BUSINESS AFFAIRS

Rated PP (for "Political Propaganda") by Uncle Sam's Movie Critics: Federal Regulations Concerning the Import and Export of Films that May "Influence" Public Opinion

by Lionel S. Sobel

When movie makers think of ratings, they think of the system administered by the Motion Picture Association of America. MPAA-rated movies come in four grades: G, PG, R or X, depending on sex, violence and language. Whether a movie entertains, informs, or is otherwise worth the price of admission is left to critics and fans. And while the evaluations of critics and fans do affect the box office, they do not have any legal effect on the way movies are distributed. Recently, however, the existence of a fifth rating grade has surfaced - one that may be referred to as "PP" for "political propaganda" - and this one may have an effect on a movie's distribution. The organization that issues "political propaganda" ratings is not the MPAA. It is the United States government itself.

Uncle Sam has employed movie critics for years. The most familiar of them wear black robes and are known as federal judges. Their reviews appear in such publications as the Federal Supplement, the Federal Reporter, and Supreme Court Reports. And in virtually all cases, the reviewer's sole concern is whether a particular movie is criminally "obscene" and thus unprotected by the First Amendment.

Uncle Sam also employs movie critics in two other departments. Some are employed by the Internal Security Section of the Criminal Division of the United States

Department of Justice. And others are employed by the United States Information Agency. Their work is not nearly as well known as that of federal judges, in part because their reviews are not published at all, and in part because the only movies they review are films that have been imported into the U.S. from other countries or are about to be exported from the U.S. to other countries. In 1983, however, several of these reviews came to public light when they triggered two unrelated but similar controversies.

Twin Controversies

The larger of the two controversies was touched off early in 1983 when the Justice Department declared that three movies produced by the National Film Board of Canada are "political propaganda." Although the declaration was far from the first of its kind the Justice

Department ever had issued, it soon became newsworthy because one of the three movies, If You Love This Planet, won an Academy Award shortly thereafter.

The second controversy was the result of an article by investigative reporter Howard L. Rosenberg published in the July-August 1983 issue of American Film, the magazine of the prestigious American Film Institute. The article was entitied "For Our Eyes Only," and it reported several instances in which the United States Information Agency had denied films desirable "certificates of international educational character" because the USIA had adjudged the films to be "political propaganda."

The issues involved in both of these controversies are largely legal, and in one case, a lawsuit already has been filed. The purpose of this article is to explore how the United States government got into the movie review business in the first place, what sorts of films are likely to be rated "political propaganda," what the consequences of such a rating are to film makers and distributors, and the legality of the standards being used by the government in deciding which films will be so rated.

Justice Department Ratings

The Justice Department's involvement in movie ratings traces its origins back to 1938 when Congress enacted the Foreign Agents Registration Act (22 U.S.C. 611 et seq.) at the recommendation of a House committee that had been specially appointed to investigate "un-American activities." According to the Committee's report, it had received "incontrovertible evidence" that there were many people in the U.S. who represented foreign governments or political groups and whose purpose was to "foster un-American activities" in violation of international law and "the democratic basis of our own American institutions of government." The Foreign Agents Registration Act required all such people to register with the Attorney General of the U.S. According to the House Committee report, registration would publicize the subversive nature of the activities of foreign propagandists, and "the spotlight of pitiless publicity will serve as a deterrent to the spread of pernicious propaganda."

In 1942, the Foreign Agents Registration Act was reinforced by an amendment requiring registered foreign agents to supply the Attorney General with two copies of any "political propaganda" intended for distribution within the United States. "Political propaganda" was defined to include communications intended to influence political interests or policies. Furthermore, the Act was amended to prohibit the distribution of political propaganda in the U.S. unless it is "conspicuously marked" at its beginning with a four-part statement specifying: (1)

the relationship between the distributor and the propaganda; (2) that the material's supplier is a foreign agent; (3) that the supplier's registration statement may be inspected in Washington, D.C.; and (4) that registration of foreign agents does not indicate approval of their material by the United States.

Apparently the two-copy deposit requirement proved burdensome even for the Attorney General, because some time after the requirement was enacted, the Attorney General adopted regulations easing the burden somewhat for foreign agent motion picture distributors. As a result, foreign agent movie distributors must deposit two copies of their films only if specially asked to do so by the Attorney General. Otherwise, they merely need to file monthly reports concerning their dissemination of propaganda along with a certification that the required four-part statement has been made part of the film. (28 C.F.R. 5.400 et seq.)

Canadian Film Board

The National Film Board of Canada has registered with the Attorney General as a foreign agent. However, it does not routinely affix the four-part propaganda statement to all of the films it distributes in the United States. Instead, the Film Board sends lists of its new films to the Justice Department, and the Justice Department requests copies of those films which it thinks may be "political propaganda." The Justice Department then reviews those films, and if it concludes that any are indeed "political propaganda," it so informs the Film Board which then affixes the four-part statement and files the dissemination reports required by the Act.

This was the procedure followed by the National Film Board of Canada in connection with If You Love This Planet, a short concerning the consequences of nuclear war, and with Acid Rain: Requiem or Recovery and Acid from Heaven, two films about the consequences of releasing sulfur dioxide into the air. The Justice Department asked to see them, and having seen them, determined that all three are "political propaganda." Shortly thereafter, If You Love This Planet won an Academy Award, thus bringing its "PP" rating - and the U.S. government's role in issuing it - to the attention of the entire country if not the entire world.

The National Film Board of Canada was of course pleased with its Oscar. And being a polite guest in what for it is a foreign country, the Board quietly complied with the labeling and report requirements of the Foreign Agents Registration Act. In Sacramento, California, however, an American citizen was offended by the "political propaganda" ratings and especially by his government's role in issuing them. The citizen is Barry Keene, and he is by profession a lawyer and a state senator.

Senator Keene did something the Film Board had not: he filed a lawsuit in Federal District Court in Sacramento challenging the constitutionality of the Foreign Agents Registration Act. In his complaint, Senator Keene alleged that he wishes to exhibit the Board's three films in order to influence public opinion on the issues they address, but that he is deterred from doing so by their characterization as "political propaganda." According to Senator Keene, if he were to exhibit the films while they were so characterized, his personal, political, and professional reputation would suffer and his ability to win re-election and to practice law would be impaired.

Preliminary Injunction Granted

In May, Senator Keene made a motion for a preliminary injunction, while the government moved to dismiss his complaint altogether. The case was heard by Judge

Raul A. Ramirez, and thusfar Senator Keene has prevailed. Judge Ramirez has denied the government's motion to dismiss and has granted a preliminary injunction barring the government from imposing any of the requirements of the Foreign Agents Registration Act on any of the three films in question, pending the ultimate outcome of the case. Keene v. Smith, Civ. S-83-287 (E.D.Cal., Sept. 7, 1983).

Because Senator Keene had nothing to do with the production of the films, and is not a movie distributor or exhibitor by occupation, the first hurdle he had to overcome was the government's contention that he did not have standing to challenge the constitutionality of the Foreign Agents Registration Act. While Judge Ramirez gave the issue careful consideration, he ruled without reservation that Senator Keene does have standing. Indeed, according to Judge Ramirez's analysis, Senator Keene's status as a non-commercial exhibitor enhances his standing, because of the reasonable likelihood that his viewers will believe (correctly) that he is using the films to communicate his own opinions. As a result, Judge Ramirez agreed that governmental characterization of the films as "political propaganda" would brand Senator Keene himself as a "purveyor of propaganda," and that would have an adverse impact on his professional and personal reputation. Furthermore, said Judge Ramirez, 'viii fication" of Senator Keene as a "purveyor of propaganda" would cause his clients and constituents to peremptorily reject the ideas that he hopes to communicate.

Substantial Questions Raised

On the merits, Judge Ramirez found that the case raises substantial questions for three reasons. "First, the statute unambiguously implicates freedom of speech, which, in the heirarchy of American values, has pride of place. Second, the statute, by focusing on materials that address issues of public policy, is content-sensitive; content sensitive statutes have long been held to present the most significant threat to First Amendment rights .... Third, the statute, by focusing on materials that address public policy issues, applies to those materials whose protection is the central concern of the First Amendment."

The government argued that the Act is constitutional because it advances the public interest in assuring that citizens are given some means of sensibly assessing the credibility of certain materials by requiring identification of their source. While Judge Ramirez did not doubt that source identification would assist viewers in evaluating films, he rejected the government's argument because he found that "congress could easily have imposed an identification requirement without denigrating the affected materials." Indeed, as Judge Ramirez later noted, the source of these films is almost certainly made known to viewers, because the U.S. Copyright Act requires the name of the copyright owner to appear in a copyright notice that is visible to the films' viewers.

The government also argued that labeling films "political propaganda" does not denigrate them, but Judge Ramirez rejected this argument as well. He reviewed the legislative history of the Foreign Agents Registration Act and concluded that Congress intentionally used the phrase "political propaganda" in a derogatory sense, as it is commonly understood. Judge Ramirez was skeptical of the government's contention that as used in the Act, "political propaganda" must be considered a non-derogatory term of art. "While it is true that Congress deserves wide latitude ...," Judge Ramirez said, "this latitude is not so great as to amount to a license to use language without regard to its commonly accepted and understood meaning. In short, even Congress must ultimately respect the limits of the English language - a language which is generally considered flexible but not infinitely malleable. Congress may not, for instance, claim Humpty Dumpty's perogative: 'When I use a word,' Humpty Dumpty said in a rather scornful tone, 'it means just what I choose it to mean, neither more nor less.'"

Finally, Judge Ramirez concluded that the balance of hardships tipped in favor of granting a preliminary injunction, because "every day that the films ... bear the stigma of ... 'political propaganda' is a day when the films are unavailable to (Senator Keene) as a medium of communication, thus abridging (his) freedom of speech .... By contrast, no injury to (the government) or to the public interest has been suggested...."

The Justice Department has decided not to appeal the preliminary injunction, saying that it was "merely a preliminary ruling and we think we will have an opportunity to show the judge after a trial that the statute is constitutional." Whether the government is able to do so remains of course to be seen. With no money, and only matters of principle, at stake, there seem to be no grounds and little reason to compromise. This is a case that is likely to go to the Court of Appeals and may well go to the Supreme Court before the questions it raises are finally answered.

USIA Ratings

The United States Information Agency's involvement with movie ratings dates back to its creation in 1953 when it assumed responsibility from the U.S. Department of State for an informal audio-visual export program. The USIA's formal activity as a movie rating agency began in 1966. But in order to appreciate the purpose of its current activities, it is necessary to look back more than 50 years.

Almost every country in the world has its own tariff and customs laws requiring the payment of duty in connection with the importation of many kinds of goods. At one time - and in some countries even today - educational films and documentaries were treated by these customs laws just as though they were Hollywood-produced entertainment features. Fifty years ago or so, educators and distributors of educational materials noticed that some countries permitted duty-free, accelerated entry of educational materials, if their educational nature were satisfactorily established. In order to take advantage of this situation, two international treaties were drafted to establish accepted procedures for certifying the character of educational materials. These treaties were known as the Geneva Convention of 1933 and the Buenos Aires Convention of 1936. The United

States, however, did not join either of these conventions. The Geneva Convention's procedure was thought to be impractical because it required materials to be shipped to a commission in Italy which issued all certificates. And the Buenos Aires Convention's procedure was unacceptable to the United States because of the manner in which propaganda materials were to be handled. Nevertheless, in 1938, the United States Department of State adopted the policy of assisting the foreign distribution of American audio-visual materials; and in 1942, it implemented that policy by certifying the nature of educational audio-video materials. Even though the United States was not a member of either existing convention, such certification facilitated the duty-free importation of American-produced materials in many countries.

Beirut Agreement

In 1948, a third treaty was drafted which overcame most of the United States' objections to the earlier two. This third treaty is known as the Beirut Agreement of 1948, and since that year, the Beirut Agreement has been the guide for all export certification done by the United States. Ironically, despite the satisfactory terms of the Beirut Agreement, and its use by this country since 1948, the United States did not formally ratify the Beirut Agreement until 1966. When the U.S. finally did ratify the Agreement, thenPresident Lyndon B. Johnson issued an executive order designating the USIA as the agency to carry out the Agreement's provisions and to make the determinations required by it. (31 Fed.Reg. 13413 (Oct. 18, 1966)). In doing so, President Johnson formalized what had been the practice since 1953 when the USIA took over from the State Department the informal certification program that had been in operation in this country since 1942.

The Beirut Agreement provides that each of its member countries shall exempt from all customs duties, quantity restrictions and import license requirements any "educational, scientific and cultural" audio-visual materials that originate in another member country. The Agreement specifies that audio-visual materials are of an "educational, scientific and cultural character" when their primary purpose or effect is to instruct or inform, or when they maintain, increase or diffuse knowledge, and augment international understanding and goodwill; and when they are "representative, authentic, and accurate." In order to obtain the exemption provided by the Agreement, an importer files in its own country a certificate issued by the government to the country in which the material originated, certifying that the material is of an "educational, scientific or cultural character." As a practical matter, the producer or distributor of such material applies for the certificate in its country and then forwards the certificate to the foreign importer which submits the certificate to its country's customs officials.

U.S. Certification Process

Here in the United States, the certification process works quite smoothly, most of the time. The USIA has prepared a simple, two-page application form. The USIA asks that copies or samples of the material to be certified be sent to it for review, though the USIA says that it is willing to discuss this requirement with applicants if sending copies to Washington seems unfeasible because the material is bulky, fragile, or sending it would be excessively expensive. The USIA says that certification usually takes about two weeks, and it promises that if more time seems necessary, it will send the applicant an acknowledgment and time estimate. When materials are certified, the applicant is sent an original

Certificate and three signed copies, and the applicant is advised to retain the original so that it may be photocopied for use in connection with subsequent shipments of the same material.

During 1982 alone, the USIA issued 1,942 certificates, 966 of which were for motion pictures and videotapes. These certificates actually covered 56,803 individual titles, because many certificates, especially those issued for filmstrips, slides and recordings, covered several individual titles each.

Although the certification program works quite smoothly most of the time, a controversy has arisen because two or three dozen times each year, the USIA denies certificates to applicants on the grounds that their materials are not "educational, scientific or cultural." In at least some of those cases, the controversy stems from the standards the USIA uses in making that determination.

USIA Regulations

When the United States ratified the Beirut Agreement in 1966, the USIA adopted regulations describing the manner in which it would be carrying out its designated duties. (22 C.F.R. 502.) One section of these regulations constitutes the USIA's "interpretation" of what the Beirut Agreement means by "educational, scientific or cultural" material. And according to some, that "interpretation" is a good deal more restrictive than it ought to be. For example, the USIA will not certify materials the primary purpose of which is to amuse, entertain, or inform concerning timely current events (such as newscasts). It will not certify materials which attempt to influence opinion or policy or which espouse or attack a cause, or which the USIA considers to be political propaganda. Nor will the USIA certify materials which may be misinterpreted or which may misrepresent the United States or other countries, or their people or institutions, or which appear to have as their purpose or effect to attack or discredit economic, religious or political views or practices. (22 C.F.R. 502.6.)

Neither the Beirut Agreement itself, nor President Johnson's executive order designating the USIA as the agency to carry out the Agreement's provisions, contain any express authority for these further limitations. Why then did the USIA issue this "interpretation"? According to the regulations themselves, the "interpretation" concerns "some of the problem areas most frequently encountered" - presumably during the 18 years from 1948 until 1966, prior to the United States' ratification of the Agreement, when the Agreement was nevertheless being used as a guide for this country's informal certification program.

John Mendenhall, the Attestation Officer of the United States who administers the USIA certification program explained to reporter Howard Rosenberg (in an interview for his American Film article) that the regulations were the result of "a learning process" and an attempt "over the years ... to refine (the) very broad rubric" of the Agreement itself. Mr. Mendenhall has conceded that a film may "instruct or inform" - as required by the Beirut Agreement even though it espouses a cause - as prohibited by the USIA's regulations. Nevertheless, this does not mean that such films should be certified, because if so, Mr. Mendenhall told Mr. Rosenberg, "Then it follows that the agency would be bound to certify ipso facto every point of view. If we did what you are suggesting, it wouldn't be long before the certificates were invalidated at many national borders anyway." By this, Mr. Mendenhall was alluding to escapeclause provisions of the Beirut Agreement which make it little more than a non-binding, gentlemen's understanding.

Escape-Clause Provisions

Article IV of the Beirut Agreement provides that when a certificate is filed by an importer, the government of the importer's country shall itself consider the material to be imported and shall itself decide whether that material is entitied to the exemptions granted by the Agreement. If the importer's country believes that the material is not entitled to exemption because it is not "educational, scientific or cultural," the exporter's country is entitled to be notified before any final decision is made "in order that it may make friendly representations in support of the exemption of that material." While the importer's country is required to give "due consideration to any representations made to it" by the exporter's country, the decision of the importer's country "shall be final."

In short, certification by the USIA does not guaranty duty-free entry of American films into foreign countries. At best, it creates a presumption in favor of duty-free entry. But that presumption can be rejected by the government of any importing country, even if it is a signatory to the Beirut Agreement. Apparently, the USIA's conservative regulations are intended to assure that USIA certifications are rarely if ever rejected by foreign governments. The question is whether the USIA should, or constitutionally may, take such a conservative position, even for such laudatory purposes.

Cost of Certification Board

Being denied a certificate does not prevent an American distributor from selling or renting its films abroad. It simply means that customs duties will have to be paid. However, the cost to an American producer or distributor of being denied a certificate is difficult to estimate, because American film exporters do not pay duties in foreign countries. It is the foreign importer that pays customs in its own country, if the film is not certified. Thus, an uncertified film is simply more expensive for a foreign importer, because it must pay not only the American distributor's fee but customs duties as well. In the educational film market, where films are frequently marketed by direct mail, the importer may simply decide the film is too expensive. And the American exporter will never even realize it has lost a sale. This means that the dollars-and-cents losses caused by the USIA's conservatism would require an empirical study to estimate and may not be accurate even if the study were carefully done.

On the other hand, the benefits of the USIA's conservatism are also difficult if not impossible to measure. If the USIA were to err on the side of American film distributors, and some certificates were rejected by foreign governments, those American distributors would be no worse off, financially, than if the certificates were denied by the USIA itself. If the USIA were to regularly err on the side of American distributors, it is conceivable that American certificates would become suspect in foreign countries. But does that mean that truly eligible American films would be taxed in foreign countries when now they are not? Overreaction by foreign countries is a questionable thing to assume - especially if the assumption is the basis for the USIA "interpretation," as it appears to be.

Furthermore, the USIA "interpretation" of the Beirut Agreement is clearly and intentionally "content-sensitive," and it focuses on materials that concern public policy issues. Thus, for all of the reasons outlined in Judge Raul Ramirez's decision in Senator Barry Keene's lawsuit concerning the constitutionality of the Foreign Agents' Registration Act, the USIA's "interpretation" of the Beirut Agreement appears to violate the First Amendment as well.

Procedure to Challenge

As a matter of procedure, a challenge to the USIA's "interpretation" would not be difficult or overly-expensive to mount. The USIA's own regulations provide for review of initial decisions by a USIA Review Board. All that is required to initiate such a review is a written request "supported by such data and arguments" as the applicant wishes the review Board to consider. The Review Board will issue a written decision. And that decision may be appealed to the Director of the

USIA who also will furnish the applicant with a written decision. The regulations provide that the Director's decision "shall constitute the final administrative action on the case." (22 C.F.R. 502.5.) But from there, an appeal to the federal courts is possible, as provided in the Administrative Procedures Act.

Although foreign governments cannot be made to respect the First Amendment rights of American citizens, there is little reason for an agency of the United States to anticipate that foreign governments will want to violate those rights, and thus do their work for them in advance. It would not be surprising for the USIA's own Review Board or Director to recognize this if an appeal were properly brought. And if they did not, federal courts have long been willing to explain First Amendment requirements to government agencies when cases have required them to do so.

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RECENT CASES

Federal Court of Appeals upholds finding that George Harrison "subconsciously" infringed copyright to "He's So Fine" in composing "My Sweet Lord"; damage award is remanded for recalculation of foreign royalty claims

A Federal Court of Appeals has upheld a lower court opinion holding that former Beatle George Harrison's song "My Sweet Lord" infringed the copyrighted work "He's So Fine." Federal District Court Judge Owen had concluded that substantial similarity between the songs together with access constituted copyright infringement, even though the copying by Harrison apparently was subconscious. Harrison admitted at trial that he remembered hearing "He's So Fine" in the early sixties. The fact that Harrison's access to "He's So Fine" occurred in 1963, some six years before Harrison composed "My Sweet Lord," did not create "temporal remoteness" precluding a finding of access, the court held. A finding of access also could have been based on the wide dissemination of "He's So Fine" during the early sixties, said the court.

Harrison argued that it would be unsound policy to permit a finding of infringement for subconscious copying. But the Court of Appeals stated: "It is not new law in this circuit that when a defendant's work is copied from the plaintiff's, but the defendant in good faith has forgotten that the plaintiff's work was the source of his own, such 'innocent copying' can nevertheless constitute an infringement." To hold otherwise, the court explained, would create problems of proof that could substantially undermine the protections Congress accords copyright holders.

The appellate court also upheld the District Court's rulings on damages with the exception of the disposition of certain foreign royalty payments; this issue was remanded for further consideration. The damages aspect of the litigation was complicated by the 1978 purchase of Bright Tunes Music, the then-copyright owner of "He's So Fine," by ABKCO Music, Inc. Allen B. Klein, the president of ABKCO, handled the business affairs of the Beatles at the time that Bright Tunes initially asserted its claims against Harrison. Klein's relationship with the Beatles ended in 1973. In 1975 and 1976, during the course of pretrial settlement negotiations between Bright Tunes and Harrison, ABKCO attempted to purchase Bright Tunes. Klein provided Bright Tunes with information about the royalty income earned by "My Sweet Lord," and Klein's estimated value of the copyright. Bright Tunes rejected Harrison's then-outstanding settlement offer. The copyright infringement action was tried in 1976 and Harrison was found liable for infringement. A bench trial was held on damages and on the counterclaims of the parties in the fall of 1979. At this point, ABKCO, having purchased Bright Tunes in 1978 for $587,000, was the sole party plaintiff. In February 1981, the damages decision was rendered; damages were calculated at $1,599,987 (ELR 3:4:1).

The District Court held that ABKCO's conduct in 1975 and 1976 would serve to limit the company's recovery against Harrison to the amount ABKCO paid for Bright Tunes. It was found to be of paticular significance that Klein's "covert intrusion" into the settlement negotiations, which included providing Bright Tunes with financial information about "My Sweet Lord" obtained while

Klein was working with Harrison, decreased the possibility of a settlement agreement between Harrison and Bright Tunes. Bright Tunes most likely gave "special credence" to Klein's offers because of his status as Harrison's former business manager. ABKCO therefore was directed to hold the "fruits of its acquisition" in trust, to be transferred to Harrison upon the payment by Harrison of $587,000 plus interest from the date of the Bright Tunes acquisition.

The Court of Appeals concluded that there was sufficient evidence to support the finding that Klein utilized confidential information in a manner inconsistent with the duty of a former fiduciary. The imposition of a trust was upheld as a proper remedy except as to the inclusion of foreign infringement claims as to which settlements already has been reached between ABKCO and Harrison. On remand, the District Court was asked to determine what portion of the $587,000 paid by

ABKCO to Bright Tunes was attributable to foreign rights, and this amount will be subtracted from the $587,000 to determine the amount of damages due ABKCO.

ABKCO Music v. Harrisongs Music, 1983 CCH Copyright Law Decisions, Para 25,603 (2d Cir. 1983) [ELR 5:8:10]

Director of photography for proposed production of the motion picture "Brenda Starr" was entitled to receive $78,000 contractual fee under pay or play agreement when production did not go forward

Victor J. Kemper, a motion picture director of photography, has been awarded $78,000 under the pay or play clause in his employment agreement with

Friedman/Meyer Productions. The agreement, which was entered into sometime between September 1980 and November 1980, stated that Kemper would provide his services for the proposed motion picture production "Brenda Starr" for a salary of $6,500 per five-day work week. The salary was to be paid for the time required to complete the principal photography on the film, or for 12 consecutive weeks commencing January 12, 1981, whichever period was longer. Kemper was to have been paid for the minimum 12-week period whether or not the film was made.

In November 1980, the chairman and the president of Friedman/Meyer were indicted by a federal grand jury in a criminal action. Subsequently, a company known as International Film Investors assumed the functions of the production company. International, in March 1980, had agreed to provide partial financing to Friedman/Meyer for the production of "Brenda Starr" in return for a share of the film's profits. It was also agreed that in the event the principals of Friedman/Meyer were indicted, International would have the right to assume all of the production functions relating to the film. But International ceased advancing funds to Friedman/Meyer and did not proceed with the production.

In January 1981, Kemper demanded his contractual payment. Friedman/Meyer argued that its obligation to pay Kemper never accrued because a condition precedent - the funding of the company by International - never was satisfied. Friedman/ Meyer contended that Kemper had impliedly agreed to the condition precedent when Kemper's agent was told about the financing arrangement, and about International's right to approve all contracts entered into by Friedman/Meyer in connection with the film.

A Federal District Court in New York has found that the parol evidence rule barred the introduction, in this case, of evidence of any prior agreement concerning the purported condition precedent. While an exception to the parol evidence rule permits the introduction of evidence to prove an oral condition precedent to a contract, the exception does not apply if the alleged condition, as here, would contradict the express language of the writing. And the president of Friedman/Meyer had testified that at the time of executing the contract with Kemper, he understood the term "pay or play" to mean that Kemper was to be paid for his services whether or not the film went forward - an interpretation of the contract that was "flatly" inconsistent with the elusive implied condition.

Friedman/Meyer also argued that when International assumed responsibility for the production of the film, Friedman/Meyer was relieved of liability to Kemper due to impossibility of performance and frustration of the purpose for which the company entered into the employment contract. The court rejected these defenses because Friedman/Meyer was responsible for the event which allegedly made performance impossible - the indictment of its principals.

Friedman/Meyer also suggested that by assigning its rights in "Brenda Starr" to International, a "novation" occurred which served to extinguish its liability to Kemper and to substitute International as the party obligated to pay Kemper. A novation requires: a previously valid obligation; an agreement of all parties to the new contract; extinguishment of the old contract; and a valid new contract supported by consideration. In this case however, there was no evidence that Kemper agreed to treat the assignment as a new contract, or that he consented to the "extinguishment" of his contract with Friedman/Meyer. The alleged silence of Kemper's agent when he supposedly was told that International would assume Friedman/Meyer's obligations to Kemper was not sufficient evidence of the requisite consent, the court ruled.

In reviewing Kemper's damage claim, the court rejected Friedman/Meyer's argument that any damages were fully mitigated because Kemper was employed during the time when the production of "Brenda Starr" might have been undertaken by International. Kemper testified that despite his efforts to obtain alternate employment, he was unemployed during the 12-week term set forth in his contract with Friedman/Meyer. Kemper was not suing for the amount he would have earned during the time it would have taken to complete the film. Thus, the amount he earned later in 1981 was irrelevant in calculating Friedman/Meyer's obligation.

VJK Productions, Inc. v. Friedman/Meyer Productions, Inc., 565 F.Supp. 916 (S.D.N.Y. 1983) [ELR 5:8:10]

Federal Court of Appeals affirms $916,666 damage award to CBS in breach of contract action against producer David Merrick because of his failure to produce mini-series based on "Blood and Money"

A Federal District Court judgment awarding CBS approximately $916,000 in damages in the network's breach of contract claim against producer David Merrick has been upheld by a Federal Court of Appeals.

The contractual dispute arose in connection with CBS' acquisition from Merrick of the right to produce a mini-series based on the late Thomas Thompson's best-selling book "Blood and Money." The Texas-league factual history of the transactions between the parties was previously recounted in these pages (ELR 4:3:3), but in brief, CBS agreed to pay Merrick a total of $1,250,000 for the mini-series rights. The Rights Agreement, entered into in August 1977, provided that if photography on the mini-series did not begin by August 1, 1979, the agreement would terminate and CBS would pay Merrick the balance owed under the agreement. In addition, the rights to "Blood and Money" would revert to Merrick. In a Production Agreement, which was entered into on the same day, CBS agreed to pay Merrick an additional $250,000 to produce the property. The Production Agreement also stated that CBS would have 90 days from the delivery of the final screenplay to notify Merrick whether it would proceed with the project. If CBS chose not to proceed, the company then would be obligated to pay Merrick the entire $250,000 fee.

In accordance with the Production Agreement, Merrick selected a director and a screenwriter. At the time of their hiring, these individuals were engaged on other projects and could not immediately begin work on "Blood and Money." Hence, the screenplay was not completed until June 1979. Prior to this, in April 1979, Merrick met with CBS executives and orally agreed to extend the August 1st deadline for the commencement of photography. Many drafts of a proposed amendment incorporating this modification were submitted to Merrick. While apparently agreeing with the basic terms of the deadline extension, Merrick failed to sign any of the amendments. But Merrick continued to act as though the deadline indeed had been extended. For example, in August 1979, the parties engaged in discussions regarding a budget and tentative production schedule for the mini-series.

The first act curtain, however, does not fall on a chorus line of energetic production executives delighting the audience with a rousing rendition of the "Blood and Money" ballad. Rather, in September 1979, Merrick notified CBS that all rights to the property had reverted to him because the network had not met the August 1st deadline.

The second act opened in the courtroom of Federal District Court Judge David W. Williams who promptly decreed that CBS was entitied to recover on its various contractual claims against Merrick because: (1) Merrick waived his right to enforce the deadline; (2) Merrick was estopped from asserting the deadline; (3) CBS's failure to meet the deadline was excused because Merrick contributed to the failure; (4) Merrick breached his oral agreement to extend the deadline; (5) Merrick failed to meet an express condition precedent of the contract in that he was not ready, willing and able to perform; and (6) Merrick breached the agreement before the deadline. The court awarded CBS the sum of $833,333 which CBS had paid Merrick, and also the sum of $83,333, the amount which CBS paid to the William Morris Agency, Merrick's agent. The court denied CBS' claim to an additional $750,000 which the network had paid, under the

Production Agreement, to the director and screenwriter hired by Merrick.

After a brief intermission, Merrick argued, on appeal, that the District Court had erred in finding that he had no excuse for his refusal to perform his agreement with CBS and that he waived his right to have photography begin before August 1, 1979. However, the Court of Appeals has ruled that the District Court's finding of a waiver by Merrick was not clearly erroneous in view, among other factors, of Merrick's failure to notify the director and screenwriter of the August 1st deadline and Merrick's refusal to accede to CBS's suggestion that he hire a second writer. In all Merrick had encouraged the development of the project both before and after the deadline had passed. Thus, there was a waiver by Merrick and CBS relied on that waiver to its detriment. Furthermore, CBS's detrimental reliance on the oral modification of the deadline date prevented Merrick from invoking the clause of the Production and Rights Agreements which called for amendments to be in writing. The District Court's other findings also were supported by ample evidence, stated the appellate court.

The Court of Appeals then turned to the issue of damages and concluded that the District Court had erred on this issue in refusing to allow CBS to recover reliance damages even though it found that a substantial breach of the agreements had occurred. The matter therefore was remanded to the District Court to determine what part of the $750,000 paid by CBS to the director and screenwriter were legitimate reliance damages. The District Court was directed to consider such questions as CBS's reasonable reliance on the agreement, attempts to mitigate damages, the value of the screenplay delivered to CBS and the foreseeability of the loss.

In a concurring opinion, Justice Nelson noted that the proper measure of damages in the case seemed to depend on an unclear area of New York law, namely, whether CBS is entitled to recover reliance damages when the restitution award was being used as a substitute for speculative lost profits in a breach of contract action. Judge Nelson, after reviewing scant New York case law, reasoned that a New York court would permit the recovery of restitution plus additional measures of contract damages in this case. Justice Nelson therefore concurred in the order to remand the case for a determination of the full contract damages due CBS.

CBS Inc. v. Merrick, 716 F.2d 1292 (9th Cir. 1983) [ELR 5:8:11]

Federal District Court refuses to dismiss counter-claim filed by The Dramatists Guild against The League of New York Theatres and Producers in

antitrust action involving licensing of playwrights' works

A Federal District Court in New York has ruled that a counterclaim filed by The Dramatists Guild against The League of New York Theatres and Producers, Inc., does state a claim and that the Guild has standing to seek injunctive relief on behalf of its members against the practices alleged in the counterclaim.

The principal action was commenced by Richard Barr, the president of the League, an association representing producers and theatre owners, against the Dramatists Guild and three of its officers - playwrights Peter Stone, Sheldon Harnick and Ruth Goetz. The complaint alleged that the Guild, a nonprofit corporation whose members include professional playwrights, composers and lyricists, violated Section I of the Sherman Act by conspiring "to restrain trade and commerce in the sale of authors' works for legitimate theatrical attractions." It was alleged that the Guild and its officers conspired to fix the minimum prices and other terms on which they would deal with producers, and agreed among themselves that they would not license a play to producers except upon the minimum terms incorporated in a standard form contract known as the Minimum Basic Production Contract. The League sought an injunction barring the use of contracts containing minimum terms and conditions for the production of any author's work as a legitimate theatrical attraction.

The Dramatists Guild, in its counterclaim, alleged that the League and the Shubert and Nederlander organizations violated Section 1 of the Sherman Act by conspiring to maintain artificially low and noncompetitive levels of compensation for playwrights. The counterclaim pointed out that the Shubert and Nederlander interests own or operate about 70% of the 41 theatres in the

Broadway theatrical district, and that by reason of their alleged monopoly power in the market for theatre ownership, they dominate the League and "dictate the terms on which they will produce playwright's works." Consequently, the minimum royalty terms of the Minimum Basic Production Contract have become maximum terms, according to the Dramatists Guild, due to concerted action by the League parties.

Federal District Court Judge Henry F. Werker first determined that the counterclaim stated a cognizable claim, in that it alleged a conspiracy by producers to fix the price of the services they purchase "at artificially low and non-competitive levels." Conspiracies among buyers to suppress prices are unlawful under the antitrust laws, noted Judge Werker. The court also found that antitrust injury was properly alleged; judicial economy would not be served by a severance of the counterclaim; and that the Dramatists Guild had standing to sue for injunctive relief on behalf of its membership under Section 16 of the Clayton Act.

Barr v. The Dramatists Guild, Inc., Case No. 82 Civ. 4876 (S.D.N.Y., Oct 25, 1983) [ELR 5:8:12]

Federal Government enjoined from treating Canadian films, including Academy Award winner "If You Love This Planet," like "political propaganda"

The United States Government has been preliminarily enjoined by a Federal District Court in Sacramento, California, from imposing any of the requirements of the Foreign Agents Registration Act on three films produced by the National Film Board of Canada. One of the three films involved in the case is the Academy Award winning short If You Love This Planet. The Act requires the deposit and labeling of films declared to be "political propaganda" by the Justice Department. For details concerning the case and the court's ruling, please see the article that begins on page 3 of this issue.

Keene v. Smith, Civ.S-83-287 (E.D.Cal., Sept. 7, 1983) [ELR 5:8:14]

Federal Court of Appeals upholds Copyright Royalty Tribunal's distribution of 1979 cable television royalty fees; but Tribunal's failure to award anything to copyright holders of religious-oriented programming is remanded along with claims by television stations originating sports broadcasts and by commercial radio stations

A Federal Court of Appeals has upheld, with several exceptions, the distribution to copyright holders of $20.6 million in cable royalty fees for the year 1979. Pursuant to the 1976 Copyright Act, cable television systems may retransmit certain copyrighted programming to their subscribers without incurring liability for copyright infringement if the systems obtain a compulsory license for their operations, in part by paying royalty fees into a central fund. The royalty payments represent compensation to copyright owners for their inability, due to the cable retransmission, to exploit their materials in "distant" markets. The fund then is distributed annually by the Copyright Royalty Tribunal among the copyright owners whose works were retransmitted by the cable systems. The Tribunal's first distribution determination, in 1978, was affirmed by the Court of Appeals in National Association of Broadcasters v. Copyright Royalty Tribunal, 675 F.2d 367 (D.C. Cir. 1982) (ELR 3:24:1). In 1979, the Tribunal allocated the fund, in an initial breakdown, as follows: 70% to program syndicators and movie producers; 15% to joint sports claimants; 5.25% to the Public Broadcasting Service; 4.5% to United States television broadcasters; 4.25% to the music performing rights societies; 0.75% to Canadian television broadcasters; 0.25% to National Public Radio; and nothing to Commercial radio.

Several of these groups raised "a host" of procedural and substantive challenges to the Tribunal's 1979 determination. In reviewing the challenges, the Tribunal utilized three primary distribution criteria that it had developed in its 1978 proceeding: (a) the harm caused to copyright owners by secondary transmissions of copyrighted works by cable systems; (b) the benefit derived by cable systems from the secondary transmission of certain copyrighted works; and (c) the marketplace value of the works transmitted. Two secondary criteria also were utilized: the quality of copyrighted program material, and time-related considerations. However, since the "harm" test had proved to be of limited utility, the Tribunal focused greater attention on the compensable marketplace value of a claimant's exploitation rights. The Tribunal stated that the Motion Picture Association of America's presentation of a Nielsen Report and the material submitted by the joint sports claimants were particularly useful evidence of such marketplace factors. And because this evidence indicated that movies and sports programs contribute "overwhelmingly" to cable's attractiveness to subscribers, a solid basis was established for the allocation of over 80% of the 1979 fund distribution to the MPAA and the sports claimants, in the Tribunal's view.

Notwithstanding the allocation of 70% of the fund to the MPAA, the MPAA, on behalf of its member producers and syndicators, claimed that program suppliers were entitied to an even greater share of the royalty fees. The Court of Appeals, however, upheld the 70% allocation, finding that the Tribunal had adequately supported its downward adjustment from the 90.5% share urged by the MPAA. The court emphasized its support of the Tribunal's use of evidence indicating the commercial factors motivating cable operators in reaching programming decisions.

The Tribunal's allocation of 4.5% of the fund to television broadcasters also was upheld, albeit with reservations by the Court of Appeals as to the decision-making route followed in this instance. Cable systems do retransmit certain "local" broadcasts, such as station news and public affairs programming to relatively nearby (though technically distant) communities. And although this retransmission may be of "marginal" value to cable systems, it is not de minimis, placing the 4.5% allocation within the "zone of reasonableness."

The MPAA also challenged the Tribunal's allocation of royalty fees among the program suppliers group. The MPAA received a 96.8% share of these fees, an amount it claimed was unjustifiably small. But the Court of Appeals found that the Tribunal had adequate support for its allocation of the balance of the program supplier fund to Multimedia Program Productions (a non-MPAA member and the originator of "The Donahue Show" and "Young People's Specials"), to the National Association of Broadcasters, and to the Spanish International Network, Inc., which often provides the only Spanish-language signal within certain primary areas.

The Court of Appeals also reviewed the claims of the Christian Broadcasting Network, the Old-Time Gospel Hour, and The PTL Television Network, all of which are the copyright owners of television programs containing material of a religious nature such as "The Old Time Gospel Hour," conducted by the Reverend Jerry

Falwell. The Tribunal treated these copyright owners as a group - the "Devotional Claimants" - and made no award of royalty fees to the group. It was found that the devotional claimants' programming had no marketplace value because the producers of the programming paid broadcasters for air time. As the Tribunal stated: "We regard it as a fundamental distinction the practice of these syndicator claimants to buy time on television stations to broadcast their programs, while other syndicated programs are purchased by the stations." Furthermore, it was found that the devotional claimants were not "harmed" by the cable retransmission of their programming.

The Tribunal's conclusions were questioned by the Court of Appeals due to the Tribunal's failure to acknowledge opposing evidence presented by the devotional claimants. One contention that was not discussed by the Tribunal was the claimant's position that their payments to broadcasters, rather than being an indication of market worthlessness, was a voluntary cost assumed by the claimants to avoid the sale of commercial time during the programs by the purchaser-stations. Such commercial-free programming is supported by viewer donations, and the donations themselves may be an indication of market value. In view of the Tribunal's failure to discuss relevant aspects of the devotional claimants' presentation, as well as other indications of arbitrariness, the Court of Appeals remanded the determination of a complete non-award for a more adequate explanation, considering all legally-cognizable evidence. On remand, if the Court of Appeals' suggestions are heeded, the Tribunal, in addition to the factors discussed above, also will be examining previously unreviewed evidence of the " benefit" to cable operators of transmitting the devotional claimants' programming. Apparently, the Nielsen Report does record a one per cent viewing rate for the religious series.

Another Tribunal conclusion - that cable retrans mission may benefit the devotional claimants - also was applied with an "unexplained vengeance," declared the court. While cable retransmission may aid the devotional claimants' contribution base, evidence was introduced suggesting that there was only a moderate net benefit from cable in terms of fundraising efforts. Furthermore, the Tribunal allocated funds to PBS and National Public Radio without any discussion of these claimants' on-the-air fundraising drives.

The next challenge to the Tribunal's allocation of fees - that of Spanish International Network - was rejected by the court. SIN had protested the Tribunal's refusal to use, in its distribution, a "fee-generated" formula, linking the distribution of royalty fees to the amount of fees paid into the fund. SIN also argued, as had the devotional claimants, that the Tribunal failed to determine that its awards were made to proven copyright owners. But the court found sufficient evidence in the record to support the Tribunal's conclusion that its awards went only to bona fide copyright owners.

Two interesting arguments then were presented by the National Association of Broadcasters. The Tribunal had determined that television broadcasters would not receive royalty fees for the value of their copyrightable contributions to sports telecasts, i.e., the manner in which editing techniques and ever-alert commentators increase the "enjoyability" of sports telecasts. The Tribunal, in accordance with a position taken in 1978, granted, in its 1979 proceeding, a request by the joint sports claimants for a declaratory ruling that the 1976 Copyright Act forbade the Tribunal from awarding any "sports" royalty fees to television broadcasters. But the Court of Appeals, in National Association of

Broadcasters v. Copyright Royalty Tribunal, had rejected the Tribunal's interpretation of the Copyright Act. The NAB then introduced evidence, in the 1979 proceeding, which attempted to demonstrate the value of a broadcaster's contributions to sports telecasts. The Court of Appeals was persuaded to remand the case for the further assessment by the Tribunal of this evidence.

The second claim presented by the NAB was the non-award to commercial radio stations. Many cable systems are equipped to import distant radio signals, and the 1976 Copyright Act authorizes the Tribunal to compensate "nonnetwork programming consisting exclusively of (distant) aural signals." The NAB pointed out that royalty fees were allocated to National Public Radio and to the music claimants. While finding much of the NAB's claim "overstated," this inconsistency in the allocation of funds to the music parties and the non-award to commercial radio stations required the remand of the issue to the Tribunal for a re-distribution of fees or for "an improved explanation of its non-award to NAB." The award to National Public Radio was not found inconsistent with the non-award to commercial radio, since NPR's programming is of a distinctive quality and has special appeal to cable subscribers, noted the court, as opposed to the de minimis market value of radio generally to cable systems. But the music award may, in part, have been intended to compensate copyright holders for the use of their music on retransmitted radio, as opposed to television signals. Hence, a non-award to NAB based on the Tribunal's conclusion that there was no marketplace value for all distant commercial radio carriage was an arbitrary determination, ruled the Court of Appeals. Pending the Tribunal's decision on remand, the "radio" award to the music claimants and the non-award to the commercial radio stations were set aside.

The court concluded by urging the Tribunal to strive for greater clarity in its decisionmaking, since the future portends an increasing number of claimants with ever more sophisticated evidentiary presentations.

The Christian Broadcasting Network, Inc. v. The Copyright Royalty Tribunal, Case No. 82-1312 (D.C.Cir., Oct. 25, 1983) [ELR 5:8:14]

Oklahoma constitutional prohibition on alcoholic beverage advertising is upheld; Federal Court of Appeals rejects First Amendment challenge brought by broadcasters and cable operators; but Supreme Court agrees to review case

Oklahoma's constitution stringently restricts the advertising of alcoholic beverages, stating: "It shall be unlawful for any person, firm or corporation to advertise the sale of alcoholic beverages within the State of Oklahoma except one sign at the retail outlet...." This restriction confounded the members of the Oklahoma Telecasters Association since, in order to comply with the provision, the broadcasters had to block out certain network advertisements. Cable operators also were restricted from accepting advertising for alcoholic beverages, but the prohibition was not enforced against the cable operators until May 1980. At that time, despite the fact that Federal Communications Commission regulations and federal copyright law prohibit cable operators from altering or modifying the television signals they relay to subscribers, the Attorney General of Oklahoma announced that the prohibition against alcoholic beverage advertising henceforth would be applied to cable systems in the same manner as it has been applied to broadcaster television. The cable operators would be subject to criminal prosecution if they continued to retransmit the advertisements.

The broadcasters and the cable operators brought an action against the director of the Oklahoma Alcoholic Beverage Control Board seeking a declaratory judgment that Oklahoma's constitutional and statutory provisions violated their rights to free speech and equal protection. A Federal District Court granted the media parties' motions for summary judgment, ruling that the power to regulate liquor granted to the states by the Twenty-first Amendment did not override the First Amendment rights of the broadcasters and the cable operators. The District Court concluded that Oklahoma's laws only indirectly advance the state's governmental interest in reducing alcohol consumption and were more extensive than necessary to serve that interest. The court issued a permanent injunction preventing the Alcoholic Beverage Control

Board from enforcing the advertising regulations against the media parties.

A Federal Court of Appeals reversed the District Court's ruling. The Court of Appeals initially determined that it was bound by the United States Supreme Court's ruling in the case of Queensgate Investment Co. v. Liquor Control Commission, 103 S.Ct. 31 (1982). Queensgate involved a First Amendment challenge to an Ohio regulation which prohibited retail liquor permit holders from advertising the retail price of alcoholic beverages. The Ohio Supreme Court held that the regulation did not violate the First Amendment. The United States Supreme Court dismissed the appeal "for want of a substantial federal question." The Court of Appeals, in this case, expressed the view that the Supreme Court, despite its dismissal of the action, had decided that Ohio's regulation was not an unconstitutional infringement of

First Amendment rights, and that Queensgate therefore was binding in the Oklahoma proceeding.

Nevertheless, the Court of Appeals, recognizing that the Oklahoma advertising prohibition is broader than the regulation at issue in Queensgate, did undertake its own examination of the prohibition. The court determined that the prohibition was a valid exercise of the state's authority under the Twenty-first Amendment as incident to the sale of alcoholic beverages, and as a means to achieve the goal of protecting Oklahoma citizens against the harms associated with the use of alcoholic beverages.

The court then considered the Twenty-first Amendment in light of the First Amendment. Commercial speech is accorded only a limited measure of protection noted the court, and this protection evaporated when confronted by Oklahoma's substantial interest "in the health and welfare of its citizens, the safety of its highways, the stability of its families, and the productivity of its work force." The advertising regulations, contrary to the District Court's view, were reasonably related to reducing the sale and consumption of liquor, and were no more extensive than necessary to serve Oklahoma's asserted interests. It was pointed out that on-premises advertising is allowed, the rebroadcast of beer advertisements is not prohibited, and alcoholic beverage advertising in out-of-state printed publications distributed in Oklahoma also is allowed. The permanent injunction issued by the District Court therefore was ordered dissolved.

In October 1983, the United States Supreme Court granted certiorari in this case under the name Capital Cities Cable v. Crisp.

Oklahoma Telecasters Association v. Crisp, 699 F.2d 490 (10th Cir. 1983) [ELR 5:8:16]

Mississippi ban on intrastate advertising of alcoholic beverages is ruled unconstitutional by Federal Court of Appeals

A Federal Court of Appeals in Mississippi, close geographically but not in spirit, to its judicial brethren in Oklahoma, has declared unconstitutional Mississippi's ban on liquor advertising on billboards and in printed and electronic media originating within the state. The Mississippi regulations were challenged by 56 media parties who sought a declaratory judgment that the state's liquor advertising ban unconstitutionally abridged their commercial speech rights. A Federal District Court agreed and granted injunctive relief against the enforcement of the regulations.

In upholding the District Court's ruling, the Court of Appeals first noted that, as opposed to the Oklahoma constitutional provisions at issue in Oklahoma Telecasters Association v. Crisp, 699 F.2d 490 (1Oth Cir. 1983), Mississippi enforces its regulations only against those advertisements whose central place of publication or dissemination is within the physical boundaries of the state. The court described the subject advertising as "a paradigm of purely commercial speech ... which does 'no more than propose a commercial transaction.'" Commercial speech may be protected expression if it concerns lawful activity and is not misleading. Mississippi pointed out that the sale and possession of liquor is illegal in the many areas of the state which have chosen to remain "dry." But the advertising ban applies to all intrastate liquor advertising, even though not all of the advertising actively and intentionally encourages an illegal activity.

Mississippi's argument that the liquor advertising was misleading also was rejected. If the advertising were found to have the potential to mislead consumers by omitting information about the possible harmful effects of alcohol consumption, this omission could be corrected by permissible regulation as to the manner of advertising. Hence, in the absence of any countervailing considerations, Mississippi's ban wrongfully prohibited protected commercial speech, stated the court.

The court next addressed the state's contention that the First Amendment has enhanced state police power in the area of liquor regulation, and that the regulations at issue would be valid if they rationally served to further a legitimate state purpose. The court, however, found the appropriate standard of review to be: does the regulation directly advance a substantial governmental interest, and is it no more extensive than necessary to serve that interest? Crucial differences were found between

Mississippi's advertising ban and the regulations involved in the cases cited by the state in support of its proposed rational basis standard. For example, the regulation in California v. LaRue, 409 U.S. 109 (1972), was directed primarily at the dispensation of liquor, not at the suppression of expression. In contrast, Mississippi's ban was directly aimed at controlling protected commercial speech and involved a virtually absolute ban on expression. The Court of Appeals' review of relevant case law resulted in the conclusion that "when state laws related to liquor regulation have come in direct conflict with constitutional guarantees that the Fourteenth Amendment requires the state to respect, the Supreme Court has reviewed the state laws according to the standards otherwise applicable to the constitutional guarantees. The Twenty-first Amendment did not change the standard of review."

The court proceeded to apply the above standard of review to the advertising ban. The recent case of Queensgate Investment Co. v. Liquor Control Commission, 69 Ohio St.2d 361, appeal dismissed, 103 S.Ct. 31 (1982), which figured prominently in Oklahoma Telecasters, was distinguished by the Court of Appeals. The Ohio regulation at issue in Queensgate prohibited liquor licensees from referring to prices in their advertising - a regulatory scheme much narrower in scope than Mississippi's. Regulating licensees raises different constitutional issues than the enforcement of a subject matter ban against publishers and broadcasters, stated the court. And while Mississippi may have a substantial state interest in promoting temperance, an interest closely allied with its interest in health and safety, the advertising ban did not "directly advance" these interests. The Court of Appeals concurred in the District Court's findings that there was no scientific evidence to support the state's position that liquor advertising stimulates consumption, and that Mississippi residents are exposed to so much liquor advertising from sources outside the state that the intrastate ban would have little effect on consumption.

The court, in enjoining the enforcement of Mississippi's ban as unconstitutional on its face, pointed out that the state still may enact rules prohibiting advertising that misleads or actively encourages illegal activity, and may require appropriate disclosures or warnings.

Lamar Outdoor Advertising v. Mississippi State Tax Commission, 701 F.2d 314 (5th Cir. 1983) [ELR 5:8:17]

New York Court of Appeals affirms dismissal of defamation claim against author and publisher of novel "State of Grace"

A New York appellate court ruling dismissing a defamation claim against Robert Tine and The Viking Press, the author and publisher of the novel "State of Grace," has been affirmed by the state's Court of Appeals.

A young woman named Lisa Springer, who was a former friend of the author, alleged that Lisa Blake, a character portrayed in a ten-page chapter of the book as the mistress of an industrialist, was substantially similar to Ms. Springer in such respects as: given name, physical characteristics, habits and recreational activities. The appellate court found that such similarities were insufficient to establish that the publication was 'of and concerning" Springer (ELR 4:19:4) and the Court of Appeals agreed in a one-page memorandum decision.

Springer v. Viking Press, Case No. 573 (N.Y.Ct.App., November 23, 1983) [ELR 5:8:18]

Briefly Noted:

Copyright Infringement.

After photographer Michael Childers was granted summary judgment in his action against High Society Magazine for copyright infringement (ELR 5:3:15), High Society sought to reargue the decision, alleging that the court had failed to consider the argument that the common law "works for hire" doctrine cast doubt on the validity of Childers' copyrights in the photographs in question. Federal District Court Judge Kevin Thomas Duffy granted the magazine's motion for reargument. However, Judge Duffy proceeded to reject High Society's attempt to raise an issue as to common law copyright since the photographs were created, and the alleged infringement occurred, after January 1, 1978. Hence, the rights of the parties were governed exclusively by the 1976 Copyright Act. And the photographs did not fall into the statutory category of "works made for hire." The copyright ownership of the works therefore was ascribed, correctly, to Childers in the absence of a writing evidencing the transfer of his copyright to his subjects. The order granting Childers' motion for summary judgment was upheld accordingly.

Childers v. High Society Magazine, Inc., 561 F.Supp. 1374 (S.D.N.Y. 1983) [ELR 5:8:18]

Video Games.

The Supreme Court of Kansas has upheld a declaratory judgment that electronic video card games are not "gambling devices." The Kansas penal code defines a "gambling device" as one which "for consideration affords the player an opportunity to obtain something of value, the award of which is determined by chance...." The electronic games in question play the card games "Double-Up" and "Twenty-One" awarding the successful player up to two free replays. The court held that although the games were "games of chance," the awarding of free games did not constitute "something of value" and as such their operation was not prohibited by the state penal code.

Games Management, Inc. v. Owens, 662 P.2d 260 (Kan. 1983) [ELR 5:8:18]

IN THE NEWS

Creators of the television series "Quincy" win dismissal of suit against them alleging plagiarism and breach of implied in fact contract

An action for plagiarism, breach of contract and unjust enrichment filed by two physicians, Leonard Kurland and Harold Kudish, against the producers of "Quincy" contained several infirmities, according to a special verdict returned by a Los Angeles Superior Court jury.

Drs. Kurland and Kudish alleged that in April 1971, together with Dr. Victor Rosen, they conceived of an idea for a television series entitled "Jeremiah Webster, M.D.," based on a modern day coroner's office. In their complaint, the doctors argued that Rosen and MCA wrongfully used elements of a 1971 three-page idea summary setting forth their concept in connection with the television series "Quincy," a show on which Rosen worked as a technical advisor. Also named as parties in the action were Lou Shaw and Glen Larson, who created "Quincy," and the National Broadcasting Co. MCA's involvement derived from its status as the parent company of Universal City Studios, which produced the series for seven television seasons.

The defending parties' trial brief noted that the doctors, via a theatrical agent, had presented their idea in early to mid-1972 to all the major networks and production companies. There was no interest shown by the companies in developing the property at that time. In 1974, writer-producer Lou Shaw registered with the Writers Guild of America West an outline for a show entitied "Quince." Larson joined the project in 1975 and participated in writing an initial teleplay whose story line was based on a scandal in the Los Angeles Treasurer's Office that occurred in the early 1970s. The teleplay was reviewed for technical accuracy by Dr. Rosen. Dr. Rosen, according to the trial brief, did not disclose any part of the

"Jeremiah Webster, M.D." idea summary to either Shaw or Larson at the time the teleplay was being written or at any time during the years he was associated with the series "Quincy."

In considering the claims raised by Drs. Kurland and Kudish, Judge James G. Kolts initially dismissed the count for plagiarism. The second count, for breach of contract, alleged an oral agreement among the three doctors not to exploit their idea without each other's consent, and to share equally in any proceeds generated by the exploitation of their idea. The defending parties' response was that Rosen did not breach any agreement since "Quincy" was independently created by Larson and Shaw.

The complaint also alleged the breach of an implied in fact contract whereby the defending parties purportedly became obligated to pay Drs. Kurland and Kudish for the reasonable value of their idea, which, according to the complaint. might amount to as much as S5,000,000.

The trial brief recalled that in order to establish the existence of an implied contract with respect to the submission of a story idea, the following facts must be proven by a preponderance of the evidence, as to each defendant (these elements derive from jury instructions in Mann v. Columbia Pictures, Inc., 128 Cal.App.3d 628 (1982) (ELR 3:14:1), that plaintiff submitted his or her idea to the defendant and that the defendant received it, that before plaintiff submitted his or her idea to the defendant, he or she clearly conditioned the disclosure upon the defendant's agreement to pay for the idea if used; that the defendant knew of the condition upon which the disclosure was being made before the disclosure was made; and that the defendant voluntarily accepted the submission of the plaintiff's terms. The breach of an implied in fact contract is established by proof that the defendant actually used plaintiff's idea rather than his or her own ideas or ideas from other sources; and the idea of the plaintiff that was used, if any, had value.

In arguing that none of the defendants breached an implied in fact contract, the trial brief pointed out that there could be no implied in fact contract among the doctors since there was no "submission" on which to base such a contract. Furthermore, the premise that an implied in fact contract existed between Drs. Kurland and Kudish and any of the remaining defendants was countered by the argument that the doctors never submitted their idea to Larson or Shaw and that neither Larson nor Shaw ever assumed the alleged contractual obligations of any of the other defendants.

In responding to the damage claims, the trial brief emphasized that a successful party in a disclosure of idea case is entitied to receive only the reasonable valde of his or her services, not the value of the idea itself. Hence, any profits earned by "Quincy" would be irrelevant in determining the compensation purportedly due to the doctors in conveying the story idea.

The complaint's third count alleged that Dr. Rosen breached a confidence by cooperating with the other defendants in exploiting the idea that he developed with Drs. Kurland and Kudish. The trial brief questioned the possibility that the doctors could establish a breach of confidence claim against any of the defending parties, assuming that such a cause of action is recognized in California. And the claim for unjust enrichment would require proof of the same elements as must be shown in a plagiarism claim. The plagiarism claim in this case, however, already was dismissed.

When the issues raised above were submitted to the jury in the form of a Special Verdict, the jury found that Dr. Rosen did not disclose the "Jeremiah Webster, M.D." idea to any of the defendants for the purpose of exploiting the idea without the knowledge or consent of Drs. Kurland and Kudish; that Drs. Kurland and Kudish did disclose the idea to Dr. Rosen and NBC, but not to MCA, Shaw or Larson; that compensation for such disclosure was expected only from NBC and only if the idea were to be used; and that the disclosure of the idea was made in confidence to Dr. Rosen, but Dr.Rosen did not breach the confidence by actually using the idea or disclosing the idea to any of the parties responsible for the creation of "Quincy."

In accordance with the jury's answers to the questions propounded in the Special Verdict, Los Angeles Superior Court Judge James G. Kolts entered judgment in favor of the defendants as to all causes of action. [Jan. 1984] [ELR 5:8:19]

Cheryl Ladd wins $1.05 million award from producers of the film "Taxi Girls"

A Los Angeles Superior Court jury has awarded actress Cheryl Ladd $1.05 million for the allegedly unauthorized use of her name and image to promote an X-rated movie called "Taxi Girls."

The jury assessed $300,000 in compensatory damages against Superfilm Ltd. and Jaacov Jaacovi, and also granted Ladd $300,000 in punitive damages from Superfilm and $450,000 in punitive damages from Jaacovi.

Ladd had argued that a poster used in advertising the movie included a drawing taken from a copyrighted photograph of her. The poster also introduced the film's star as "Nancy Suiter, the Cheryl Ladd look-alike." Ladd stated that the advertisement misappropriated her name and likeness and damaged her reputation as a "wholesome, honest, decent and morally upright actress."

The filmmakers were permanently enjoined from using Ladd's name or image in any further publicity for "Taxi Girls" or for any other movie unless Ladd's permission is obtained. [Jan. 1984] [ELR 5:8:20]

WASHINGTON MONITOR

Federal Communications Commission rejects mandatory children's programming requirements

The FCC has declined to impose upon broadcasters mandatory programming requirements for children's television shows. The Commission stated that quotas for such programs are unnecessary because of the increased amount of overall programming available to children through cable television and pay television. In addition, mandatory programming requirements might impinge upon the constitutional right of broadcast licensees to exercise their discretion in program selection.

The children's programming issue came before the FCC in 1970 when Action for Children's Television petitioned the Commission to require daily programming for children. In 1974, the FCC issued a policy statement suggesting that broadcasters make a "meaningful effort" to present more informational and educational programs, and to broaden the scheduling of shows for children. Then, in 1980, the Commission suggested that it might reconsider the policy statement and review other options, such as a requirement for specified amounts of children's programming each week.

FCC Chairman Mark S. Fowler noted that while programming requirements were rejected, broadcasters still are obligated to provide programming to meet the needs and interests of children - a part of the licensee's community. [Jan. 1984] [ELR 5:8:20]

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