

RECENT CASES

Termination of copyright assignment by heirs of co-author of "Who's Sorry Now" cut off music publisher's right to further royalties from pretermination recordings of the song

Under the new Copyright Act, Congress extended the duration of copyrights in works created before 1978 from 56 years to 75 years. This added life of copyright has become known as the "19-year extended term" of copyright. A primary issue facing Congress in enacting this provision was, who should be given the chance to benefit from the extended term? Congress concluded that there were strong reasons for giving authors the opportunity to benefit from the extended term, and allowed authors to exercise control over the additional 19 years.

The law accomplishes this by providing authors with the right to "terminate" any "transfer" of rights that occurred before January 1, 1978. It does this in the so-called "termination of transfers" provision of the Copyright Act. The result is a reversion of the copyright to the author, so that authors (or their heirs) will benefit from the exploitation of the work during the 19-year extended life of the copyright. The reversion of rights, however, is subject to a number of limitations.

The meaning and application of one of the limitations - called the "derivative works exception" to the termination of transfers provision - was the subject of a lawsuit that has been closely followed in the music business.

The facts in the case were undisputed. The heirs of one of the composers of the song "Who's Sorry Now" properly exercised their rights under the Copyright Act by terminating the composer's grant to a music publishing company, Mills Music, of all rights in the extended

19-year term. Upon termination, the composer's share in the copyright in the song reverted to the composer's heirs, who then had the right to exercise control over the song for the duration of the copyright.

It was the position of the music publisher that such control was not absolute, and actually was shared to a great extent with the music publisher, at least with respect to the termination.

The publisher pointed to Section 304(c) of the Copyright Act, which provides that a reversion of rights upon termination is subject to the following limitation:

"A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after termination of other derivative works based upon the copyrighted work covered by the terminated grant."

It was undisputed that a sound recording is a derivative work. Thus, the music publisher contended that the "derivative works exception" preserves the publisher's right to share in mechanical royalties earned from the sale of sound recordings licensed by it and prepared by record companies before termination of the grant by the heirs, and to continue licensing new releases of old derivative works that it first licensed prior to the termination.

Last year, District Judge Edward Weinfeld of the Federal District Court in New York City agreed. (ELR 4:7:1). Judge Weinfeld concluded that the publisher would have no rights with respect to sound recordings or other derivative works prepared after the termination of the grant. However, Judge Weinfeld ruled that derivative works, such as sound recordings, prepared and licensed prior to termination could continue to be utilized under the terms of the grant, and that royalties derived from such licenses would be shared between publisher

and composer, as before, under the composer's music publishing contract with the publisher.

But a Federal Court of Appeals has reversed, calling publishers "non-creative middlemen" who Congress did not intend to share in derivative work royalties after termination.

The Court of Appeals began with the proposition that the publisher was relying on two separate grants: the grant from the composer to the publisher and the grant from the publisher to the record company. The phrase in the Copyright Act which states that a derivative work "may continue to be utilized under the terms of the grant" does not, according to the appellate court, refer to the composer/publisher grant.

"Since the only grants which have terms that define the circumstances under which derivative works are to be prepared and utilized are the publisher/record company grants, it is the terms of those grants that the Exception

preserves, not the grant from the composer giving the publisher 50% of the mechanical royalties," said the court.

The court's next proposition was that the music publisher is not a utilizer of the sound recording. The derivative works exception protects only the actual creator of a derivative work prepared under the authority of the grant authorizing the creation of such derivative work. In this case, the original creators of such derivative works were record companies that prepared sound recordings, but not the music publisher.

"In short, it was authors, not publishers, who were the intended beneficiaries of the termination provisions. And it was the derivative works' owners, themselves creators, not publishers, who were the intended beneficiaries of the Exception," concluded the court.

Not addressed in the court's opinion were those instances where music publishers themselves create

derivative works such as print arrangements and translations, and thus are not acting in the capacity of "non-creative middlemen." The question therefore remains whether music publishers may continue to utilize such derivative works that they create under the authority of the grant between the composer and the publisher, and whether it makes any difference whether such grant defined the circumstances under which such derivative works were to be prepared and utilized.

Harry Fox Agency, Inc. v. Mills Music Inc., Docket No. 83-7009 (2d Cir., October 18, 1983) [ELR 5:7:3]

Nation magazine article containing excerpts from former President Ford's memoirs did not infringe book's copyright, rules Federal Court of Appeals; judgment awarding \$12,500 in damages to Harper &

Row and The Reader's Digest Association is reversed because factual material comprising major part of the article was not copyrightable

The interplay between the First Amendment's concern with the public's need for access to information, and the Copyright Act's interest in protecting an author's creative works, was the compelling issue in a recent opinion by Federal Court of Appeals Judge Irving R. Kaufman. The decision involved the unauthorized publication by The Nation magazine, in 1979, of excerpts from the manuscript of "A Time to Heal" - the memoirs of Former President Gerald Ford. Judge Kaufman found that the publication by The Nation did not constitute copyright infringement, thereby reversing the District Court ruling (ELR 4:22:3) which had awarded damages of \$12,500 to Harper & Row and to The Reader's Digest Association, the publishers of "A Time to Heal."

The publishers had entered into an exclusive agreement in 1977 to publish Mr. Ford's memoirs. The book was to include a description of "the circumstances and reasoning surrounding the pardon of Mr. Nixon by Mr. Ford." In 1979, Time magazine acquired the exclusive right to print prepublication excerpts from the memoirs in its April 23rd issue. However, in late March 1979, The Nation magazine obtained a copy of the Ford manuscript and in its April 9th issue, printed a 2,250 word article by Victor Navasky, the editor of the magazine, summarizing the highlights of the memoirs. The article focused on Ford's decision to pardon Nixon and also included references to Ford's relationship with Henry Kissinger and to other historical episodes. When The Nation article appeared, Time requested, but was denied, permission from Harper & Row to advance its publication date to April 16th. Time eventually did not publish any of the manuscript and did not pay the balance of \$12,500 due

on its \$25,000 contractual fee with Harper & Row. Harper & Row and Reader's Digest filed a copyright infringement action against The Nation.

Judge Kaufman first noted that the trial court had not discussed the "threshold issue" of whether the material used by The Nation was copyrightable. The Copyright Act protects only original works of authors. In determining the presence of originality, one may look to the overall arrangement of facts or to the author's chosen language. Harper & Row claimed that The Nation's use of short segments of verbatim quotation and considerable paraphrasing was an infringement of Ford's form of expression. The Court of Appeals disagreed, pointing out that the magazine "drew on scattered pieces of information from different pages and different chapters, and then described that information in its own words." Judge Kaufman continued: "Were information copyrightable ... the [Copyright] Act would clash with the First

Amendment on every occasion in which author chose to put in his own words facts which had already been described by another writer."

First Amendment considerations were particularly important in this case, observed the court, because the article described political events of major significance. "The paraphrasings concern the very essence of news and of history ... Were 'expression' in this context given a broader terrain, an individual could be the owner of an important political event merely by being the first to depict that event in words," said Judge Kaufman. The District Court apparently believed that Ford's revelations as to his state of mind while involved in the events he depicted were copyrightable, agreeing with the publishers' position that such personal and subjective material constituted protected expression. Judge Kaufman, however, commented "in passing" that the "states of mind" of public officials participating in crucial political decisions

may not be any less "fact" than any act which such an official may or may not undertake. And even if it were agreed that Ford's "reflections" were original, protectable expressions, the coupling of those reflections with uncopyrightable information did not, as the District Court had concluded, transform the combination into a copyrightable "totality." Judge Kaufman reiterated the view that the District Court's position would be "tantamount to permitting a public official to take private possession of the most important details of a nation's historical and political life by adding language here and there on the perceptions or sentiments he experienced while in office and insisting the work's entire contents are thereby made his alone by virtue of copyright. The Copyright Act was not intended to provide such a private monopoly of fact at the expense of the public's need to be informed."

In addition, it was pointed out that a great deal of the information concerning the pardon decision already had been presented by Ford before a Congressional committee in 1974 and subsequently was printed in a government document, and thus was not copyrightable. And the article's use of conversations attributed to other persons also would not amount to an infringement of copyrighted material because of the requirement of the Copyright Act that an author's work be his own and not originate in others.

The court did not accept The Nation's argument that the words Ford spoke while he was in office could not be copyrighted by Ford. If a conversation originating with a public official is not "Fixed" as a writing or publicly delivered as a part of his or her official duties, the official may copyright the phrasing of a sentence, "if and when it is later written down," declared the court.

In all, according to Judge Kaufman's calculations, the article in *The Nation* contained, at most, approximately 300 words that could be copyrighted, including segments of conversations and Ford's impressions of Nixon's character. *The Nation* argued that its use of this material was a fair use of copyrighted material and the Court of Appeals again agreed with the magazine. Before turning to an analysis of the four factors which must be considered in a fair use defense under section 107 of the Copyright Act, Judge Kaufman first commented on the District Court's finding that the magazine article was not "hot news." Navasky had testified that his purpose in writing the article was news reporting. This testimony was uncontradicted. Judge Kaufman stated that an article concerning a new book on the actions of the highest public officials in official positions ". . . must be characterized as the reporting of either news or of recent history." There was no evidence of "chiseling for personal

profit" which led a court in one case to find that a claim of news reporting merely was a pretext for such personal profit.

The District Court also was found to have erred in conducting its own evaluation of the quality of the journalism in the article. Judge Kaufman suggested that "the recounting of information, without more, would seem to be the very essence of 'news reporting.'"

The District Court's rejection of the statutory fair use factors was reversed. The "purpose or character" of the article, according to the District Court, was its publication for profit. But the fact that a profitmaking motive may have been involved (amounting in this case to \$418) was, without more, legally irrelevant where the work in which the use appeared offered some benefit to the public.

The District Court's analysis of the "nature of the copyrighted work," the second of the four elements of fair

use, also was found faulty in that it ignored the "essentially factual nature of the book." Copyright protection of such works is narrow, even if a limited amount of non-factual material is included in the work.

The District Court also had found that The Nation article used "the heart of the book" - the material regarding the Nixon pardon. But this material, again, was factual information of great public import. The quantitative amount of potentially copyrightable words - 300 out of 2,250 - according to the Court of Appeals, was "insubstantial." And while the District Court had found that the article had an "economic impact" on the publishers because of the cancellation of the Time agreement, there was insufficient evidence to demonstrate that it was The Nation's use of Ford's original language which led to the Time cancellation. The "meager ... infinitesimal" amount of copyrightable material used by The Nation was informative and "neither superfluous or excessive for the

article's purpose" - a use that did not "supersede the use of the original work."

In the event any doubt remained about his conclusion, Judge Kaufman declared that The Nation was entitled to a fair use defense and that "Where information concerning important matters of state is accompanied by minimal borrowing of expression, the economic impact of which is dubious at best, the copyright holder's monopoly must not be permitted to prevail over a journalist's communication. To decide otherwise would be to ignore those values of free expression which have traditionally been accommodated by the statute's fair use provisions."

The Court of Appeals did affirm the District Court's dismissal of the publishers' state law claims for conversion, based on the failure to assert that The Nation exercised unauthorized dominion and control over the manuscript copy of the memoirs, and for tortious

interference with contractual rights, on the basis of pre-emption by the Copyright Act.

Judge Thomas J. Meskill registered a lengthy dissent which emphasized his disagreement with the majority's statement that Ford's description of his state of mind at the time of the Nixon pardon was a fact not entitled to copyright protection. It should be noted that this indeed was a statement by Judge Kaufman and not a ruling; the statement suggested that a state-of-mind description by a public official might be considered a fact in certain circumstances and that, even if not a "fact," was not sufficient, when combined with other factual material, to render copyrightable a description of a newsworthy or historic event.

Judge Meskill then questioned the majority's position that printed facts are never entitled to copyright protection, pointing out that "it is no less a copyright infringement to reproduce copyrightable works consisting of

'facts' than to reproduce those consisting of expression.'" But Judge Kaufman, in his opinion, had distinguished the paraphrasings of disparate facts in this case from those works in which an alleged infringer borrows virtually an entire work and merely changes verbatim language or slight details in the structure. If The Nation had taken all of the Ford book or all of a chapter, the use of paraphrasing would not have protected the magazine from liability. But The Nation "drew on scattered pieces of information from different pages and different chapters, and then described that information in its own words."

Judge Meskill's view of The Nation article as a work which was "almost entirely a paraphrase, was of trivial originality and contained no independent research by the author," thereby infringing the copyright in the Ford memoirs, did not prevail.

Judge Meskill also believed that The Nation article did not constitute a fair use of "A Time to Heal." The article lacked news value in Judge Meskill's view, because the magazine added nothing original to the Ford memoirs and "used far more of the memoirs than was necessary to write a 'news' article." And, contrary to the majority view, Judge Meskill would have ruled that the case did involve a "knowing" invasion of the market for the Time serialization.

Harper & Row, Publishers, Inc. v. Nation Enterprises,
Case No. 83-7277 (2d Cir., November 17, 1983) [ELR
5:7:4]

**New York trial court refuses to enjoin unauthorized
publication of photographs of John and Yoko
Lennon**

Let it be, a New York trial court judge has decreed, in refusing to enjoin the distribution of an issue of Swank Magazine which published, allegedly without authorization, photographs of John and Yoko (Ono) Lennon.

The photographs in question were taken in November 1980 by Allan Tannenbaum for the purpose of promoting the album "Double Fantasy." Tannenbaum retained the copyright in the photographs and the original negatives, though he delivered a set of prints to the Lennons. In October 1984, Swank published several of the photographs in connection with an article describing the arrest by New Orleans police of an individual who was charged with the attempted murder of a woman who supposedly "stole" the photographs from him.

Yoko Lennon argued that the publication by Swank was unauthorized and constituted a use for purpose of trade in violation of section 51 of New York's Civil

Rights Law. The complaint set forth Lennon's "strong belief" that a former employee stole the photographs from the family's residence and that Swank obtained the photographs at the end of a long and winding road that led from her door. Tannenbaum also sought injunctive relief on the ground that the unauthorized publication amounted to a "theft" of his property, resulting in irreparable damage to his reputation.

Imagine, if you will, retorted Swank, that we did not obtain Lennon's consent to publication. Nevertheless the photographs appeared as an integral part of a newsworthy article and their publication therefore was protected by the First Amendment, argued the magazine.

New York County Supreme Court Justice Sinclair has agreed with Swank and recalled that "it is the established law of New York that the unauthorized use of an individual's picture is not for 'trade purposes' and therefore not violative of section 5 1 if it is in connection with

an item of news or one that is newsworthy." Lennon, having achieved newsworthy status, could not avail herself of section 51 "merely" by stating that the publication of the photographs was without consent. And the fact that Swank may publish material that many consider "tawdry" or "unsavory" does not remove it from First Amendment protection.

Furthermore, Tannenbaum did not present strong support for his belief that the photographs obtained by Swank were the same ones taken by him at the November 1980 session.

Justice Sinclair, in bringing down his silver hammer, also noted that Lennon and Tannenbaum apparently became aware in late July 1983 of Swank's intention to publish the photographs, but sought no judicial intervention for three weeks during which time 155,000 copies of the magazine were being printed and distributed throughout the United States. These "equities" increased

in importance, stated the court, in view of the moving parties' failure to demonstrate a clear right to the relief requested.

Lennon v. Swank Magazine Corp., (N.Y. Cnty.) New York Law Journal, p. 6, col. 4, Aug. 23, 1983 [ELR 5:7:6]

Florida court enjoins distribution of unauthorized cable television descrambling equipment

Dade Cable Television, Inc., an affiliate of Storer Cable Communications, has been granted permanent injunctive relief against two companies which were engaged in the unauthorized sale of equipment intended to intercept Dade Cable's transmission of programming to its subscribers and to decode the transmissions for

reception on a standard television receiver. Upon installing the equipment, a purchaser would be able to receive Dade Cable programming without paying the requisite fee for the service.

A Florida county court first found that state statutes proscribing the theft of pay cable television service had been violated. The court noted that in decisions under the federal counterpart to one of the applicable Florida statutes, the "overwhelming weight" of authority suggested that the Florida companies had violated the law. Furthermore, the companies were causing substantial and irreparable damage to Dade Cable's business by the loss of potential as well as existing customers. And Dade Cable had shown that it had no feasible means of detecting nonsubscribers who were receiving programming via the use of the unauthorized devices.

The court concluded that an injunction would serve the public interest in that the possible discontinuance of

Dade Cable's services would be prevented. Therefore, a permanent injunction was issued, and the court also ordered that the companies provide Dade Cable with all customer lists and other material which would aid in identifying any purchasers or suppliers of the unauthorized descrambling equipment.

Storer Cable Communications, Inc. v. Rodriguez, Case No. 83-18572 (Dade Cnty., Fla., October 25, 1983) [ELR 5:7:6]

Miami ordinance regulating the transmission of "indecent" material by cable television is ruled unconstitutional

A Miami ordinance providing for the regulation of "indecent" material on cable television violates the First

Amendment, a Federal District Court judge has ruled. The ordinance, which was enacted in January 1983, provided that "No person shall by means of a cable television system knowingly distribute by wire or cable any obscene or indecent material." The Miami City Manager was authorized to review, as well as to initiate, complaints under the ordinance. If sufficient probable cause was found to warrant a hearing, the City Manager would then determine whether a violation of the ordinance had occurred, and if so, impose sanctions, including suspension or termination of the cable television license.

HBO, a cable programming service offered via Cablevision, the cable television licensee in Miami, brought an action seeking declaratory and injunctive relief against the enforcement of the statute. HBO cited the likely chilling effect of the ordinance on the company's exercise of its free speech rights, as well as the First Amendment rights of its subscribers.

Federal District Court Judge William Hoeveler, stating that "it is difficult to conceive ... of any construction which would save this ordinance from its constitutional infirmities," has granted HBO's motion for summary judgment and has permanently enjoined the city from enforcing the provisions of the ordinance.

The court first noted that while obscenity is not protected by the First Amendment, the scope of permissible obscenity regulation has been carefully defined. Indecent speech does not equate with obscenity and may receive some First Amendment protection. Thus, by regulating the transmission of indecent material, the ordinance was overly broad and facially defective.

In support of its position, the city cited the case of *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). In *Pacifica*, a monologue by comedian George Carlin which was aired by a radio station during the afternoon, was found "patently offensive" by the FCC and subject

to regulation. The United States Supreme Court upheld the FCC's position, noting that the content of indecent speech, which in the Carlin monologue was characterized as "vulgar," "offensive," and "shocking," could be regulated under some circumstances. But the prohibition in the Miami ordinance was "wholesale" without regard to the time of day or other variables essential to the decision in *Pacifica*. Furthermore, stated Judge Hoeveler, the rationale of *Pacifica* applied only to broadcasting, and the medium of cable television is distinguishable in such significant aspects as the greater quantitative choice and the greater overall viewing control provided to the subscriber, including the capacity to install a "parental key."

The enforcement procedures of the ordinance also were ruled unconstitutional as a violation of the due process clause of the Fourteenth Amendment. Miami argued that the ordinance's mandatory

prediscipline/deprivation hearing satisfied due process requirements by guaranteeing licensees a "meaningful opportunity to be heard." But the extensive involvement of the City Manager in all phases of the hearing procedure was found to present an "intolerably high" risk of arbitrary or capricious governmental action.

Judge Hoeveler also discussed HBO's claim that the ordinance violated the equal protection clause of the Fourteenth Amendment because the city chose to regulate the distribution of indecent speech transmitted by cable television but not by other forms of communication. Since the ordinance was content-based, the court applied a strict scrutiny to the challenged provision and observed that under such a test, the city had failed to demonstrate that the prohibition of indecent material on cable television was necessary to maintain certain standards of public morality. Furthermore, other forms of transmission, such as subscription broadcast television,

movie theaters, and over-the-air microwave transmissions were not subject to the ordinance.

This disparity in treatment was "probably not justified under the exacting demands of strict scrutiny," stated Judge Hoeveler.

Cruz v. Ferre; Home Box Office v. Ferre, Case No. 83-330-CIV-WMH (S.D.Fla., Aug. 2, 1983) [ELR 5:7:7]

Injunction prohibiting unauthorized distribution of radio plays is upheld by Federal Court of Appeals, but case is remanded for redetermination of damages because original award erroneously included punitive damages

A lawsuit involving the copyrights to certain old time radio dramas has had plot-quickenning dramatic developments of its own on its way through the courts. The copyrights in the shows comprising the radio series "Lights Out Everybody" are owned by Arch Oboler. In 1978, Oboler granted an exclusive license to Nostalgia Lane, Inc., to distribute and sell these shows. However, an individual named J. David Goldin, doing business under the names Kos Records, Radio Yesteryear and Radiola Records produced and sold tapes of some of the shows, without authorization, after 1978. Oboler and Nostalgia Lane filed an action for copyright infringement and a Federal District Court granted a directed verdict on their behalf (ELR 5:1:19). The court also enjoined Goldin from engaging in the distribution of any sound reproduction of Oboler's radio plays and awarded \$33,000 compensatory damages to Nostalgia Lane,

\$15,000 punitive damages to both parties, \$10,000 attorneys fees, and costs.

A Federal Court of Appeals has affirmed the directed verdict as to liability but has remanded the issue of damages. In so doing, the court suggested two possible courses of action on remand: the election of statutory damages or a new trial limited to the issue of actual damages plus infringer's profits. If Oboler and Nostalgia Lane elect statutory damages, the judge then may order a fivefold increase in the maximum award if willful infringement is proven. If a new trial is held, the court noted that punitive damages would not be available under the Copyright Act of 1976. Punitive damages have been awarded in common law copyright infringement actions as a matter of state law. And Oboler had presented an unfair competition cause of action. However, in the court's view, this common law claim "seems to us to be preempted by the Copyright Act of 1976."

Oboler v. Goldin, Docket No. 83-7153 (2d Cir. 1983)
[ELR 5:7:7]

Public broadcasting stations are not required to provide open caption programming for hearing impaired viewers, rules Federal Court of Appeals

A Federal Court of Appeals has ruled that public television stations are not required to provide open captions on their programs for the benefit of their hearing impaired viewers. The obligations owed to hearing impaired viewers by public broadcasters and by federal agencies has been the theme of a lengthy action brought by the Greater Los Angeles Council on Deafness against the federal government, the Public Broadcasting System, and Los Angeles public television station KCET. The

Council argued that section 504 of the Rehabilitation Act of 1973 requires federally funded television stations to provide open captioning, a process in which subtitles translating the audio portion of a program appear at the bottom of the television screen. The Council sought to enforce the Act by compelling various federal agencies, including the Federal Communications Commission and the Department of Education, to issue regulations on captioning and by seeking to enjoin the distribution of funds by those agencies to television stations that fail to provide open captioning. The federal agencies involved contended that the requirements of the Rehabilitation Act are met by closed captioning, which is used by many public stations, including KCET. In a closed captioned system, a viewer wishing to see captioned programming must purchase a decoder costing approximately \$250.

In 1981, a Federal District Court in Los Angeles ruled in favor of the Council, stating that hearing impaired viewers had been denied the benefit of federally funded programming in violation of the Rehabilitation Act and the Constitution. Judge Manuel Real concluded that closed captioning was not a reasonable means of assuring non-discriminatory access by hearing impaired viewers to television programming, and ordered the Department of Education to stop disbursing funds for the production of broadcasting of television programming until the agency developed suitable regulations on open captioning.

But a Federal Court of Appeals has reversed several of Judge Real's orders. The appellate court has found that the order to terminate funding pending the development of regulations was erroneous and that it was within the discretion of the appropriate federal agencies to determine whether to establish regulations to implement the

Rehabilitation Act or to implement the Act by ruling on complaints against funding recipients, or by conditioning funding grants upon compliance with the Act.

Federal Court of Appeals Judge Protor Hug also noted that there was no support for the District Court's conclusion that there is a constitutional obligation to make television programs accessible to the hearing impaired.

While agreeing with the Council on several of its claims, Judge Real had dismissed the Council's action against the Public Broadcasting System and its affiliated stations on the basis that federal law did not require affirmative action on their part to provide access to programming. This ruling was affirmed. The Rehabilitation Act requires only "evenhanded treatment" of handicapped individuals and does not mandate the production and broadcast of federally funded programs with open rather than closed captions, stated Judge Hug.

The Court of Appeals' decision follows close upon an unsuccessful attempt by the Council to persuade the FCC to order hearings on the renewal applications of KCET and several commercial television stations in Los Angeles. The Council had argued that the stations failed to ascertain the needs of the hearing impaired audience and had not made their programming available to the hearing impaired in violation of the Rehabilitation Act. But the United States Supreme Court ruled that the Rehabilitation Act did not require the FCC to conduct the hearing sought by the Council (ELR 5:2:1 1).

In a separate though similar case, the Federal Court of Appeals also has just ruled that the Rehabilitation Act does not require the FCC to issue equal employment opportunity rules giving preference to the handicapped. That decision has not been published as yet, and will be reported as soon as it is available.

Greater Los Angeles Council on Deafness, Inc. v. Community Television of Southern California, Case No. 80-5400 (9th Cir., Nov. 2, 1983) [ELR 5:7:8]

New York court refuses to grant summary judgment in dispute over authenticity of art work by Henri Matisse

A New York judge's impression of a dispute over the authenticity of a Matisse decoupage was that a number of unresolved factual issues in the case precluded an award of summary judgment to either party.

The decoupage, entitled "Bunch of Yellow Flowers," was purchased in December 1973 by Jane Engelhard for \$260,000. At the time of sale, Engelhard received a document which described and identified the decoupage as the work of Henri Matisse. In 1978, Engelhard

arranged to have the piece donated to the Houston Museum of Fine Arts. The Art Dealers Association of America was asked to provide an appraisal of the donation. The Association contacted Matisse's daughter, Madame Duthuit, the holder of the droit moral which, under French law, includes the right to pass on the authenticity of works attributed to an artist. Madame Duthuit refused to provide a Certificate of Authenticity; the Association consequently would not appraise the work; and the museum refused to accept the donation.

Engelhard, alleging breach of warranty, brought an action to recover the value of the art work. New York's General Business Law provides that "Whenever an art merchant, in selling or exchanging a work of fine art, furnishes to a buyer of such work who is not an art merchant, a written instrument which, in describing the work, identifies it with any author or authorship, such description (i) shall be presumed to be part of the basis

of the bargain and (ii) shall create an express warranty of author authenticity of such authorship as of the date of such sale or exchange."

The sellers of the Matisse piece claimed that Engelhard was an "art merchant" and thereby was not within the category of persons protected by the statute. It also was noted that the definition of "art merchant" under the statute includes persons to whom special knowledge or skill in the art field may be attributed due to the employment of an agent or broker. Engelhard did employ an individual as a "caretaker or curator" for her art collection.

New York State Supreme Court Judge Andrew R. Tyler first found that Engelhard had not shown that she was a protected buyer of a work of art, rather than an art merchant. Additional information as to the "curator's" knowledge and responsibilities would be helpful, suggested the court. Furthermore, Engelhard had failed to show that there was a breach of the warranty, i.e.,

whether, at the time of the sale, there was no reasonable basis in fact to believe that the work of art in question was an authentic Henri Matisse. According to a deposition, when the decoupage was shown to the son of Henri Matisse in 1973, he verified the signature as that of his father. And in October 1973, Madame Duthuit also purportedly orally acknowledged the signature as being authentic.

Thus, Judge Tyler concluded that at this stage of the proceedings, neither party was entitled to summary judgment.

Engelhard v. J.H. Duffy & Sons, Ltd., (N.Y.Sup.Ct.)
New York Law Journal, p.13, col. 1, Oct.27, 1983
[ELR 5:7:9]

IN THE NEWS

Writers Guild conducts "re-run" of 1982 Board election under recently revised membership classification rules pursuant to settlement of suit by U.S. Department of Labor; complaint about 1983 Board election triggers new Department of Labor investigation and lawsuit

Members of the Writers Guild of America West put aside their typewriters, word processors and quills for a few moments on December 13th in order to vote in a "re-run election" to fill eight seats on the Guild's Board of Directors. The Guild's first draft of its September 1982 Board election was rejected by the United States Department of Labor because the Department found that there was probable cause to believe that in conducting its 1982 election, the Guild violated several provisions

of the LaborManagement Reporting and Disclosure Act of 1959.

In a complaint filed in April 1983 in Federal District Court, the Department of Labor contended that the Guild's voting and membership eligibility rules denied members in good standing: the right to nominate candidates, the right to be candidates and to hold office through the imposition of unreasonable candidacy qualifications, and the right to vote or otherwise support the candidate of their choice. The Department of Labor also alleged that in conducting the election, the Guild failed to provide adequate safeguards to insure a fair election by allowing ineligible members to run for and hold office.

In its answer to the complaint, the Guild noted that in 1971, a similar complaint was reviewed by the Secretary of Labor concerning the election held in that year. At that time, further proceedings were not held because

the Department of Labor concluded that the rules and procedures used by the Guild in classifying members and conducting elections conformed with the Act.

The issues joined, as it were, a flashback is in order to clarify the background of the players involved in the election drama.

The Guild shares with certain B-movie heroines a difficult "past" in its dealings with "hyphenates" - writers who perform executive and supervisory functions for producers along with minor writing tasks. In 1973, the Guild engaged in a strike against the Association of Motion Picture and Television Producers, Inc., whose members produce motion picture and television films, and against NBC, CBS and ABC. The Guild issued "strike rules," which, among other things, prohibited all members from crossing picket lines established by the Guild at struck premises. One rule stated: "All members, regardless of the capacity in which they are working, are

bound by all strike rules ... to the same extent as members who confine their efforts to writing." About 30 hyphenates worked during the strike, performing only functions required by their supervisory positions. The Guild took the position that the hyphenates were subject to discipline simply for crossing picket lines, even if no writing services were performed. And thus the Guild imposed various penalties on its disciplined members. In two cases, individuals were expelled from the Guild and were fined \$50,000 each. Another "hyphenate" was expelled and fined \$10,000.

As a result of these penalties, the National Labor Relations Board issued complaints against the Guild, charging violations of sections 8(b)(1)(B) of the National Labor Relations Act, which provides that "It shall be an unfair labor practice for a labor organization ... to restrain or coerce ... an employer in the selection of his representatives for the purposes of collective bargaining

or the adjustment of grievances." Many of the hyphenates were exercising grievance-adjusting functions when working as producers, directors or story editors. An Administrative Law Judge concluded that by issuing strike rules, the Guild sought to restrain the hyphenates from performing this managerial function and thereby "coerced and restrained" the hyphenates' employers in their selection of bargaining representatives.

The United States Supreme Court eventually ruled that it may be an unfair labor practice for a union to discipline a member for performing a grievance adjustment function, and the Court agreed that in this case there was sufficient evidence that many of the hyphenates were restrained from performing their normal duties due to pressure from the Guild, including severe discipline. *American Broadcasting Companies, Inc. v. Writers Guild of America, West., Inc.*, 437 U.S. 411 (1978).

The Legacy of the case has been a spotlight on Guild activities - a spotlight which now has moved from the hyphenate issue to the Guild's membership classification and voting eligibility regulations. These regulations, described as "byzantine in their complexity," prompted the Department of Labor's 1983 complaint against the Guild.

The Department and the Guild entered into a settlement agreement with respect to the Guild's eligibility regulations in March 1983. The settlement, which was approved by a Federal District Court in California in August 1983, incorporates various amendments to the Guild's constitution. The amendments, adopted by Guild members in July 1983, establish four classes of membership: Current, In Arrears, Withdrawn and Emeritus. A member previously classified as an Associate or Non-Current member, without voting eligibility, may be reclassified as a Current member if the member has had

two employments or sales within the two years preceding June 1983 or achieves one additional employment or sale by June 1985.

The increase in current members which may occur upon reclassification is likely to be counterbalanced by revised requirements for attaining membership in the Guild. In the future, an individual seeking to attain Current membership must establish that she or he has had two or more employments and/or two sales of literary material in covered fields of work in the preceding two years and has accumulated 12 units of credit as set forth in the Guild's regulations. Units are based upon work completed under a contract of employment or upon the sale or licensing of previously unpublished and unproduced literary or dramatic material, provided the employment, sale or licensing is within the jurisdiction of the Guild. Term employment of 13 weeks or more also qualifies an applicant for membership in the Guild. In

many instances, meeting the employment or sale provision also will fulfill the 12 unit requirement. However, a writer may challenge any finding that the membership requirements have not been met; and the Guild retains the flexibility to adjust the requirements upon a showing of special circumstances in an individual case.

The amendments also provide that a member will become an Emeritus member and not eligible to vote except in limited instances, only when such writer has had no employment or sale in the covered fields for 10 years without regard to the unit credit assigned to such employment or sale.

As a result of the changes, 4,600 (rather than 3,200) members of the Guild's approximately 6,100 members will be allowed to vote on issues such as strikes. Other members who are still denied a vote have been given two years in which to accumulate enough credits to qualify for reclassification and voting membership.

Under the settlement, the validity of the Department of Labor's claims were not conceded by the Guild, and the settlement also did not constitute an admission by the Guild that a violation of the Labor Management Reporting and Disclosure Act had occurred.

The members elected to the Board on December 13th will serve until September 1984. Whether the amended rules will result in altering the composition of the Board to such an extent that future Guild policy on industry issues is significantly influenced remains to be seen.

What has become apparent already, however, is that the amended rules have not brought the Guild internal peace. As a result of its 1983 Board election, held in September, Guild member and Board candidate Edmund Morris filed a new complaint with the Department of Labor alleging that this year's election violated the settlement agreement approved last August. Among the charges is an allegation that two hyphenates were

elected to the Board despite being ineligible to serve in that position. As a result of Morris' complaint, the Department of Labor conducted an investigation, and has filed a lawsuit against the Guild in Federal District Court in Los Angeles. The suit alleges that the Guild violated federal labor law prohibitions against supervisors and managers holding union office. Though the Writers Guild has not yet filed an answer to the Department of Labor's new lawsuit, a Guild spokesman told the press that the Guild disagrees with the Department's interpretation of the law. [Dec. 1983] [ELR 5:7:10]

MPAA members are awarded \$44,000 in damages in copyright infringement action

Maxwell's Video Showcase in Erie, Pennsylvania has been ordered to pay \$44,000 in damages to several

member companies of the Motion Picture Association of America. Maxwell's, a videocassette retailer, apparently had constructed 40 separate viewing rooms on the company's premises. Although each room could accommodate a maximum of four individuals, a Federal District Court judge ruled that Maxwell's unlicensed exhibition of films on videocassettes was an unauthorized "public performance" in violation of the Copyright Act. [Dec. 1983] [ELR 5:7:11]

Federal District Court judge orders CBS to supply General William Westmoreland with material pertinent to controversial Vietnam documentary; New York state court judge orders CBS to supply "60 Minutes" outtakes for use in criminal prosecution

CBS News has been ordered to supply General William C. Westmoreland with notes and interviews gathered by CBS News executive Burton Benjamin during an internal investigation of the 1982 documentary "The Uncounted Enemy: A Vietnam Deception." The documentary contained allegations that Westmoreland conspired to underreport estimates of enemy troop strength during the Vietnam war for political purposes. Westmoreland denied these charges and filed a \$120 million libel suit against CBS News.

During a post-broadcast investigation, Benjamin interviewed 32 persons connected with the broadcast and issued a critical report. Subsequently, CBS News President Van Gordon Sauter stated that despite certain faults in the production of the documentary, "CBS stands by this broadcast."

In April 1983, Federal District Court Judge Pierre Leval granted Westmoreland access to the Benjamin

report, ruling that CBS had waived any First Amendment privilege when Sauter based his public comments about the documentary upon the report. Access to Benjamin's notes and other material recently was granted by Judge Leval on the same ground.

CBS also was unsuccessful, in New York State Supreme Court, in attempting to quash subpoenas for the unused videotapes and outtakes from a segment of a "60 Minutes" television program. The segment, which was broadcast in November 1981, depicted interviews with two men who had been convicted, in absentia, on charges of selling weapons to South American terrorists. When one of the men, George Gregory Korkala, was apprehended and granted a new trial, a subpoena was issued for the material CBS acquired, but did not broadcast, in preparing for the interview segment. CBS's arguments that the outtakes were protected under the First Amendment and under New York's Shield Law were

rejected. Justice Thomas B. Galligan ruled that the standards for the discovery of unpublished information were met by the prosecutor and that the disclosure would not "inhibit or chill the ability of CBS effectively to gather and report news in the future." The protection of the Shield Law also was found to be unavailable to CBS in this case. [Dec. 1983] [ELR 5:7:11]

Federal District Court strikes down \$500,000 jury award to television newscaster Christine Craft in sex discrimination action against Metromedia

A Federal District Court Judge has set aside the jury award of \$500,000 to Christine Craft in her sex discrimination action against Metromedia, Inc., the owner, until 1982, of Kansas City television station KMBC. Craft had claimed that she was unfairly demoted from

the position of anchorwoman to reporter because the station found her "too old, too unattractive and not deferential to men." Craft sought reinstatement at her KMBC position along with back pay and benefits and actual and punitive damages on the grounds that the alleged harassment by Metromedia over her appearance amounted to tortious conduct.

Metromedia argued that the decision to demote Craft was based on survey results indicating a negative viewer response to her performance.

A six member jury awarded Craft \$375,000 in actual damages and \$125,000 in punitive damages for fraud. But Judge Joseph E. Stevens, Jr., in granting Metromedia's request for a new trial, found that the award was excessive and the result of "passion, prejudice, confusion or mistake on the part of the jury." The court rejected, as did the jury, Craft's claims of unequal pay practices. However, the jury's advisory verdict

recommending a finding that Craft was discriminated against, also was rejected by Judge Stevens. [Dec. 1983] [ELR 5:7:12]

Los Angeles City Council adopts controversial media gross receipts tax

The Los Angeles City Council has instituted a business tax, effective January 1, 1984, on the gross receipts of the print and broadcast industries. California wholesale activities for the publication and sale of newspapers, magazines and other periodicals will be subject to a tax of \$1.00 per \$1,000 in gross receipts; the rate will be \$1.25 per \$1,000 on retail activities. Radio and television entities will be assessed \$1.25 in gross receipts.

Motion picture and television producers were successful in their efforts to avoid inclusion in the tax measure.

Producers will continue to pay a business tax of up to \$3,750, the same maximum fee previously paid by television stations. [Dec. 1983] [ELR 5:7:12]

WASHINGTON MONITOR

Federal Communications Commission announces six-month delay in further action on proposal to eliminate financial interest and syndication rules

The Federal Communications Commission has announced a six-month delay, until May 1984, in taking any further action on its proposal to repeal FCC rules barring television networks from obtaining an ownership interest in non network-produced programs and from syndicating the programs they broadcast.

This announcement was the culmination of a civics lesson, par excellence, in the mechanics of administrative decision-making. The FCC, in August 1983, had proposed the repeal of its 1970 financial interest and syndication rules. After intense activity by film studios and producers and by the television networks, the Senate, in October, voted to prohibit the FCC from changing the financial interest and syndication rules for six months. The producers had argued that the elimination of the rules would mean that the three major television networks would be in a position of financial and creative dominance over television content. The networks contended that new technology and market forces - particularly increased competition from cable television - required the termination of the rules.

In early November, President Reagan expressed support of a two-year moratorium on any reconsideration of the rules - a significant departure from previous

Executive Branch statements in support of the FCC's proposal. Subsequently, the House of Representatives passed legislation which would prohibit the repeal of the rules for six months.

According to FCC Chairman Mark Fowler, the delay will give the producers and the networks a chance to continue their current compromise negotiations regarding the rules. [Dec. 1983] [ELR 5:7:13]

Federal Communications Commission bars state governments from regulating SMATV systems

The Federal Communications Commission has barred state and local governments from regulating the approximately 600 Satellite Master Antenna Television Systems that distribute programming to multiunit dwellings such as apartment complexes and hotels. As a result,

SMATV operators will not be required to engage in municipal franchising processes, as do cable television operators. State and local franchises are not required, according to the FCC, because SMATV systems use satellite antennas erected on private property to receive programming that is distributed by cable lines to single units in a complex, and the wires do not cross any local roadways. Since the TV channels received by the systems are "inherently interstate in nature," the systems were ruled subject to federal regulation and preemption. [Dec. 1983] [ELR 5:7:13]

Federal Communications Commission announces that broadcasters may sponsor debates among political candidates without the participation of a third party sponsor

The FCC has announced that broadcasters may arrange and present debates among political candidates without obtaining the sponsorship of a third party, such as the League of Women Voters. Under the Commission's 1976 "Aspen Rule," political debates were declared bona fide news events. But the rule required that non-partisan groups sponsor the debates. Henceforth, broadcasters, when presenting debates on their own, will not have to make equal time available for the presentation of opposing viewpoints. [Dec. 1983] [ELR 5:7:13]

DEPARTMENTS

In the Law Reviews:

Hastings College of the Law has published Volume 5, Number 3 of Comm/Ent, A Journal of Communications

and Entertainment Law. The issue is available at a cost of \$6.50 directly from Hastings, 200 McAllister St., San Francisco, CA 94102. It contains the following articles:
Subliminal Projection: History and Analysis by Thomas Albert Bliss, 5 Comm/Ent 419 (1983)

Journalists' Interference with Police: The First Amendment, Access to News and Official Discretion by Kent A. Middleton, 5 Comm/ Ent 443 (1983)

Copyright Protection for Video Games, Computer Programs and Other Cybernetic Works by Marilyn Brody, 5 Comm/ Ent 477 (1983)

The Disabled Student Athlete: Gaining a Place on the Playing Field by Kathleen De Santis, 5 Comm/Ent 517 (1983)

Video Game Regulation and the Courts by Linda Sue Dobb, 5 Comm/Ent 549 (1983)

Metromedia v. San Diego III: Content Regulation, Commercial Speech and the California Supreme Court's Recent Billboard Decision by Steven Saxton, 5 Comm/Ent 581 (1983)

The Tennessee Bar Association has published The Journal of Copyright, Entertainment and Sports Law. It is available for \$6.00 from the Tennessee Bar Association, 3622 West End Avenue, Nashville, Tennessee 37205 and includes the following articles:

Commissioned Works Under the United States Copyright Act by Richard Colby, 2 Journal of Copyright, Entertainment and Sports Law 1 (1983)

Cable Television and Copyright; The United Kingdom Perspective by Stephen de B. Bate, 2 Journal of Copyright, Entertainment and Sports Law 25 (1983)

Securing Loans for Clients in the Music Industry by Pamela G. Browne and R. David Ludwick, 2 Journal of Copyright, Entertainment and Sports Law 34 (1983)

Communications and the Law is published by Meckler Publishing, 520 Riverside Avenue, Westport, CT 06880. The current issue includes the following:

Copyright Law as a Protection Against Improvidence: Renewals, Reversions and Terminations by M. William Krasilovsky and Robert S. Meloni, 5/4 Communications and the Law 3 (1983)

Abating Obscenity As a Nuisance: An Easy Procedural Road for Prior Restraints by Robert L. Hughes, 5/4 Communications and the Law 39 (1983)

Technological Abundance and the Future of Video Delivery System Regulation by Mark Johnson 5/4 Communications and the Law 51 (1983)

Copyright for the Eighties: Cases and Materials by Stanley Rothenberg, 5/4 Communications and the Law 67 (1983)

International Media Law is published by Oyez Longman publishing Ltd., 21/27 Lamb's Conduit Street, London, England WC1N 3NJ. It has compiled a symposium on the Piracy issue as follows:

Introduction: the Threat of Piracy by Gillian Davies, 1 International Media Law 106 (1983)

Audio Piracy by Michael Edwards, 1 International Media Law 107 (1983)

Film/Video Piracy by Elizabeth Greenspan and Dr. Beatrice von Silva Tarouca, 1 International Media Law 116 (1983)

Book Piracy by Nicolas Thompson, Jeremy Osborne and Robert Machesney, 1 International Media Law 127 (1983)

Columbia University School of Law and Volunteer Lawyers for the Arts have jointly published Volume 8, No. 1 of Art and the Law which is available at 1560

Broadway, New York, NY 10036. It contains the following articles:

New York Times v. Sullivan Reconsidered: Time to Return to "The Central Meaning of the First Amendment" by Anthony Lewis, 8 Art & the Law 1 (1983)

Home Video Licensing Agreements by Harold Iselin, 8 Art & the Law 29 (1983)

Dealing with Infants: A Primer for Adults by Gary Graifman, 8 Art & the Law 43 (1983)

Record Piracy and Modern Problems of Innocent Copyright Infringement by Frank L. Fine, 8 Art & the Law 69 (1983)

Monopoly, Anti-Monopoly: The Loss of Trademark Monopoly by George Dwight II, 8 Art & the Law 95 (1983)

Journalists' Rights to Their Own Works by Douglas Steinger, 8 Art & the Law 113 (1983)

The New Video Marketplace and the Search for a Coherent Regulatory Philosophy by Jill Abeshouse Stern, Erwin G. Krasnow and R. Michael Senkowski, 32 Catholic University Law Review 529 (1983)

Cable, Content Regulation and the First Amendment by Henry Geller and Donna Lampert, 32 Catholic University Law Review 603 (1983)

Now You See It, Now You Don't: Minority Ownership in an "Unregulated" Video Marketplace by Allen S.

Hammond, IV, 32 Catholic University Law Review 633 (1983)

Controlling Violence in Professional Sports: Rule Reform and the Federal Professional Sports Violence Commission by Ronald A. DiNicola and Scott Mendeloff, 21 Duquesne Law Review 843 (1983)

Trademarks: Protection of Merchandising Properties in Professional Sports, 21 Duquesne Law Review 927 (1983)

Obscenity, Cable Television and the First Amendment: Will FCC Regulation Impair the Marketplace of Ideas?, 21 Duquesne Law Review 965 (1983)

An Assessment of the Commercial Exploitation Requirement as a Limit on the Right of Publicity, 96 Harvard Law Review 1703 (1983)

Trouble in outer Galactica: The Police Power, zoning and Coin-Operated Videogames by Edward H. Ziegler, Jr., 34 Syracuse Law Review 453 (1983)

Common Law Intellectual Property and the Legacy of International News Service v. Associated Press by Douglas G. Baird, 50 University of Chicago Law Review 411 (1983)

Title IX: Women's Collegiate Athletics in Limbo, 40 Washington and Lee Law Review 297 (1983)

Corporate Libel Plaintiffs and the News Media: An Analysis of the public-Private Figure Distinction After

Gertz by Robert E. Drechsel and Deborah Moon, 21 American Business Law Journal 127 (1983)

Indecent Programming on Cable Television and the First Amendment, 51 George Washington Law Review 254 (1983)

Protecting Child Rape Victims from the Public and Press After Globe Newspaper and Cox Broadcasting, 51 George Washington Law Review 269 (1983)

Copyright and the Right of Publicity: One Pea in Two Pods.?, 71 Georgetown Law Journal 1567 (1983)

Content Regulation and the Dimensions of Free Expression, 96 Harvard Law Review 1854 (1983)

The Developing Privilege of Neutral Reportage, 69 Virginia Law Review 853 (1983)

[ELR 5:7:14]