamping of its books, it identified areas ripe for regulation in its 1979 "Notice of Inquiry and Proposed Rulemaking, Deregulation of Radio." The public responded with more than 20,000 comments, most of them unfavorable. Despite its unpopularity, the Commission pursued its course, and on January 14, 1981, adopted a Report and Order easing regulatory burdens on broadcasters. The Office of Communications of the United Church of Christ (UCC), Classical Radio for Connecticut, Inc. (CRC), Henry Geller and the National Association for the Advancement of Colored People (NAACP), subsequently filed petitions for review of the Order with the Court of Appeals.

The petitioners claimed that virtually every section of the Order violated either the Communications Act or the requirements of the Administrative Procedure Act (APA). According to the court, the APA empowers it to set aside orders made outside of an agency's authority or without a rational basis. The court found rational rule-making necessitates that an agency address public comments in the rulemaking proceedings, consider alternatives, explain its rejection of those alternatives and the adoption of policies which depart from prior standards. According to the court, the FCC sufficiently met these requirements in all sections of its order except that which dealt with program logs.

Petitioners specifically attacked the FCC's decreased emphasis on program categories - religious, educational, public affairs, etc. - and quantity requirements for non-entertainment programming as inconsistent with the Communications Act. The court disagreed, noting that over the years the courts, legislature and even the FCC have interpreted the Act as requiring broadcasters to address community concerns - and nothing more. The petitioners failed to show that the Act mandated certain types of programming. In fact, such a content requirement might be inconsistent with the First Amendment, said the court.

The petitioners also opposed allowing stations to base nonentertainment programming decisions on their audiences and on services provided by other stations in the market. They feared this would lead to a decrease in the diversity of information sources and to less minority programming. Since the FCC contended that financial survival required specialization, the court upheld the FCC's decision as one based on logical argument.

Regarding the issue of the elimination of ascertainment requirements, the NAACP charged that (1) the Commission did not adequately explain reasons for its shift in policy; (2) its decision lacked factual basis; and (3) elimination of the rule would require review of programming content which might violate the First Ammendment. In rejecting these arguments, the court concluded that the FCC has broad discretion in this area and its cost benefit analysis sufficiently supported the policy shift. The court also found that the amount of content review would not change since under the prior regulatory scheme, the Commission had to analyze content in order to determine whether a station met its community obligations.

In upholding the FCC's elimination of commercial quota guidelines, the court found the FCC's reasoning rational and said that it trusted the FCC to revise its ruling if the market does not sufficiently limit overcommercialization.

The court concluded its analysis by remanding the section of the order regarding program logs. It asked the Commission to reconsider its proposal in light of the other regulatory changes. Reconsideration was necessary since under the new regulatory scheme, petitions to deny renewals will provide the primary means for determining whether stations have fulfilled their public interest obligations. The FCC's proposed programs issues list would not provide enough information to establish a prima facia case for nonrenewal, in the court's view. The FCC has responded by releasing a "Further Notice of Proposed Rule Making." The Notice solicited comments and posed options concerning program logs. The Notice also indicated the FCC's tentative preference for retention of an issues/programs list and a complete record of all issue-oriented programming. This record would include the issues discussed in a program along with the date, time, and duration of the broadcast. The FCC has yet to make a final decision on the logs issue.

While the public awaits the FCC's decision on program logs, it can be assured that guidelines on commercial and nonentertainment program levels and formal ascertainment requirements have been swept away in the spirit of deregulation. Unfortunately, noted the court, this deregulation was the product of the unrepresentative bureaucracy and judiciary.

Geller v. Federal Communications Commission, 707 F.2d 1413 (D.C. Cir. 1983) [ELR 5:6:9]

Federal Communications Commission's elimination of formal ascertainment requirements for small commercial television station licensees is upheld

One of the more arduous tasks imposed on broadcast licensees by Federal Communication Commission regulations is the ascertainment of community "problems, needs and interests." In 1971, the Commission issued a Primer on Ascertainment of Community Problems by

Broadcast Applicants. The Primer required all new and renewal applicants to determine the demographics and the economic, social, racial and ethnic composition of the area of license. The applicant then was required to conduct two surveys in the six month period prior to filing an application - a survey consisting of interviews with community leaders representing a cross-section of the community and another survey involving interviews with a random sample of the community.

Soon after the release of the Primer, small market broadcasters began to comment that the requisite ascertainment procedures were an unnecessary, impractical and wasteful ritual, particularly because broadcasters in smaller communities are likely to be well-acquainted with all of the elements comprising the community. In response to such comments, the FCC, in 1975, established a three-year experimental small market exemption for commercial radio and television license renewal applicants serving communities of less than 10,000 persons which are outside all Standard Metropolitan Statistical Areas.

At the end of the test period, the Commission decided to adopt the small market exemption to the ascertainment regulations. This decision was based on the absence of formal protests filed against the exempt licensees during the three-year period. In 1981, ascertainment formalities were deleted for all radio broadcasters, and the Commission affirmed the permanent exemption from ascertainment formalities which was granted to small commercial television stations, emphasizing that the exempt licensees apparently were meeting their obligation to provide programming responsive to the problems, needs and interests of their communities.

The National Black Media Coalition contended that the exemption from documentation and reporting requirements which was granted to the small market licensees was arbitrary, capricious and without any basis in the record. The Coalition noted that the Commission had not conducted a rigorous evaluation of the data derived during the experimental period. But the FCC's decision not to conduct a statistical analysis of test results did not invalidate its conclusions. The finding that the exempt stations were providing responsible programming in as satisfactory a manner as were non-exempt stations was a reasonable determination, a Federal Court of Appeals has declared in affirming the FCC's decision.

National Black Media Coalition v. Federal Communications Commission, 706 F.2d 1224 (D.C.Cir. 1983) [ELR 5:6:10]

Broadcasters were not required to investigate sponsors of advertisements opposing California's anti smoking initiative, rules Federal Court of Appeals

The Communications Act of 1934 requires broadcast licensees to identify the sponsors of paid political advertising at the time the ads are broadcast. Licensees also are under an obligation to make reasonably diligent inquiries to learn the true sponsor of ads when they have reason to think it is someone other than the apparent sponsor.

The issue of the scope of a licensee's duty to investigate arose in a proceeding instituted before the Federal Communications Commission by a political action committee known as "Yes on IO." Yes on 10 supported Proposition 10, an initiative presented to California voters in a 1980 referendum. The proposition would have required separate smoking and nonsmoking areas in designated public locations. Advertisements opposing the initiative were prepared by a political action committee called "Californians Against Regulatory Excess," and stations broadcasting the advertisements identified this committee as the sponsor of the ads.

The Yes on 10 group claimed, however, that the tobacco industry was the true sponsor of the ads and that the stations had been provided sufficient information to require them either to so identify the sponsor or to conduct a "diligent" investigation of sponsorship. Yes on 10 eventually asked the FCC to order broadcasters to display the words "Paid for by the tobacco industry" on the Regulatory Excess ads, but the FCC declined to issue such an order.

Federal Court of Appeals Judge Bork has agreed with the FCC that the licensees in this case had not failed to exercise reasonable diligence in refusing to inquire into the sponsorship of Regulatory Excess ads. Although the tobacco industry apparently was supplying the committee with almost all of its funding, it was claimed that the industry did not exercise editorial control over the committee's ad campaign.

Judge Bork stated that a licensee confronted with the type of undocumented allegations and rebuttals present in this case is not required by section 317 of the Communications Act to look behind the "plausible representations" of a sponsor that it is the real party in interest. Furthermore, it was noted that the imposition on licensees of a more stringent duty to investigate might create an 'unposing range of administrative and constitutional difficulties.

Loveday v. Federal Communications Commission, 707 F.2d 1443 (D.C. Cir. 1983) [ELR 5:6:11]

Connecticut court refuses to enforce noncompetition covenant in employment agreement between newscaster and television station

A Connecticut trial court has refused to enforce a noncompetition clause contained in a contract between newscaster Patrick J. Sheehan, the "number one news personality" in Connecticut, and WTNHTV, Channel 8 in New Haven.

Sheehan began working as a news reporter and weekend anchor on Channel 8 in 1971. In 1974, he hoisted away to work in a similar capacity at WFSB-TV, Channel 3 in Hartford. Then, in 1979, Sheehan dropped in again at Channel 8. He signed a three-year contract which provided, in part, that upon the termination or expiration of Sheehan's employment, Sheehan would be restricted for a maximum period of one year from rendering (with two exceptions) "any on-the-air services or making any on-the-air appearances, live or recorded, over the facilities of any other radio or television station, or [Cable-TVI system licensed to serve or operating within Station's market. . . ." When the Channel 8 contract expired in November 1982, Sheehan did not enter into a new contract with it. He continued, however, to provide his services to the station until April 1983. But in June 1983, Sheehan resurfaced as news anchor at Channel 3.

Channel 8 sought to enforce the non-competition clause in Sheehan's contract, but a Connecticut trial court has refused to issue the requested injunctive relief on the ground that the restrictive covenant in the employment contract constituted an unreasonable restraint on employment.

The court acknowledged that Sheehan did benefit from Channel 8's investment in enhancing his status as a news personality and that the station probably would lose viewers due to Sheehan's departure. Thus, Channel 8 had a "legitimate right" to protect its interest by means of a non-competition covenant. However, in this case, the non-competition provision was ruled overbroad in several respects. First, Sheehan was restrained from any type of on-the-air performance. The restricted activity was not limited to the broadcasting of news. This broad restriction would substantially affect Sheehan's ability to earn a living and served to protect no legitimate interest of Channel 8. The provision also was overbroad in its designation of the restricted area of noncompetition as the "station's market." Channel 8 argued that the term was limited to the geographic area technically defined by Arbitron as the station's Area of Dominant Influence. But the court found no evidence that this technical meaning was intended by the parties. Therefore, the market in this case might include Channel 8's entire viewing area, which reaches portions of several other states.

The court declined to "rewrite" the on-the-air services or geographic area provisions to give them a more limited application, and, accordingly, entered judgment against the station.

Capital Cities Communications, Inc. v. Sheehan, Case No. CV-83-0218242-S (New Haven Dist.Ct., July 21, 1983) [ELR 5:6:11]

Public official's lefter to stores concerning controversial board game did not violate First Amendment rights of game's distributor and was not defamatory

The creators of a board game entitled "Public Assistance - Why Bother Working for a Living" have been denied relief in an action alleging the violation of their First Amendment rights by certain government officials. The game, distributed by Hammerhead Enterprises, Inc., attracted intense negative reaction due to its distorted presentation of the welfare system. One of the unfavorable responses to the game was expressed by Stanley Brezenoff, the Administrator of the Human Resources Administration of the City of New York. In November 1980, Brezenoff addressed a letter to 13 New York area department stores urging the stores to refrain from carrying the game. Several stores chose not to order the game, but there was no evidence suggesting that any store acted directly in response to Brezenoff's letter.

A Federal District Court dismissed Hammerhead's complaint, finding that Brezenoff's letter did not constitute censorship and was not defamatory since it was a statement of accurate facts and a good faith expression, of Brezenoff's personal opinion. A Federal Court of

Appeals has affirmed this ruling, noting that Brezenoff's letter did not contain any implied threats to use coercive state power to stifle protected speech, and had not in any way deterred the distribution of the game.

The appeals court also rejected Hammerhead's defamation claim, which was based on the argument that Brezenoff, by urging the suppression of an unpopular viewpoint, acted against the public interest and hence, expressed a false and defamatory position with respect to the creators of the game. Federal Court of Appeals Judge Irving R. Kaufman pointed out that the United States Constitution does not permit the imposition of liability for expressing "so-called 'false ideas,' " however controversial.

Hammerhead Enterprises, Inc. v. Brezenoff, 707 F.2d 33 (2d Cir. 1983) [ELR 5:6:12]

Anti-noise ordinance is upheld as constitutional, except for its prohibition against "unnecessary" noise, in suit by owners of stadium used for music concerts and baseball games

A Federal Court of Appeals has upheld the constitutionality of most of the provisions of the Charlotte (North Carolina) Noise Ordinance. The owners and operators of a sports and entertainment stadium located in Charlotte had challenged the 1980 ordinance - which regulated the use of sound-amplifying equipment in private parks - on due process, equal protection and free speech grounds.

A Federal District Court had ruled that the provision of the ordinance which prohibited "unnecessary" noise was unconstitutionally vague, and that another provision of the ordinance, which granted an exemption from liability in certain circumstances, was unconstitutionally vague.

The District Court therefore granted injunctive relief to the stadium operator against the enforcement of the ordinance.

On appeal, Federal Court of Appeals Judge Donald Russell affirmed the District Court finding that the use of the term "unnecessary" in the ordinance was unconstitutionally vague. But the court held that this finding did not provide a sufficient basis for invalidating the other provisions of the ordinance. The exemption section was precise in setting forth the specific volume of sound allowable at designated hours, stated Judge Russell. Thus, the injunction against the enforcement of the statute was vacated except insofar as the injunction pertained to that part of the ordinance prohibiting "unnecessary" noise.

Jim Crockett Promotion, Inc. v. City of Charlotte, 706 F.2d 486 (4th Cir. 1983) [ELR 5:6:12]

Louisiana court refuses to enjoin coach Bum Phillips' pregame appearances on radio program, because competing broadcaster failed to establish unconditional right to Phillips' services

In 1981, football coach Bum Phillips entered into a contract with Insilco Sports Network in which Phillips agreed to perform on a certain number of pregame shows on WGSO, Insilco's New Orleans affiliate. The terms of the agreement were set forth in a letter sent to Phillips on April 3, 1981. In response, on April 15, 1981, Phillips' agent allegedly mailed a letter to WGSO. The letter purportedly included several revisions of the terms proposed in the April 3rd letter and also stated that "should Insilco Broadcasting and/or WGSO fail to be the official flagship station for the New Orleans

Saints Broadcast in the 1982 or 1983 seasons this agreement would be null and void those years."

When Insilco sought to bar Phillips from performing on a pregame radio show scheduled to be broadcast over WWL in New Orleans, Phillips responded that Insilco no longer possessed the exclusive right to his services because the company had not obtained the exclusive right to broadcast the Saints' games in 1982 and 1983.

A Louisiana appellate court has affirmed a trial court ruling denying Insilco's petition for a preliminary injunction. The court found, on the basis of the April 15th letter, that there was no meeting of the minds between the parties as to the relationship between Phillips' obligation to Insilco and Insilco's retention of the rights to broadcast the Saints' games. Insilco had failed to establish by a preponderance of the evidence that Phillips had undertaken an exclusive, unconditional obligation to the company.

Phillips v. Insilco Sports Network, Inc., 429 S.2d 447 (La.App. 1983) [ELR 5:6:13]

Basketball referee was not given adequate notice of charges, rules Federal District Court in voiding discipline imposed by union

In contrast to their usual roles, basketball referees Earl Strom and Richard Baretta had an altercation with one another in November 1979 during halftime of a basketball game the two were officiating. As a result of the incident, the Commissioner of the NBA fined Strom $2,500. Subsequently, Strom discussed the incident, along with other topics, in an interview that appeared in the March 1981 issue of Referee Magazine. Baretta, in turn, claimed that Strom's "conduct" was critical of him and detrimental to basketball and Baretta requested a grievance committee investigation. After a hearing, the Executive Board of the National Association of Basketball Referees found Strom guilty of the charges against him and imposed a three-year probation period.

Strom contended that the discipline imposed by the Association violated section 101 of the LaborManagement Reporting and Disclosure Act because he was not afforded written specific notice of the charges against him prior to the hearing.

A Federal District Court has agreed, stating that a notice of the hearing, which was issued six months after the magazine interview appeared, was unclear and inadequate. There was no reference in the notice to the infraction eventually found by the Board - a "pattern of conduct aimed at the destruction of Richard Baretta's effectiveness as a referee." The fact that Strom may have been aware of the alleged misconduct did not serve to cure the deficiency in the notice. And Strom had not waived his statutory right to specific written charges, noted the court, in an order declaring the discipline imposed by the union null and void.

Strom v. National Association of Basketball Referees, 564 F.Supp. 250 (E.D.Pa. 1983) [ELR 5:6:13]

Director's employment agreements with television commercial production company violated California's Talent Agencies Act rules California Labor Commissioner

The Film Consortium, a television commercial production company, acted as an unlicensed talent agent in obtaining employment for director Brian Cummins, the California Labor Commissioner has ruled. This apparently is the first time that the provisions of the Talent

Agencies Act of 1978 have been applied to a company engaged, at least partially, in the production of television commercials.

Hearing Officer Carl G. Joseph initially noted that the Talent Agencies Act and its predecessor statutes have been applied "to encompass any unlicensed [employment] procurement activity, regardless of the procuring entity's overall activity." It was emphasized that the purpose of the Act - to protect artists from exploitation - requires its application to even a single instance of procuring employment. In this proceeding, the evidence showed that The Film Consortium had engaged in "continuous and systematic" acts of obtaining employment for Cummins by arranging about 90 commercials for the director over a three-year period.

The Film Consortium provides its services to directors pursuant to long-term employment contracts. The company sells a director's services to advertising agencies when it submits bids to produce commercials. But the essential information required to develop the bids generally is determined by the director, noted Hearing Officer Joseph. And although an advertising agency may consider the amount of the bid in selecting a production company, the most significant factor in awarding the commercial usually is the identity of the director. There was testimony that an agency may choose a higher bid in order to obtain the services of a preferred director. The advertising agency then pays the entire cost of producing the commercial. And the actual production work, at least on commercials "produced" through The Film Consortium, has been performed by the director and by free-lance production personnel selected by the director. Even if The Film Consortium on occasion did act as a production company, it still regularly engaged in the type of employment procurement activity regulated by the Act, stated the hearing officer.

Furthermore, Cummins was not an employee of The Film Consortium. He selected and had complete control over the projects on which he preferred to work. Nevertheless, The Film Consortium was compensated for its services in obtaining employment for Cummins through a 35% markup on the cost of the commercial. This markup was characterized by the hearing officer as "the equivalent of a commission on Mr. Cummins earnings." The Film Consortium's argument that it had suffered losses on the commercials directed by Cummins was found to be irrelevant with respect to the question of whether the Act would apply to the company's employment procurement activities.

It also was found that The Film Consortium violated its fiduciary duties as a talent agency by the manner in which the company circulated to advertising agencies its "corporate reel." A corporate reel is a videotape or film reel containing the work of several directors. The commercials included on the Film Consortium's reel were identified as the work of particular directors only on a single piece of paper. As described by Hearing Officer Joseph, if the paper were to be separated from the reel, an advertising agency might be unable to identify the director responsible for a particular commercial on the reel. This potential confusion was "a deliberate result of the use of the corporate reel. The evidence showed that the Film Consortium's purpose in using the reel was to obscure the identity of Mr. Cummins . . . and thereby to attribute or infer such work to other directors or to [The Film Consortium] itself."

The hearing officer concluded that Cummins agreements with The Film Consortium of February 1, 1980 and June 10, 1981 were void and unenforceable. The amount of money due Cummins from the company will be determined in a separate hearing.

Cummins v. The Film Consortium, Case No. TAC 5-83, Before the Labor Commissioner of the State of California, Division of Labor Standards Enforcement (Oct. 4, 1983) [ELR 5:6:13]

Federal District Court rules that unauthorized merchandiser of Elvis Presley memorabilia is entitied to damages for the wrongful injunction which had been issued in an action brought by Presley's exclusive licensee

Pro Arts, Inc, has donned its blue suede shoes in anticipation of an award of damages for the wrongful injunction issued by a Federal District Court in the longstanding Elvis Presley merchandising action brought against the company in 1977 by Factors Etc., Inc. and Boxcar Enterprises.

The permanent injunction prohibited Pro Arts from marketing Presley memorabilia. However, the District Court's ruling subsequently was reversed by the Court of Appeals on the ground that under Tennessee law there is no descendible right of publicity. (ELR 5:2:7) The District Court, accordingly, vacated the stay which had been granted in the action and entered summary judgment dismissing the complaint against Pro Arts.

With respect to damages, Judge Tenney has held that the discharge of the injunction bond did not preclude an award of damages to Pro Arts. Factors also argued that the circumstances of the case justified the denial of damages, citing: the initial affirmance of the preliminary injunction by the Court of Appeals; Pro Art's failure to argue at the preliminary injunction stage of the case that Tennessee law should apply in the action; and the difficulty of anticipating that the Court of Appeals would base its ruling on the Sixth Circuit Court of Appeals' view of Tennessee law. Nevertheless, Judge Tenney stated, he would not decline to award damages simply because Factors acted in good faith. In all, Factors, by virtue of the injunction "had the benefit of an exclusive license to which they were ultimately found not entitled," and Pro Arts will be awarded damages not to exceed the $100,000 value of the injunction bond.

Factors Etc., Inc., v. Pro Arts, Inc., 562 F.Supp. 304 (S.D.N.Y. 1983) [ELR 5:6:14]

Producers of the television program "Casey Stengel" are denied summary judgment in infringement action brought by author of Stengel biography

By following a somewhat circuitous route to a not entirely predictable conclusion, a Federal District Court judge in New York has exhibited, in a manner of speaking, certain of the distinguishing features of "Stengelese." In leading off his opinion, Judge Carter noted that the life of "legendary" baseball manager Casey Stengel has been scrutinized by many authors. Among them was Maury Allen, a sportswriter and journalist, who in 1979, published a biography of Stengel entitied You Could Look It Up, The Life of Casey Stengel. Soon after, in l981, a television program entitled "Casey Stengel" was presented in which an action recalled incidents in Stengel's lifetime.

Allen claimed that the writers and producers of "Casey Stengel," including the Susskind Hall of Fame Corporation and Hallmark Cards, had infringed his copyrighted work. The producers moved for summary judgment tossing out the claim that while portions of the program may have been "borrowed" from Allen's book, such portions were non-copyrightable historical facts and quotations.

Judge Carter first signaled to the parties that the central issues in an infringement action - a showing of copying and of substantial similiarity between the allegedly infringing piece and the original work generally are not susceptible to a motion for summary judgment. The producers argued, however, that in this case the court was not even called upon to examine the issue of substantial similarity because non-copyrightable historical and factual material was involved.

Allen responded that the producers had copied his protected "Expression" of incidents in Stengel's career. But the court pointed out that there were inconsistencies in Allen's characterization of 13 of the 17 passages which allegedly were copied. In his deposition, Allen had declared that the passages in question were quotations; but in a subsequent affidavit, Allen stated that one anecdote was "faction" - a mixture of fact and fiction that he created - and that another passage also was invented, albeit suggested by Stengel's "style of thinking and speaking about his managerial philosophies." The court questioned the "machinations" which produced these pinch responses. Nevertheless, since a genuine issue of material fact appeared to be present with respect to the source of the passages in question, the producers' motion for summary judgment was denied.

Maury Allen v. Susskind Hall of Fame Corp., CCH Copyright Law Reports, para. 24,471 (S.D.N.Y. 1982) [ELR 5:6:15]

City's denial of cable television franchise to company which had provided cable service for 15 years did not violate antitrust laws

During the fifteen years that Hopkinsville Cable TV provided cable television service to the city of Hopkinsville, Kentucky, the company operated on the basis of a license which had to be renewed annually. In 1981, Hopkinsville asked the city to grant it a franchise. The city did pass an ordinance authorizing the award of a non-exclusive 15-year franchise for the provision of cable television service. However, the franchise was not awarded to Hopkinsville. Instead, it was awarded exclusively to a company known as Pennyroyal Cablevision.

As a result, Hopkinsville filed a complaint in Federal District Court, alleging that Pennyroyal, and certain of its individual stockholders, the city of Hopkinsville, the city's mayor and its attorney violated federal antitrust laws. Hopkinsville claimed that the award of the cable television franchise to Pennyroyal constituted a refusal to deal with Hopkinsville in violation of section 1 of the

Sherman Act, as well as conspiracy to monopolize the cable television market in Hopkinsville in violation of section 2 of the Sherman Act.

A Federal District Court in Kentucky has granted Pennyroyal's motion for summary judgment on the ground that the company and the govemment parties are immune from antitrust liability in connection with the award of the cable television franchise under the "state action" exemption to the Sherman Act, announced in Parker v. Brown, 317 U.S. 341 (1943). Judge James F. Gordon observed that the state of Kentucky has granted municipalities the authority and responsibility to issue franchises to public utilities seeking to enter the municipal marketplace, including the authority, according to the court, to create a monopoly for a provider of cable television service. The court distinguished Hopkinsville's action from the situation involved in Community Communications Co v. Boulder 455 S.Ct. 40 (1982)

(ELR 3:19:5), in which the city of Boulder was not accorded immunity from antitrust liability in connection with its regulation of cable television expansion. In Boulder, the Supreme Court declared that the state of Colorado had taken a position of "mere neutrality" toward the regulation of cable television franchises. Hence, Boulder could not avail itself of the "state action" exemption.

The court also ruled that Pennyroyal and its shareholders were shielded from antitrust liability under the Noerr-Pennington doctrine which established that "the First Amendment right to petition the govemment prevents the Sherman Act or other antitrust law from applying to attempts by private individuals to obtain governmental action 'that would produce a restraint or monopoly. ' " Pennyroyal's application to obtain a monopoly from the city was "precisely the type of conduct protected." Noerr-Pennington also protected the city officials from antitrust liability for acts in support of Pennyroyal not otherwise protected under the state action exemption.

Hopkinsville's claim that the city's failure to grant the company a franchise violated the First Amendment was rejected, because the denial was not an attempt to influence the content of cable television available in Hopkinsville. Furthermore, the denial of a franchise did not deprive Hopkinsville of a vested property right without due process of law, particularly in view of the fact that Hopkinsville never had operated under a franchise from the city.

Hopkinsville Cable TV, Inc. v. Pennyroyal Cablevision, Inc., 562 F.Supp. 543 (W.D. Kentucky 1982) [ELR 5:6:15]

Summary judgment denied to television station alleging infringement of a copyrighted news item by a television clipping service

On March 11, 1981, WXIA-TV in Atlanta, during its evening news program, broadcast a one minute, 45 second report concerning a jogging exercise program known as a "Fitness Trail." The story was videotaped by TV News Clips, a company that monitors and records television news shows, and provides to its clients copies of news stories conceming them. WXIA claimed that News Clips had infringed its copyright in the "Fitness Trail" segment and sought an injunction barring further distribution of any videotaped copies of the material.

A Federal District Court judge has denied WXIA's motion for summary judgment. News Clips had argued that its use of the news item constituted a fair use, and the court agreed that there existed factual questions with respect to News Clips' argument. One such question was the extent to which WXIA engaged in the practice of providing videotapes of its own programing, for a fee, to interested parties. The court expressed some uneasiness as to whether a presumably impartial news organization might ethically engage in the extensive sale of videotape copies of its programming. Factual questions regarding WXIA's operations in this area remained to be resolved, stated the court, prior to the consideration of the other elements of a fair use defense.

Pacific and Southern Co. v. Duncan, CCH Copyright Law Reports, para. 25, 421 (N.D.Ga. 1982) [ELR 5:6:16]

Court upholds million-dollar jury verdict against Syufy Enterprises on claims that company

monopolized the exhibition of first run films in San Jose, California

The way to San Jose is clearly marked by the brickbats that have been hurled during the lengthy antitrust lawsuit between Syufy Enterprises and American Multicinema. Both companies are theatre operators in Santa Clara County, California. AMC operates 24 screens in the area; Syufy operates 15 screens and four drive-in theater complexes in the area.

In 1979, Syufy filed an action alleging that since 1973, AMC and its film buying and booking agent, as well as the parent company of both corporations, combined with various motion picture distributors to restrain trade in the exhibition of first run films in Santa Clara County in violation of the Sherman Act. Among the factors cited by Syufy in support of its complaint, which charged that AMC acted with the intent to destroy Syufy's ability to compete for major first run films, were: AMC's hiring of Syufy's head film buyer in order to learn Syufy's confidential business operations; surrounding Syufy's theatres in Santa Clara County with 18 new AMC screens; operating the Santa Clara theatres below cost and subsidizing its losses with funds from AMC's nationwide network of theatres; attempting to force independent exhibitors into splitting agreements; and the block booking of films in AMC theatres.

AMC filed a counterclaim for damages and injunctive relief on the basis of Syufy's alleged violations of section 1 and 2 of the Sherman Act. According to AMC, Syufy possessed monopoly power in both the indoor and drive-in exhibition of major films in the San Jose area and used this power and conspired with various distributors and exhibitors to restrain trade and eliminate competition in the exhibition of major first run films in the San Jose area of Santa Clara County. AMC's charges were that: Syufy conspired to exclude AMC, via a system of unlawful clearances, from the opportunity to exhibit first run films in Santa Clara County simultaneously with the exhibition of such films by theatres owned and operated by Syufy; that Syufy consistently has paid substantially less in film rental fees than would have been paid under AMC bid terms; that Syufy allegedly excluded AMC from the opportunity to compete fairly with Syufy by the rigging of bids and sham awards to Syufy of license agreements by the co-conspirators; and that Syufy conditioned its licensing of first run films at its drive-in theatres in Santa Clara County upon the award of license agreements to Syufy's indoor theatres under terms and conditions inferior to exhibition license terms proposed by AMC.

Eventually, a jury returned a verdict in favor of AMC and awarded the company $1 million in damages. A

Federal District Court has denied Syufy's motion for judgment notwithstanding the verdict or for a new trial.

In its post-trial motion, Syufy challenged the finding on AMC's monopolization claim by arguing that without evidence of Syufy's complicity with any exhibitors or distributors, and given a competitive bidding market, the unilateral action of an exhibitor could not give rise to liability for monopolization because it is the distributor who decides where films will be exhibited. The court rejected this "novel legal theory," pointing out that the question of whether each exhibitor was able to receive fair consideration of its bid was the essence of the lawsuit.

The court also ruled that AMC had presented sufficient evidence of Syufy's market share and monopoly power to support the jury finding of monopolization. Syufy's power to exclude competition - an essential element of monopoly power - was demonstrated by evidence that

Syufy had successfully created barriers to entry into the exhibition market at a time when the San Jose market was growing substantially and when Syufy had more than doubled its own exhibition capacity. AMC also presented substantial evidence that Syufy engaged in anticompetitive conduct to maintain its monopoly power, including alleged threats made by Syufy's owner to "run AMC out of town if AMC did not either sell out to Syufy or get out of San Jose," and the acquisition by Syufy of its largest competitor shortly before the commencement of the lawsuit. The third element required to establish monopoly casual antitrust injury - also was shown by a study which demonstrated that AMC's theatres in the relevant market were substantially less profitable than comparable AMC theatres in two other markets. The study, furthermore, was a sufficient basis on which to assess damages, stated the court.

The elements necessary to establish AMC's claim for attempt to monopolize also were present, the court ruled.

Syufy Enterprises v. American Multicinema, Inc., 555 F.Supp. 418 (N.D.Cal. 1982) [ELR 5:6:16]

Court refuses to dismiss indictment charging copyright infringement of the film "Raiders of the Lost Ark"; erroneous statement concerning registration of film's copyright did not invalidate search warrant

In a spirit of derring-do, the FBI, in June 1981, apprehended stolen prints of the films "Raiders of the Lost Ark" and "On the Right Track." A grand jury indictment followed, charging several individuals with receiving and duplicating the stolen films and with copyright infringement. In ruling on motions to suppress evidence seized by the FBI pursuant to a search warrant, a Federal District Court in Illinois has ruled that there had been sufficient probable cause to support the issuance of the warrant. The court noted that the FBI, after receiving a tip from an informant, conducted an independent investigation of the circumstances surrounding the removal of a print of the "Raiders" film from a theater in Benton Hill, Michigan; and this investigation provided the requisite corroboration of the informant's tip.

It also was alleged that the search warrant was improperly issued because the supporting affidavit erroneously stated that "Raiders" had been copyrighted and that the registration of the copyright was pending. The court observed that while the application for copyright registration indeed was not filed until August 1981, the statement as to registration in the application for the search warrant was "mere surplusage," and that the alleged removal of the print from the theater without permission was a criminal act whether or not the registration was in fact pending. As to the existence of a copyright in the film, the Certificate of Copyright Registration indicated that the date of publication of "Raiders" was May 29, 1981. Since a copyright in a work "subsists from its creation," a copyright necessarily existed in the film at the time when it was published, concluded the court. The motion to dismiss the indictments therefore was denied.

United States of America v. Stevens, CCH Copyright Law Reports, para. 25,454 (N.D.Ill. 1982) [ELR 5:6:17]

Briefly Noted:

Copyright.

A Federal District Court has held a Texas restaurant liable for copyright infringement because of its failure to comply with compulsory license procedures applicable to juke boxes. An investigation by BMI in 1981 disclosed the operation of a juke box performing BMI controlled compositions at the Gold Club Drive-In. The juke box did not display the required registration sticker and in fact was not registered. A letter sent by BMI to the owner of the restaurant inquiring as to the identity of the operator of the juke box went unanswered. Under the Copyright Act, the owner of an establishment may be held liable for copyright infringement if it fails to identify the operator of a juke box not displaying a registration sticker. The District Court granted BMI a summary judgment enjoining further infringement and awarded statutory damages.

Broadcast Music, Inc., v. Allen-Genoa Road, Drive In, Inc., Civil Action No. H-81-2900 (S.D.Tex., May 4, 1983) [ELR 5:6:17]

Copyright.

A Federal District Court in Minnesota has ordered O'Connell's Clover Club, Inc. to pay Broadcast Music, Inc. the sum of $2,250 representing statutory damages of $250 for each of the nine BMI copyrighted compositions infringed by the club, and has enjoined the club from further infringement of the copyrights in the musical compositions, including "Blue Suede Shoes" and "Elvira" until a General Licensing Agreement is signed with BMI.

The club had challenged, as conclusory, the affidavits submitted by BMI which served to establish the unauthorized performance of the works. This challenge was rejected by the court as was the club's questioning of BMI's proprietary rights to three of the songs. The club also claimed as an affirmative defense that BMI had failed to provide a listing of all of the songs in its repertoire. However, BMI did inform the club of the necessity to obtain a license in order to use the copyrighted musical works, and provided the club with information as to the number of composers and compositions represented by the organization. "A defense that a party lacked the knowledge that the music was copyrighted is unavailing. To allow this defense would totally defeat the purpose of the Copyright Act for all proprietors . . ." concluded the court.

Broadcast Music, Inc. v. O'Connell's Clover Club, Inc., Case No. 4-82-1076 (D.Minn., July 26, 1983) [ELR 5:6:18]

Contempt Proceedings.

A 30-day sentence imposed on the presidents of two companies found to have violated a court order enjoining the sale of unauthorized E.T. merchandise, popularized by the movie "E.T. The Extra-Terrestrial," has been reversed by a Federal Court of Appeals. In 1982, Universal Studios brought suit in District Court in New York City against four companies and obtained a preliminary injunction barring unauthorized sales of E.T. merchandise. After discovering that the sales continued, Universal initiated what it believed to be civil contempt proceedings seeking money damages. The trial judge however, found the violators to be in criminal contempt and imposed the 30-day prison sentence. The use of the courts to remedy past violations may take the form of either civil contempt remedies or criminal contempt punishment. However, in the case of criminal contempt proceedings, Federal Rules of Criminal Procedure require strict adherance to procedural rights not required in civil contempt proceedings. As these proceedings were brought under the guise of civil contempt, the lower court's ruling was found to be "alien" to proper federal procedure and was reversed.

Universal City Studios v. N.Y. Broadway International, 705 F.2d 94 (2d Cir. 1983) [ELR 5:6:18]

Labor Relations.

In 1980, American Broadcasting Companies, Inc. was ordered by the Industrial Commissioner of the Department of Labor of the State of New York to provide an additional meal period between the hours of five and seven o'clock P.M. to all employees scheduled to work a shift beginning at noon and continuing past seven P.M. A trial court annulled the Commissioner's notice of labor law violation, holding that the employees had waived their rights under the statute by entering into a collective bargaining agreement negotiated by the National Association of Broadcasting Employees and Technicians (NABET) on their behalf (ELR 4:24:7). The trial court's finding that the waiver of the specified meal period did not contravene public policy has been upheld on appeal. The appeals court stated that the relevant provisions of the collective bargaining agreement would "amply safeguard the health and well being of ABC's technical employees," and it observed that a readjustment of the scheduling of rest periods rather than the relinquishment of a statutory requirement was involved. In dissent, Justice Asch stated his view that the statutory meal period requirement was enacted to protect the health and safety of workers and could not be waived by a collective bargaining agreement. Even if the meal period provision were waivable, the NABET-ABC agreement did not refer to this provision, leading Judge Asch to conclude that there was no proof that the statute was a subject of negotiation or that the workers indeed intended to waive its protection.

American Broadcasting Companies, v. Roberts, 461 N.Y.S.2d 816 (App.Div. 1983) [ELR 5:6:18]

Libel.

A $2.5 million punitive damage award in a defamation suit brought against Doubleday & Company and its commissioned author has been upheld by a Texas appellate court. In 1972, Doubleday published a book entitled "Shadow on the Alamo" which falsely accused a member of the State Optometry Board of having been indicted three times for practicing without a license. The court noted that verification of the manuscript would have been a simple proposition and in fact was proposed by Doubleday's attorneys who had warned that the book contained "substantial problems in the area of libel." Doubleday made no effort to verify the manuscript prior to publication. The court found Doubleday's conduct to be in "reckless disregard of whether the statement was true or not," and as such not protected by the N.Y. Times v. Sullivan doctrine. Furthermore, noting that the statements made were libelous per se, the court upheld the punitive damages award even though no actual damages were awarded.

Rogers v. Doubleday & Co., 644 S.W.2d 833 (Tex.App. 1982) [ELR 5:6:18]

IN THE NEWS

Paramount Pictures is ordered to pay $576,000 to authors of "Grease" pursuant to arbitrator's award in audit claim

An arbitrator's award ordering Paramount Pictures to pay $576,000 to the coauthors of the play "Grease" has been confirmed by a New York court. The authors, Jim Jacobs and Warren Casey, had challenged Paramount's accounting of the receipts derived from the 1978 film version of the play. The audit focused on such areas of cooperative advertising, assessment of income from foreign gross receipts, general overhead, foreign taxes and interest rates. The authors also objected to Paramount's allocation of five percent of some foreign gross receipts to shorts which played on the same bill with "Grease." According to the authors' attorney, the amount of the award, based upon royalty terms in the contract conveying the movie rights to the play, indicated that arbitrator Ephraim London most likely had decided that Paramount erred in its accounting reports by $3.5 to $4 million. [Nov. 1983] [ELR 5:6:19]

Composer is awarded $241,000 in damages due to omission of his artist credit on single record

Composer Barry DeVorzon has been awarded $241,000 by a Los Angeles Superior Court jury in a breach of contract action against A & M Records involving the omission of his co-artist credit on the label copy of the hit single record "Nadia's Theme" also known as the theme from "The Young and The Restless." DeVorzon wrote, produced and performed the composition with Perry Botkin, Jr., and the single was relabeled to give DeVorzon proper credit. But it was contended that radio stations did not receive the relabeled records and that the omission of his co-artist credit damaged sales of a subsequent DeVorzon album released by Arista Records. [Nov. 1983] [ELR 5:6:19]

Distributors are awarded $277,000 in underreporting claim against Indiana exhibitor

A Federal District Court Jury in Indiana has awarded six major studios a total of $277,000 in compensatory and punitive damages, as well as as yet undetermined attorneys fees, in an action brought against William E.

Dennis, a Bloomington, Indiana theater operator. The studios alleged that the exhibitor had underreported box office receipts at the Towne Cinema during the period April 1976 through August 1980. Of particular interest was the asserted underreporting of receipts on the film "Breaking Away," which was filmed in Bloomington, and which, presumably would have raced away in attendance. [Nov. 1983] [ELR 5:6:19]

Federal District Court enjoins interception of "blacked-out" Miami Dolphin football games by Miami area bars

The National Football League and the Miami Dolphins have obtained an injunction prohibiting three bars in the Miami area from intercepting blacked-out Dolphin football games by using satellite dish antennas or earth stations, and showing the games via closed-circuit television for their patrons. By using the earth stations, the bars were able to intercept signals which were being relayed from the Orange Bowl to either the NBC or CBS operations centers in New York. The bars argued that they were exempt from copyright liability since they were exhibiting a program received on equipment "commonly used in the home." Despite the fact the most of the 400,000 earth stations currently in use are located in private homes, the receiving equipment, according to an expert witness, is "large, costly, sophisticated and anything but 'commonly used in the home.'"

The NFL contended that the interception of the games by the bars injured in-stadium attendance and lessened ticket sales.

In issuing an injunction, Federal District Court Judge James W. Kehoe ruled that the game programs embodying the live telecasts of Miami Dolphin games are copyrightable, and that the interception of the programs infiiinged the exclusive copyright held by the NFL and the Dolphins in the programs.

It should be noted that individuals with backyard earth stations will not be affected by the ruling because, presumably, such individuals are not presenting public performances of the game programs.

The decision has received a favorable reaction from HBO which, along with other copyright holders, relays hundreds of hours of programming via communications satellites. However, at this point HBO has not sought to prevent commercial establishments from picking up and showing its programming, but rather is engaged in the process of scrambling its feeds to thwart interception. [Nov. 1983] [ELR 5:6:19]

Belgian cable operators agree to pay 15% royalty fee to U.S. copyright holders

Belgian cable operators and copyright holders have signed an agreement providing for a collective royalty fee to motion picture producers, music rights owners and broadcasters. The amount of the fee will be 15% of revenues received from subscribers to Belgium's 40 cable systems. The cable systems will be authorized to carry programming originating from broadcast stations in Holland, England, France, Germany and Luxembourg as well as Belgium. The agreement, which was effective as of July 1983 and runs through December 1988, apparently is the first system instituted in a European nation for the collection and distribution of royalty payments for cable transmissions of broadcast programming. Appropriately, Belgium has the world's highest per capita penetration of cable service, with about 2.5

million cable-TV subscribers. The 15% rate, in contrast to royalty payments of 0.8% to 1% in the United States will mean that copyright holders will receive approximately $7.50 of the average annual fee paid by each subscriber. [Nov. 1983] [ELR 5:6:20]

WASHINGTON MONITOR

FCC proposes modification of "seven station" rule limiting ownership of media properties

The Federal Communications Commission has proposed to eliminate or modify its "seven station" rule which prohibits ownership by one party of more than seven AM, seven FM and seven television stations. The rule, which was adopted in 1953, was designed to promote diversification of media ownership in order to maximize the presentation to viewers of diverse viewpoints on matters of public interest, and to prevent undue concentration of economic power in the broadcast industry. The FCC, in asking for comments on alternative proposals, has stated that the rule may be limiting program diversity by restricting the potential development of new networks and new program production by group owners. The FCC also said that in view of the tremendous increase in broadcast outlets since 1953, the spectre of economic concentration may no longer provide a valid basis for the rule. [Nov. 1983] [ELR 5:6:20]

DEPARTMENTS

Book Notes:

"Counseling Clients in the Entertainment Industry 1983" and "Cable Television in a New Era"

Both of these new volumes are course handbooks prepared to supplement programs sponsored by the Practising Law Institute earlier this year.

Counseling Clients in the Entertainment Industry 1983 is a 493-page volume first distributed last spring at a program of the same name chaired by Martin E. Silfen. The book has been designed for use in conjunction with the two-volume handbook Counseling Clients in the Entertainment Industry 1982 (noted at ELR 4:4:8). The 1983 edition contains materials, including outlines, contracts and forms, on Personal Management and Legal Representation, Sound Recordings, Motion Picture Production, Theatrical Productions, Home Viewing and the New Technologies, Tax Problems, and Merchandising, Licensing and Endorsements. The book is course handbook number 156 in the PLI series.

Cable Television in a New Era was compiled for distribution last spring at a program chaired by Gary L. Christensen. It contains original articles, outlines, contracts and forms relating to recent regulatory changes and business developments in the communications industry, financial aspects of cable-TV, FCC regulation of cable-TV, copyright and antitrust issues; legislation, and the acquisition and sale of cable systems. This book is course handbook number 158 in the PLI series.

Both volumes may be ordered directly from the Practising Law Institute, 810 Seventh Avenue, New York, N.Y. 10019; phone (212) 765-5700. They are $35 each. [ELR 5:6:21]

In the Law Reviews:

Loyola Law School of Los Angeles has published Volume 3 of the Loyola Entertaimment Law Journal. It is available for $1 0.00 per copy from Loyola of Los Angeles Entertainment Law Journal. 1441 West Olympic Blvd., Los Angeles, CA 90015. Volume 3 contains the following articles:

The Music Business and the Sherman Act. An Analysis of the "Economic Realities" of Blanket Licensing by Lionel Sobel, 3 Loyola Entertainment Law Journal 1 (1983)

A Legal and Statistical Analysis of the National Football League Scheduling Format. Most Teams Can't Win for Losin' by Ethan Lock and J. Michael Gratz, 3 Loyola Entertaimment Law Journal 51 (1983)

The Right of a Recording Company to Enjoin an Artist from Recording for Others by Jay L. Cooper, 3 Loyola Entertainment Law Journal 79 (1983)

Works Made for Hire in International Copyright Law by Richard Colby, 3 Loyola Entertainment Law Journal 87 (1983)

The Section 110(5) Exemption for Radio Play in Commercial Establishments: A Narrowly Construed Music Copyright Haven by Robert Thome, 3 Loyola Entertainment Law Journal 101 (1983)

Decreasing Sports Violence Equals Increasing Officials' Liability by A. Diane Carpenter, 3 Loyola Entertainment Law Journal 127 (1983)

Copyright Protection for Video Game Programs and Audiovisual Displays, And Substantial Similarity and the 'Scope of Audiovisual Copyrights for Video Games by Theodore J. Grabowski, Jr., 3 Loyola Entertainment Law Journal 139 (1983)

Master Recordings: How Does the California Sales Tax Apply? by Edward G. Samaha, 3 Loyola Entertainment Law Journal 163 (1983)

Califomia Entertainment Lawyer Directory, 3 Loyola Entertainment Law Journal 179 (1983)

Paying the Piper: Performance Rights in Musical Recordings by Gary L. Urwin, 5 Communications and the Law 3 (1983) (published by Earl Coleman Enterprises Inc., P.O. Box 143, Pine Plains, NY 12567)

"The Play's The Thing": Legal Rights in Legitimate Theatre by Joseph Calderon, Gerald Schoenfeld and Alvin Deutsch, 5 Communications and the Law 59 (1983) (published by Earl Coleman Enterprises Inc., P.O. Box 143, Pine Plains, NY 12567)

Art Update: Tax Deductions for Self-Created Works of Art by Larry D. McBennett, John Paul and Joan Steams, 30 Federal Bar News & Journal 342 (1983) (published by Federal Bar Association, 1815 H St. NW, Suite 408, Washington D.C. 20006)

Professional Team Sports New Legal Arena: Television and the Player's Right of Publicity by James W. Quinn and Irwin H. Warren, 16 Indiana Law Review 487 (1983)

Crossed Signals. Copyright Liability for Resale Carriers of Television Broadcasts, 16 Indiana Law Review 611 (1983)

Every Home Should Have One! the Betamax as a Staple Article of commerce in Universal City Studios, Inc. v. Sony Corp. of America by Nancy G. Carlin, 16 UC Davis Law Review 209 (1982)

Copyrightability of Video Games: Stern and Atari, 14 Loyola University of Chicago Law Journal 391 (1983)

Defamation by Fiction, 42 Maryland Law Review 387 (1983)

Problems in Giving Obscenity Copyright Protection: Did Jartech and Mitchell Brothers Go Too Far? by Kurt L. Schmalz, 36 Vanderbilt Law Review 403 (1983)

Snow v. the Eaton Centre: Wreaths on Sculpture Prove Accolade for Artists' Moral Rights by David Vaver, 8 The Canadian Business Law Journal 81 (1983) (published by Canada Law Book Ltd., 240 Edward Street, Aurora L4G 3S9 Canada)

Speech and Press in National Emergencies by Morris D. Forkosch, 18 Gonzaga Law Review 1 (1983)

The Applicability of the Equal Time Doctrine and the Reasonable Access Rule to Elections in the New Media Era by Robert S. Koppel, 20 Harvard Journal on Legislation 499 (1983)

Copyright Infringement: Use of Song "Cunnilingus Champion of Company C" Not a Fair Use of Song, "Boogie Woogie Bugle Boy of company B, " 1 3 Rutgers Law Journmal 839 (1982)

Fair Trial v. Free Press. Who's on First? by Honorable Arthur L. Alarcon, Anna R. Gustafson and Alan C. Messarra, 14 University of West Los Angeles Law Review 1 (1982)

Section 43(a) of the Lanham Act: A Statutory Cause of Action for False Advertising by Gary S. Marx, 40 Washington and Lee Law Review 383 (1983)

Symposium on International Art Law, 15 New York University Journal of International Law and Politics 757 (1983)

The Americanization of Droit Moral in the California Art Preservation Act by Shelley A. Longmuir, 15 New

York University Journal of International Law and Politics 901 (1983)

Beckton: The Law and the Media in Canada reviewed by Anthony H.A. Keenleyside, 14 Ottawa Law Review 621 (1982)
[ELR 5:6:22]