BUSINESS AFFAIRS

Television and Radio Coverage of the 1984 Olympics: Will the Summer Games Really Be an ABC Sports "Exclusive"?

by Lionel S. Sobel

The 1984 Summer Olympics begin next month, and final preparations now are underway by athletes and administrators alike. Among the thousands of details being attended to are arrangements for some 8,000 journalists - more than one for every competitor. As a result of the intense coverage it will receive, the '84 Summer Olympics may become the most scrutinized event in history, despite the Soviet-led boycott. Indeed, it has been estimated that 2.5 billion people around the world will watch at least a portion of the Olympics on television.

For 1984 at least, television coverage of the Olympics has been and will be provided by ABC Sports. This is because ABC outbid the other two networks for U.S. television rights to both the Winter and Summer Olympics. And Olympic television rights are granted on an "exclusive" basis to one selected broadcaster in each country. This year, apparently for the first time, Olympic radio rights also were granted on an exclusive basis, and ABC outbid its competitors for those rights in the U.S. as well.

Controversies

Although exclusives are common in the entertainment business, and in television especially, ABC's "exclusive" broadcasting rights to the Olympics have been the subject of a surprising amount of controversy, most of it generated by CBS and NBC. As long ago as the fall of 1982, Neal Pilson, president of CBS Sports, complained to leaders of the international sports federations that ABC's enforcement of its exclusive TV rights to the Summer Olympics would result in an "acute limitation on a longtime practice of news gathering" and an "unfortunate limitation on the American public" that would "greatly restrict exposure of the Olympics on television." "I think it is wrong," Pilson opined. "The Olympics don't belong to just one person or network." CBS reportedly considered filing a lawsuit to invalidate certain aspects of ABC's exclusive rights. (Los Angeles Times, October 27, 1982, Part VI, page 1.) No such suit ever was filed, but the fact that one was considered is remarkable in itself.

Last February, a controversy erupted, if only briefly, over the scope of ABC's exclusive TV rights to the

Winter Olympics. This time, the disputant was NBC which broadcast a portion of an award ceremony, tape of practice ski runs, and post-event interviews in a manner that ABC said violated its exclusive rights. Reuven Frank, president of NBC News, quickly apologized for the incident and assured ABC that steps had been taken to see that similar incidents would not recur.

Most recently, a tempest has arisen over ABC's exclusive radio rights to the Summer Games. Jim Farley, NBC vice president of radio news, has been quoted as describing ABC's exclusive rights as "the biggest increase in press restrictions for radio news in my memory." (Los Angeles Times, June 6, 1984, Part VI, page 7.)

At the heart of each of these controversies are essentially legal questions - questions that will not become moot when the Olympic flame is extinguished in August. The most basic of these questions is, how was ABC able to acquire "exclusive" Olympic broadcasting rights in the first place?

Broadcasting Property Rights

Though few people think of the Olympics in show business terms, the Olympics are in fact a production, like a stage play or the Super Bowl. The Olympics are "produced" by the International Olympic Committee (IOC), and as their producer, the IOC owns all of the rights to the Olympics including television and radio rights.

Legal authority for this proposition is well settled. As long ago as 1938, the Pittsburgh Pirates sued radio station KQV to prevent it from broadcasting play-by-play descriptions of the Pirate's baseball games. KQV had stationed observers at vantage points outside Forbes Field who were able to see over the fences and observe plays as they were made. The Pirates, while perhaps flattered, were not pleased by this because they had sold the exclusive right to broadcast play-by-play descriptions of their games to General Mills which in turn had entered into an agreement with NBC for the broadcast of the games over two of its radio stations. The Pirates were granted an injunction restraining KQV from broadcasting Pirates' games.

In granting the injunction, the court explained that "The [Pirates' owner] has, at great expense, acquired and maintains a baseball park, pays the players who participate in the games, and has, as we view it, a legitimate right to capitalize on the news value of their games by selling exclusive broadcasting rights to companies which value them as advertising mediums for their merchandise. This right the defendant [KQV] interferes with when it uses its broadcasting facilities for giving out the identical news obtained by its paid observers stationed at points outside Forbes Field for the purpose of securing information which it cannot otherwise acquire. This, in our judgment, amounts to unfair competition, and is a violation of the property rights of the [Pirates' owner]. For it is our opinion that the [Pirates' owner], by reason of its creation of the game, its control of the park, and its restriction of the dissemination of news therefrom, has a property right in such news, and the right to control the use thereof for a reasonable time following the games." Pittsburgh Athletic Co. v. KQV Broadcasting Co., 24 F.Supp. 490, 492 (S.D.N.Y. 1938).

Similar results have been obtained in virtually all cases involving this issue. (ELR advisory editorial board member Philip R. Hochberg has co-authored an excellent law review article with Robert Alan Garrett which analyzes in detail in the property rights associated with sports broadcasts. The article is entitled Sports Broadcasting and the Law, and it appears at 59 Indiana Law

Journal 155 (1984). For a discussion of all of the cases which establish that the right to broadcast sports events is a property right, see pages 157 through 161 of that article.)

IOC Charter Limitations

As the owner of the broadcasting rights to the Olympics, the IOC has the legal power to decide what use to make of those rights. Because the IOC is anxious for news coverage, the IOC Charter authorizes broadcasters to televise highlights of Olympic events during regular news programs, free of charge. However, the Charter also imposes strict limits on free news coverage, and it is these limits which have sparked controversy and thoughts of lawsuits.

According to the IOC Charter, television stations may broadcast no more than three news reports per day, no longer than three minutes in length apiece, each one separated from the next by at least three hours. Furthermore, the Charter allows the IOC to sell to one broadcaster in each country the "exclusive right" to carry an unlimited amount of Olympic coverage in its own country. When the IOC does so, the exclusive rights holder may be the only one permitted to broadcast any coverage of a day's events on the day they are held. This is so because IOC rules require other broadcasters to delay their three-minute reports of each day's events until the exclusive rights holder has completed its news broadcasts for that entire day. Thus, if the exclusive rights holder finishes its news coverage at midnight, all other broadcasters will have to wait until the next day to carry Olympic highlights on their own news programs. And therein lies the rub.

The Los Angeles Olympic Organizing Committee (LAOOC) is the IOC's agent for the production of the

1984 Summer Games. As the IOC's agent, the LAOOC sold exclusive U.S. broadcasting rights to ABC. ABC's coverage of the Olympics is likely to last until 11 p.m. Pacific time (2 a.m. Eastern time) each day. Therefore, east coast and mid-western television stations will be unable to show any Olympic highlights on the day the events occur. West coast stations will have to wait until 11 p.m. to show highlights of that day's events, and even then will be able to show only three minutes' worth.

Radio Limitations

Radio reports from Olympic competition sights also are subject to the three-per-day, three-minute restriction, though the significance of the "rule of threes" should not be overstated. It appears that radio reports originating from places other than competition sites may be broadcast without limit, so long as they are part of regular news shows. And event results may be broadcast from newswire service reports as soon as they are in, without limit.

Furthermore, bona-fide non-sport news events will be exempt from the IOC's restrictions, even if those events are Olympics related. Clearly, what is covered by this exemption - though there has been a reluctance to say so out loud - are terrorist attacks and other disasters related to the Olympics though not to the competitive events themselves. No one quarrels with this exemption. What does chafe some news executives, however, is the possibility that they and ABC will differ about whether a particular event is a bonafide, non-sport exempt news event. NBC's Jim Farley, for example, has said, "I'll tell you, we have real First Amendment problems with someone telling you what is news."

Possible Challenges

Despite the grumbling about ABC's exclusive rights, and the impact the exclusive nature of those rights will have on other broadcasters' coverage of the Olympics, it is possible and even probable that no one will challenge ABC's exclusivity. If ABC's exclusive rights are challenged, it will happen in one of two ways. First, a lawsuit may be filed alleging that such rights violate the higher First Amendment rights of other networks, independent stations and the public. Such a suit would seek a court order declaring the limitations void, thus giving other networks and stations the right to broadcast more Olympic coverage than IOC rules would permit. Second, another network or independent station may simply

Olympic coverage as it wants as soon as it wants to do so. For example, it might shoot and then broadcast its own videotape of events like the marathon which will be run on public streets. Or it might ignore the embargo on

ABC's feeds. Or it might videotape ABC coverage off the air and then rebroadcast highlights during its own news programs. If a network or station did any of these things, ABC, the LAOOC and the IOC would have to file a suit against the offending broadcaster.

Although CBS and NBC have been vocal about their objections to ABC's exclusive rights, it will be surprising if either challenges those rights in any way. Both, after all, now are the exclusive rights holders to many other newsworthy sporting events, and may well be the successful bidder for U.S. rights to some future Olympics. When CBS and NBC own the exclusive rights to sporting events, they properly expect others to respect their exclusivity. The extent to which this is so was well illustrated just a couple of months ago, during this year's NCAA championship basketball tournament. CBS owned the exclusive television rights to that event, and thus had the exclusive right to bring television cameras into the Seattle arena where the games were played. NBC's Al McGuire was in Seattle to tape a special for broadcast on his network after the tournament was over. McGuire was unable to get his camera crew into the arena, however, even to tape interviews with the winning coaches. As a result, McGuire sat in the stands like any fan, and sent a runner to take the coaches to a temporary studio set up across the street where the interviews eventually were conducted.

Winter Olympics Dispute

The dispute that arose between ABC and NBC last winter over NBC's coverage of the Winter Olympics does not appear to have been the result of an intentional challenge of ABC's rights by NBC. Instead, it appears to have been the result of a bona fide mistake or misunderstanding. On February 13th, NBC Nightly News broadcast a feature on American skier Cindy Nelson. While NBC correspondent Bob Jamieson was interviewing Nelson, NBC cameras caught a brief shot of flags being raised in the background during the awards ceremony for the giant slalom. NBC's broadcast of the Cindy Nelson feature, including the flag raising ceremony, preceded ABC's broadcast of the giant slalom awards ceremony, and thus violated ABC's exclusive rights. ABC responded by revoking permission it earlier

brief excerpts from ABC coverage - after ABC had broadcast the event - in connection with news programs.

At first, at least one NBC executive was almost contemptuous of ABC's objection to the NBC broadcast. NBC vice president Bud Rukeyser said the flag shot was only one second long and sarcastically added, "We're planning to have a massive press conference to show our one-second documentary called 'Three Flags over Sarajevo.'"

There was more to the issue than the flag shot, however. NBC also had broadcast videotape of practice ski runs combined with post-event interviews in a manner that bordered too closely, in ABC's view, with the actual event coverage later carried by ABC. According to ABC, this too violated its rights. The dispute was never litigated, however. NBC News President Reuven Frank sent ABC an immediate letter of apology for the use of the flag shot and shortly thereafter agreed to discontinue using tapes of practice runs in connection with post-event interviews. In response, ABC reauthorized NBC's use of excerpts from ABC coverage, and that was the end of the matter.

Mutual respect among the networks is to be expected, because all hold exclusive rights to newsworthy sporting events. Independent stations, on the other hand, have less to lose by challenging ABC's exclusivity, because they are not likely to acquire rights to future Olympics. Furthermore, there is a serious chance that local sportscasters somewhere will decide to use same-day highlights of ABC's coverage on their own broadcasts and will simply make off-the-air videotapes for that very purpose. It has happened before.

If a lawsuit is filed, ABC, the LAOOC and the IOC are all but certain to win, and they should. While the First Amendment-free press issue is not frivolous, neither the facts nor the precedents support it here. In fact, the few precedents that do exist clearly uphold the legality of the exclusive rights ABC has acquired.

Legal Precedents

The closest case on point is one that was filed in 1981 by a Connecticut television station challenging ABC's exclusive right to broadcast that year's World Figure Skating Championships. The championships were held in the Hartford Civic Center Coliseum, and in order to get into the Coliseum with camera equipment, television stations had to agree in writing not to broadcast any coverage of the event until ABC completed its own broadcast, even if ABC's coverage were delayed until a later date. According to the complaining station, this restriction imposed an unconstitutional burden on its newsgathering efforts. But a Federal District Court in Hartford disagreed. The court acknowledged that the skating championships were "news" and that worldwide attention would be focused on them. However, said the court, the restriction did not amount to censorship. The public had ready access to the event. Newspapers and radio stations could report on it without any restrictions. Even television stations could attend and report on the event; only their broadcast of action footage had to be delayed until ABC's coverage was complete. Finally, the court noted that because skating was a uniquely visual sport, television coverage of it "would have an unusual impact on the entertainment value of this event." Post Newsweek Stations v. Travelers Insurance, 510 F. Supp. 81, 86 (D.Conn. 1981). All of the reasons the court cited in upholding ABC's exclusive rights to the 1981 skating championships are equally applicable to the 1984 Summer Games. While the case is only a District Court case, and thus not binding on other courts, the result is perfectly consistent with United States Supreme Court authority.

In 1977, the Supreme Court decided a case filed by "human cannonball" Hugo Zacchini against a Scripps-Howard television station in Ohio that had videotaped and broadcast his act, without Zacchini's permission. The station claimed it had a First Amendment right to show the tape, because the act was newsworthy. Indeed, its broadcast had been part of the station's 11 o'clock news program. Zacchini agreed that his act was newsworthy. However, he argued, the station's unauthorized broadcast had infringed his right of publicity, and for that, it had to pay. The Supreme Court agreed with Zacchini. It ruled that the First Amendment did not give the station a privilege to broadcast Zacchini's act without his consent, just as the First Amendment does not authorize stations to "film and broadcast a prize fight . . . or a baseball game . . . where the promoters or the participants had other plans for publicizing the event." According to the Supreme Court, the unauthorized broadcast of Zacchini's act posed "a substantial threat to the economic value of that performance," while the law's "protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public." Zacchini v. Scripps-Howard Broadcasting, 433 U.S. 562, 575 (1977).

Copyright Issues

Stations that make unauthorized use of off-the-air videotapes of ABC's coverage are even more vulnerable than those that use their own tape. This is so because ABC will own a copyright in its broadcasts. Thus, stations that make unauthorized use of off-the-air tapes of ABC's coverage will be liable for copyright infringement. There are of course defenses to infringement actions, and the first one that comes to mind in cases involving the use of mere excerpts is the "fair use" defense. The scope of the fair use defense in sports broadcast cases has been tested twice. The results supported the copyright owner in both.

In 1981, ESPN was sued by the Boston Red Sox, the Boston Bruins and the television station that had the exclusive right to broadcast their games. The reason for the suit was that ESPN had been taping television broadcasts of Red Sox and Bruin games, without authorization, and had been using excerpts on ESPN's own news program. Though the television broadcasts of the Red Sox and Bruin games were copyrighted, ESPN argued that its use of them was a noninfringing "fair use" because the excerpts were only two minutes long and were used for news purposes. A Federal District Court in Boston disagreed, however. It ruled that the public's right of access to newsworthy information would have been adequately protected had ESPN simply reported the facts concerning Red Sox and Bruin games. Use of videotape highlights was not necessary for that purpose and was not a fair use, said the court. New Boston Television v. ESPN, CCH Copyright Law Reports para. 25,293 (D.Mass. 1981).

Ironically, the second case that supports ABC's right to control use of taped excerpts from its broadcasts is a case that arose out of ABC's coverage of the 1972

Olympics a case that ABC lost. During its coverage of the '72 Summer Games, ABC broadcast a 2 1/2 minute segment of a copyrighted film about Olympic wrestler Dan Gable (who, as things turned out, won a gold medal that year). ABC did so without permission. Nevertheless, ABC argued that its use of the segment was a non-infringing fair use because it was for the "laudable" purpose of "disseminating the life history of an important public figure involved in an event of intense public interest." The court's response was that ABC's argument "proves too much." Furthermore, the court added in what appears to be a prescient provision, ABC's theory was not one that ABC itself would "embrace" if someone else tried to use it as justification for copying ABC's broadcasts. The court explained - in language equally applicable to the 1984 Olympics - that ABC had the right to use the facts contained in the Cable film. It could not use the film itself, however, not even a 2 1/2 minute slice, without permission.

Economic Interests

Given the importance of both a free press and business competition in American society, it is fair to ask whether the law ought to protect exclusive broadcasting rights, especially to an event as important as the Olympics. The answer is yes, the law should protect exclusive rights, and the reason lies in the economics of both sport and broadcasting in the final decades of the twentieth century.

In Zacchini (the "human cannonball" case), the Supreme Court recognized that economic factors were pertinent to its decision. It recognized, in other words, that the right to control the distribution of a performance provides an economic incentive for the investment required to produce the performance; and the Court recognized that the unauthorized distribution of a performance poses a substantial threat to the economic value of the performance. These considerations are important to the 1984 Olympics as well.

In 1932, when Los Angeles first hosted the Olympics, tickets to the most popular events were no more than $3 apiece. This year, tickets to the Opening and Closing Ceremonies cost as much as $200 and other premium events as much as $95. In 1932, there were 2.9 million tickets available, while this year more than 7 million will be sold. Nevertheless, if ticket revenues were the LAOOC's sole or even greatest source of income, the Olympics could not have been held in Los Angeles and may not have been scheduled at all, anywhere. Even the "Spartan" Olympics planned by the LAOOC are simply too expensive to finance without substantial broadcasting income. The figures tell the story. The LAOOC's budget is some $480 million. Ticket sales are expected to generate only $90 million or so. ABC, on the other hand, paid $225 million itself for U.S. television rights, and broadcasters in other parts of the world paid an additional $75 million or so for exclusive rights in their territories. Thus television alone will be financing more than half the cost of staging the '84 Summer Games. Without exclusive rights, it is doubtful that anywhere near such a sum could have been raised.

Consider too ABC's financial needs. On top of the $225 million it paid for rights, it is building and will operate, at its own expense, an international television center for the use of foreign broadcasters. Furthermore, ABC will have 2600 people working the Olympics. It will be using $200 million worth of equipment, including 200 cameras, 140 videotape machines and 40 mobile units. To cover the enormous expense all of this represents, ABC hopes to sell $430 million in advertising.

Given the exclusivity it has paid for, ABC may well succeed. It expects 170 million Americans to watch at least part of its broadcasts.

If however ABC's coverage were not exclusive - if for example other broadcasters could show unlimited highlights of each day's events - would ABC be able to attract the audience it will need in order to sell the amount of advertising it must in order to cover its costs, let alone turn a profit? The answer is probably not. And ABC undoubtedly figured as much when it agreed to pay $225 million.

Of course, it might be argued that exclusive rights were not the only kind that could have been sold. Suppose the LAOOC had decided to sell non-exclusive rights to every broadcaster that was interested. How much would broadcasters pay for non-exclusive rights that put them in competition with each other for an audience? In the aggregate, it likely would have been far less than ABC was willing to pay for an exclusive. And the LAOOC undoubtedly figured as much when it decided to offer exclusive rights. The LAOOC's budget does not have much room for less on the revenue side. Thus, the exclusive rights sold to ABC were an essential element in the plan that made the '84 Summer Games possible in the first place.

The Future

What of the future? From all that is known at this time, it appears that broadcast revenue will play an increasing role in the financing of future Olympics. For 1980, NBC paid the not-inconsiderable sum of $87 million for the U.S. television rights to the Moscow Olympics. Only four years later, ABC paid $91.5 million for the television rights to the '84 Sarajevo Winter Olympics and the once-astonishing sum of $225 million to television rights to the Los Angeles Summer Games plus an additional $500,000 for radio rights. Earlier this year, ABC agreed to pay $309 million for the U.S. television rights to the 1988 Winter Olympics in Calgary. And before the Soviets withdrew from the L.A. Summer Games, it was thought that the South Koreans would be asking for as much as $750 million to $1 billion for U.S. television rights to the 1988 Summer Games in Seoul! (As a result of the uncertainty created by the Soviets' withdrawal, bidding on the 1988 Summer Games has been postponed until after the close of the L.A. Games.) Howard Cosell scoffed that the rumored $1 billion asking price was "vastly exaggerated." And CBS Sports President Neal Pilson has predicted that U.S. rights to the Seoul Games would be acquired for "less" than $400 million. But can $400 million, plus production expenses, be covered by advertising revenue alone? Possibly not. As a result, the 1988 Olympics may go down in history as the first to be carried, if only in part, on pay-TV. Indeed, ABC has acquired not only the U.S. television rights to the 1988 Winter Olympics, but also an option on the pay-TV and home video rights as well. ABC's recent acquisition of ESPN puts the network in a good position to exploit the pay-TV rights itself, should it decide to do so. Insofar as the 1988 Summer Olympics are concerned, it has been reported that all three networks have asked Home Box Office whether it might be interested in sharing the coverage - and the cost - of those Games.

The possibility that the Olympics will be shown on payTV in 1988 is one that has existed, as a legal matter, only since 1977. Prior to then, the FCC's "anti-siphoning rules" prohibited pay-TV coverage of sporting events that had been broadcast on conventional television. Under those rules, the Olympics could not have been shown on pay-TV unless the IOC first withheld the Olympics from conventional TV for ten years - a financially impossible thing for the IOC to have done. In 1977, however, a Federal Court of Appeals in Washington, D.C., ruled that the FCC had exceeded its statutory authority in adopting the "anti-siphoning" rules. Home Box Office v. FCC, 567 F.2d 9 (D.C.Cir. 1977), cert.denied, 434 U.S. 829 (1977). In so ruling, the court cleared the way for pay-TV coverage of the Olympics. That was a development which someday may make it possible, as a financial matter, for the Olympics to continue at all.

Lionel Sobel is the editor of the Entertainment Law Reporter and a professor at Loyola Law School in Los Angeles.
[ELR 6:1:3]

RECENT CASES

Federal District Court refuses to order Olympic officials to schedule 5K and 10K races for women this summer

"We feel that the Olympic games must be reserved for men ... We feel that we have tried and that we must continue to try to achieve the following definition - the solemn and periodic exaltation of male athleticism with internationalism as a base, loyalty as a means, art for its setting and female applause as a reward."

So said Baron Pierre de Coubertin nearly two decades after he founded the modern Olympic Games in 1896. His attitude was not unlike that of those managing the ancient Olympic Games in Greece where women risked death if they even watched, let alone participated in those competitions.

As women have made inroads into Olympic competition, this attitude has eroded slowly. However, there are those who have felt that the process has taken too long. Among them are 82 women runners who compete in the 5,000 meter and 10,000 meter track races - events which have never been included in the Olympic program for women, but have been for men since 1912. Desiring parity with the men, these women sued for an injunction and writ of mandate to include both these track events in the 1984 Summer Olympic Games. The women, representing 27 countries from around the world, were joined by the International Runners Committee and the Road Runners Club of America. They alleged that failure to schedule these events constituted gender-based discrimination in violation of state, federal and international law.

Named defendants included the International Olympic Committee (IOC), the United States Olympic Committee (USOC), the Los Angeles Olympic Organizing

Committee (LAOOC), the International Amateur Athletics Federation (IAAF), The Athletic Congress of the United States (TAC), and the Los Angeles Coliseum Commission.

Detailing his reasoning in a 38-page opinion, Federal District Court Judge David Kenyon denied the injunction, stating that "While the plaintiffs have submitted a volume of material, much of which presents with clarity the male-oriented approach taken in the Olympics from its modern-day inception and for many years, plaintiffs have not shown sufficiently that these defendants have violated the standards set forth in these laws."

In determining whether to issue a preliminary injunction, the runners had to demonstrate a fair chance of success on the merits and the possibility of irreparable injury. With respect to the latter, the court found that the administrative inconveniences which the defendants would suffer did not outweigh the irreparable injuries which the runners would suffer, namely the missed opportunity to compete not only in the upcoming Games, but in future Olympic Games as well since most athletes are unable to compete in more than one Olympiad due to the physical demands.

While the court agreed that there was irreparable harm to the runners, he disagreed that the runners had demonstrated a fair chance of success on the merits. In analyzing the federal constitutional claims, the court considered four factors from which an invidiously discriminatory purpose could be inferred and which would have been sufficient to demonstrate a fair chance of success.

The court examined the historical context of the disputed decision and held that while the runners made a strong showing of blatant sex discrimination from the inception of the Games to 1949, statistics revealed that women have become more involved in the last 35 years and that there was little evidence showing that these gains were deliberately delayed for discriminatory reasons. The second and third factors -the impact of the official action and the events leading up to the challenged decision - also did not show gender-based discrimination, according to the court. Finally, the court determined that the legislative or administrative history failed to produce statements made by Olympic decision-makers which have denied women the opportunity to run these two events in the 1984 Games.

In analyzing the runners' claims pursuant to the California Constitution, the Unruh Civil Rights Act, the Federal Public Accommodations Act, the Amateur Sports Act and international law, the court applied a rational basis test and found that the Olympic rules are rationally related to the legitimate purpose of administering and presenting an orderly Olympics in 1984. The court therefore concluded that the runners failed to carry their burden of presenting sufficient evidence that the law had not been obeyed.

The American Civil Liberties Union of Southern California, representing the runners, has announced plans to seek an expedited appeal from the Ninth Circuit Court of Appeals. The ACLU will argue that the judge applied a legally erroneous standard under California law.

Martin v. International Olympics Committee, CV 83-5847 Kn, (C.D. Cal., April 16, 1984) [ELR 6:1:8]

Recorded music synchronization license for "American Graffiti" soundtrack included video discs and cassettes, rules Federal District Court in New Jersey

In 1973, Lucas film Ltd. entered into an agreement with Chess Janus Records (the predecessor in interest of

Platinum Record Company) by which Lucas film obtained the right to use master recordings of four songs on the soundtrack of the motion picture "American Graffiti." The four songs covered under the agreement were "Almost Grown" and "Johnnie B. Goode" recorded by Chuck Berry, "Book of Love" recorded by the Monotones, and "Goodnight Sweetheart" recorded by the Spaniels. "American Graffiti" was released for national theatrical exhibition in August 1973 by Universal City Studios, and the film subsequently was shown on cable television and on network and local television.

In 1980, MCA Distributing Corp., a Universal affiliate, released the film for sale and rental to the public on video cassettes and video discs. When MCA did so, Platinum brought a lawsuit for breach of contract, misappropriation, unjust enrichment and tortious interference with business opportunities against Lucasfilm, Universal and MCA. Platinum contended that the 1973

Lucasfilm-Chess Janus agreement did not include the right to distribute "American Graffiti" on video cassettes or on video discs.

The 1973 agreement stated: "Subject to our (Lucasfilm's) performance of the terms and conditions herein contained, you agree that we have the right to record, dub and synchronize the above mentioned master recordings, or portions thereof, into and with our motion picture and trailers therefor, and to exhibit, distribute, exploit, market and perform said motion picture, its air, screen and television trailers, perpetually throughout the world by any means or methods now or hereafter known."

Platinum argued that the agreement did not specifically provide for the right to distribute "American Graffiti" via video cassettes and video discs and that it was necessary to go beyond the terms of the agreement and to determine the parties' intent as to these rights at the time of entering the agreement. Platinum also argued that the parties' intent was a material issue of fact which would preclude summary judgment.

A Federal District Court in New Jersey has granted summary judgment to the "American Graffiti" parties, noting that the language of the agreement was "extremely broad and completely unambiguous, and precludes any need in the Agreement for an exhaustive list of specific potential uses of the film." The court cited the recent case of Rooney v. Columbia Pictures Industries, 538 F.Supp. 211 (S.D.N.Y. 1982) (ELR 4:7:5) as supporting the position that the agreement at issue could fairly be read as including newly developed media.

Platinum also argued, unsuccessfully, that the showing of "American Graffiti" on video cassettes and video discs would not be an "exhibition" of the film as covered by the agreement. But the court observed that the company had not presented a "clear-cut" definition which set out exactly which activities do or do not qualify as the exhibition of a motion picture. It was pointed out that no objections had been raised to the showing of "American Graffiti" on cable and over-the-air television. In the court's view, video cassette and video discs operate as a means of exhibition, "not as something of an altogether different nature from exhibition." And since there was no mistake shown as to the terms of the agreement, no material facts remained to be determined; summary judgment was granted accordingly.

Platinum Record Company, Inc. v. Lucasfilm, Ltd., 566 F.Supp. 226 (D.N.J. 1983) [ELR 6:1:8]

Damage award of $200,000 to entertainer Carol Burnett in libel action against National Enquirer will stand as California Supreme Court and United

States Supreme Court decline to review appellate court decision affirming judgment in her favor if Burnett accepted reduction of trial court's $800,000 damage award

On February 21, 1984, the United States Supreme Court dismissed, for want of a substantial federal question, an appeal in entertainer Carol Burnett's libel suit against the National Enquirer. Previously, the California Supreme Court had declined to review appeals by Burnett and the Enquirer from a California Court of Appeal decision reducing Burnett's damage award to $150,000 punitive damages and $50,000 compensatory damages (if Burnett elected to accept such amounts rather than proceed with a retrial). (ELR 5:3:17)

The lawsuit arose over the publication on March 2, 1976 of an item in the National Enquirer's "gossip column" which read: "In a Washington restaurant, a boisterous Carol Burnett had a loud argument with another diner, Henry Kissinger. Then she traipsed around the place offering everyone a bite of her dessert. But Carol really raised eyebrows when she accidentally knocked a glass of wine over one diner and started giggling instead of apologizing. The guy wasn't amused and 'accidentally' spilled a glass of water over Carol's dress."

In response to a demand from Burnett, who maintained that the item was false and libelous, the National Enquirer published a retraction on April 6, 1976. The correction statement referred to the March 2nd report as erroneous and read, in part: "We understand that these events did not occur and we are sorry for any embarrassment our report may have caused Miss Burnett." Burnett, unsatisfied with the retraction, filed a libel complaint and, after a jury trial, was awarded $300,000 compensatory damages and $1,300,000 punitive damages. Los Angeles Superior Court Judge Peter Smith ordered a retrial unless Burnett accepted, as she did, a reduced award of $50,000 compensatory damages and $750,000 punitive damages. (ELR 3:2:2)

On appeal, the initial issue raised was whether the trial court erred in holding that the National Enquirer was not a newspaper for purposes of applying California Civil Code section 48(a), a statute setting forth the specifications for a demand for correction and the types of damages recoverable in a libel action against a newspaper. In reaching this conclusion, the court had relied on testimony which indicated that the National Enquirer is designated a magazine or periodical in eight mass media directories, and that the publication provides little or no current coverage of subjects such as politics, sports or crime; does not attribute content to wire services, and in general, does not make reference to time. A "fundamental" consideration for the trial court was that newspapers, due to the necessity of publishing articles containing news, generally are not in a position to guard adequately against the publication of material which is untrue. The appellate court, after reviewing the less than definitive cases dealing with the scope of section 48(a), concluded that the protection of the statute is limited to "those who engage in the immediate dissemination of news. . . ." Thus, the trial court correctly found that the National Enquirer, a publication with a "lead time" of one to three weeks, should not be deemed a newspaper with reference to assessing Burnett's damage claims.

The National Enquirer then argued that the amount of punitive damages was grossly excessive; that the punitive damages were impermissibly disproportionate to the compensatory damages awarded; that the trial court erred in revising the ratio between punitive and compensatory damages; and that there was insufficient evidence to show that the National Enquirer ratified the acts of its employees. The appellate court held that the $750,000 judgment "to punish and deter" the publication was not justified even in view of evidence showing that the Enquirer reporters knew that at least part of the complained-of article was probably false and that a vast national audience might read material which would expose Burnett to "contempt, ridicule and obloquy" and tend to injure her in her occupation, and that the retraction was "evasive, incomplete and by any standard, in many respects, legally insufficient." In all, the Enquirer's conduct in connection with the Burnett article was "reprehensible and was undertaken with the kind of improper motive which supports the imposition of punitive damages." But the publication's net income for the time period under consideration was about $1,560,000. The appellate court, apparently relying on this figure, determined that an award of $750,000 punitive damages was excessive and required that it be reduced to the sum of

$150,000 or that the Enquirer be granted a new trial on the punitive damage issue.

The $50,000 compensatory damage award was upheld on the basis of Burnett's testimony concerning the emotional distress and mental anguish caused her by the article.

The appellate court concluded by discussing an incident during the trial when a number of the jurors became aware that entertainer Johnny Carson had made several derogatory comments about the Enquirer during "The Tonight Show." Carson stated that the Enquirer was a publication "composed of fabrications authored by liars." The trial court had examined each juror as to his or her ability to participate in a fair and impartial trial and took other measures to avoid any possibility of prejudice.

In accordance with its findings, the appellate court affirmed the compensatory damage judgment and vacated the punitive damage award. The matter was remanded for a new trial on this issue unless Burnett consented to the reduction of punitive damages to the sum of $150,000.

As associate justice of the Court of Appeals, while concurring with the affirmance of the judgment, dissented from the proposed reduction of the award of punitive damages. In Justice Beach's view, reducing the jury award of punitive damages meant that the court was reweighing the evidence - a task to be undertaken only upon a clear and convincing showing that the jury was motivated by passion and prejudice. Furthermore, punitive damages need to be more than an "expense" or "cost of doing business," stated Justice Beach, and referring to a ratio of compensatory to punitive damages is not relevant in calculating this deterrent factor, in his opinion.

Burnett v. National Enquirer, Inc., 193 Cal.Rptr. 206 (Cal.App. 1983) [ELR 6:1:9]

California appellate court rejects claims for defamation, intentional infliction of emotional distress and invasion of privacy brought by the late Errol Flynn's children against author and publisher of Flynn biography, California Supreme Court declines further review

In 1981, Rory and Deirdre Flynn filed an action for defamation of character against Charles Higham, the author of the book Errol Flynn, the Untold Story, and against Dell Publishing Company. The complained of statements referred to Errol Flynn, the deceased father of the Flynns, as a homosexual and a Nazi sympathizer. Higham and Dell demurred to the complaint, and the trial court sustained the demurrer with leave to amend. When the Flynns failed to amend their complaint, the trial court entered an order of dismissal. This order has been upheld by the California Court of Appeal.

The appellate court relied on the principle that defamation of a deceased person does not give rise to a civil right of action at common law in favor of the surviving spouse, family or relatives who are not themselves defamed. The Flynns argued that an implied civil cause of action exists based on California Penal Code section 248 which states: "A libel is a malicious defamation ... tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation, or publish the natural or alleged defects of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule." But this position has not been supported by case law, noted the court. Therefore, the Flynns failed to state a cause of action based on defamation for the statements made by Higham of and concerning their deceased father.

The court also found that the Flynns failed to state a cause of action for intentional infliction of emotional distress. To allow an independent cause of action for intentional infliction of emotional distress based on the same acts which would not support a defamation action would allow the Flynns to do indirectly that which they could not do directly, observed the court.

The court also rejected the Flynns' cause of action for invasion of privacy. All of the complained-of statements referred solely to Errol Flynn; there were no direct references to Rory or to Deirdre. The right of privacy cannot be asserted by anyone other than the person whose privacy has been invaded, and the right does not survive, but dies with the person.

The California Supreme Court has declined to review the case.

Flynn v. Higham, 197 Cal.Rptr. 145 (Cal.App. 1983) [ELR 6:1:10]

____

Federal Court of Appeals upholds decision granting summary judgment to Dell Publishing Company in defamation action brought by individual mentioned in book "Fellini on Fellini"

When Rod Geiger sued Dell Publishing Company, the publisher of Fellini on Fellini, for defamation, a Federal District Court granted Dell's motion for summary judgment on the ground that the collection of articles concerned matters of legitimate public concern and that Geiger had not established gross irresponsibility on the part of the publisher. (ELR 5:4:12) A Federal Court of Appeals has upheld the District Court's decision.

The Court of Appeals rejected Geiger's argument that Dell, as a book publisher, was not entitled to the level of First Amendment protection afforded other media entities. The New York Court of Appeals has applied the same defamation standard to publishers of a book in which several newspaper articles were reprinted as the court applied to the publishers of the newspaper in which the articles originally appeared (Karaduman v. Newsday, Inc., 51 N.Y.2d 531 (1980); ELR 3:5:5). This defamation standard applies to private individuals whose activities are "arguably within the sphere of legitimate public concern."

Geiger, a United States Army private stationed in Italy in 1945, was the individual who carried a print of the landmark film "Open City" back to the United States in his barracks bag. Nonetheless, Fellini described Geiger, in the article "Sweet Beginnings," as a "half-drunk soldier" who misrepresented himself as an American producer but "who didn't have a dime." This description concerned a matter within the relevant "sphere," declared the court. The fact that events set forth in Fellini's essay occurred about 30 years before the publication of Dell's book was not sufficient in this case to remove the episode from the public eye.

Furthermore, Geiger did not show that Dell was grossly irresponsible in its publication despite its alleged failure to check the accuracy of Fellini's statements with Geiger. The complained-of statements previously have been published on four occasions (once in the United States) over a long period of time without any prior objection by Geiger. Dell, as a republisher, was entitled to rely on the accuracy of the account given by Fellini (a first-hand observer of the events described) and on the research of four intervening publishers, in the absence of any reason to believe that the statements were untrue. The court rejected Geiger's contention that the injurious nature of the statements alone should have prompted Dell to question the accuracy of the report.

The court noted that book publishers may not be under the same time pressure as newspapers, magazines or broadcasters, but that financial considerations do preclude their conducting, on a routine basis, a detailed check of every potentially defamatory reference in a work. This type of research "might raise the price of non-fiction works beyond the resources of the average man" noted the court - an eventuality which could have a chilling effect on the free flow of ideas.

Geiger v. Dell Publishing Company, Inc., 719 F.2d 515 (1st Cir. 1983) [ELR 6:1:11]

New York appellate court rules that professional model is entitled to trial on claim that New York

Magazine published his photograph without authorization

The September 7, 1981 issue of New York magazine contained an article on men's fall fashions entitled "Classic Mixes." Professional model Tony Stephano appeared in several of the nine photographs accompanying the article. One of the photographs of Stephano taken during the shooting session for the September 7th article first appeared in the August 31st issue of the magazine in a column entitled "Best Bets." The caption of the "Best Bets" item mentioned that the jacket modeled by Stephano would be available in certain New York area stores and gave the approximate cost. Stephano contended that he had orally agreed with News Group Publications (the publisher of New York magazine) that his photographs were to be used only in the September 7th article. Stephano therefore sued the magazine for a total of $700,000 in compensatory and punitive damages for the alleged violation of New York Civil Rights Law sections 50 and 51.

A New York trial court granted the magazine's motion for summary judgment on the ground that the August 31st item was an editorial portion of the magazine. The "Best Bets" article was described as a "newsworthy observation ... in a section devoted to keeping the readership apprised of novel happenings and offerings within the metropolitan area and not for advertising purposes or purposes of trade as contemplated by the statute...."

This ruling has been reversed by an appellate court which noted that factual questions remained as to whether the item in the August 31st issue was truly in the public interest or was an advertisement in disguise. Stephano argued that the "Best Bets" item not only alerted the magazine's readers that certain jackets were in style but also gave the designer name of thejacket, the price, and sales locations.

Presiding Justice Francis T. Murphy pointed out that the September 7th article and photographs "undisputably" were included in the magazine for purposes of trade, i.e., to increase circulation. And since the caption and photograph in the August 31st issue were identical in form and presentation to the September 7th material, a reasonable trier of fact might conclude that the August 31st article also was used for purposes of trade within the meaning of sections 50 and 51. Justice Murphy stated that a trier of fact would have to determine whether the newsworthiness of the item was merely incidental to its commercial purpose.

The appellate court also ruled that summary judgment should have been denied for the additional reason that the August 31st item might have been an advertisement in disguise. It was noted that the item benefitted several of the magazine's regular advertisers, and that Stephano should have an opportunity to determine whether any consideration was given by the advertisers for the mention of their names in the column and to determine whether the magazine promised to give its advertisers free exposure in the "Best Bets" column as part of its "basic advertisement package." The magazine's position was that the use of merchandising details added to the informational purpose of the item, and that the item was prepared wholly without regard to advertising considerations.

Stephano, in a second cause of action, claimed that the magazine invaded his right of publicity. This claim was dismissed by the trial court on the ground that New York has not recognized such a right other than under sections 50 and 51 of the Civil Rights Law; the dismissal of this claim was upheld.

In a concurring opinion, Justice Arnold L. Fein focused on the question of whether the agreement between Stephano and the magazine encompassed the use of his photograph in the August 31st issue. Justice Fein stated that although there was no written consent as required by sections 50 and 51, Stephano's claim might be foreclosed if, as a professional model who had modeled for the magazine on prior occasions for similar articles, he indeed had agreed to the August 31st publication. Previous cases involving the unconsented-to publication of photographs of nonprofessionals "were of doubtful application to a professional model paid a fee for his services," stated Justice Fein.

Justice Asch, in dissent, agreed with the trial court that the fact that the "Best Bets" item may have been printed to increase the magazine's circulation did not violate sections 50 and 51 when the purpose of the publication was to disseminate information of public interest.

Stephano v. News Group Publications, Inc., New York Law Journal, page 3, col. 1 (N.Y.App., Jan. 5, 1984) [ELR 6:1:11]

Federal Court of Appeals rules that the publication of an advertising jingle prior to January 1978 divested its creator's common law copyright in the work

Maybe you can have too much of a good thing, as Memphis advertising writer H. Jackson Brown learned when he sought copyright protection for a jingle he composed in 1971 entitled "He Traded My Way." Brown wrote the piece as part of an advertising package for a car dealership in Lexington, Kentucky. In 1974, Brown sold a similar customized tape to a car dealer in Nashville, and sold a third tape to another car dealer, Chuck

Hutton Chevrolet, again customizing the jingle to include, in this case, Hutton's name. When Bob Tabb, an employee of Hutton, left the company to open a car dealership in Huntsville, Alabama, Tabb borrowed Brown's tape from Hutton, re-recorded the jingle, and, after substituting his name, used the jingle in radio and television advertising.

In 1979, Brown learned of Tabb's use of the jingle. Brown applied for and obtained a certificate of registration of copyright in the work as of April 25, 1980. The certificate indicated that the work was first published on June 24, 1971.

Brown then brought an action for copyright infringement against Tabb, claiming protection for the jingle under the Copyright Act of 1976. Copyright protection was available to Brown prior to the 1978 effective date of the Act either under a common law copyright or a statutory copyright under the Copyright Act of 1909.

Brown did not claim protection under the 1909 Act and a common law copyright was available only if a divesting publication had not occurred prior to January 1, 1978.

The pre-1978 case law definition of "Publication" indicates that "publication occurs when by consent of the copyright owner, the original or tangible copies of a work are sold, leased, loaned, given away, or otherwise made available to the general public...." Brown argued that the pre-1978 publication of his work was a "limited" publication that "communicated the contents of (the work) to a definitely selected group and for a limited purpose, and without the right of diffusion, reproduction, distribution or sale" and did not divest his common law copyright.

A Federal District Court in Alabama disagreed with Brown, and granted summary judgment to Tabb on the ground that Brown's jingle entered the public domain prior to January 1, 1978 since it was "published" before that date. A Federal Court of Appeals has upheld this ruling, stating that the publication involved in the case was neither limited in purpose nor limited to a definitely selected group. Brown argued that the customization of the jingles constituted an implied restriction on the dealer's right to distribute the work. But the court pointed out that even if there was no right of sale, each dealer "was completely free to use the jingle for his own commercial benefit, and to broadcast the work as broadly as he wished." Brown not only failed to restrict the dealers' use of the work but also failed to limit the distribution of the jingle to a select group. The composition apparently was available to any automobile dealer in a market not yet exposed to the jingle. The court declined to consider as a select group all car dealers or dealers in markets where the jingle was not already in use. Brown's belief that a new dealer would seek his permission before re-recording a customized tape and substituting his or her name did not provide a basis for granting copyright protection to the work, concluded the court.

Brown v. Tabb, 714 F.2d 1088 (11th Cir. 1983) [ELR 6:1:12]

Supreme Court of Ohio affirms award of more than $25,000 to producer of "beautiful music" tapes in breach of contract action against radio station

WXEZ, an FM radio station in Toledo, Ohio found out there is a price to be paid for changing from a "beautiful music" programming format to a "top forty" rock and roll format. In this case, the price was $25,792 - the balance due on WXEZ's contract with Stereo Radio Productions.

In 1972, Stereo entered into a contract with Midwestern Broadcasting Company, the owner of WXWZ, by which Stereo agreed to supply its music tapes to the station, as well as music cue sheets and schedules for recommended tape rotations. The term of the contract was three years, with monthly payments to Stereo of $1200. Stereo produces master tapes which are duplicated and sent to subscribing radio stations. Each station is supplied with a library of about 130 tapes with continuous updating. Stereo and Midwestern entered a second contract in 1975, this time for a four year term. The cost of the service remained at $1200 per month until the final year of the contract when the payment was increased to $1500 per month.

In the summer of 1977, WXEZ became dissatisfied with its small share of the listening audience, and it switched to a "top forty" music format. Stereo stopped sending new tapes to the station but continued billing Midwestern. Midwestern continued to make its monthly payments until November 1977.

In September 1979, Stereo filed its breach of contract action. The trial court ruled that Midwestern breached its contract with Stereo. Then, although the parties had specified that all disputes were to be settled in accordance with New York law, the court found that the state of New York did not bear any relationship to the parties or their contract. Therefore the court applied Ohio law on damages and concluded that under Ohio law, Stereo had failed to prove its damages and was entitled to only nominal damages of five dollars.

An Ohio appellate court reversed and remanded the decision, finding that the trial court had erred in refusing to apply New York law. The court further found that Stereo was entitled to damages in the sum of $25,792, the contract price for each unpaid month, minus the $100 per month saved by Stereo by not having to complete its contract with Midwestern.

Justice James P. Celebrezze of the Supreme Court of Ohio has upheld the ruling of the appellate court. The application of New York law was correct since New York did bear a substantial relationship to the parties and the contract: Stereo was located in New York in 1975; the contract was executed in New York; and, prior to 1976 when Stereo moved to New Jersey, part of its performance of the contract, including the preparation of duplicate tapes, took place in New York.

The appellate court was found to have correctly assessed damages under New York law by determining the amount Stereo would have received under the contract less the necessary expense of performance. The expense of performance did not include Stereo's overhead or fixed expenses, as argued by Midwestern. As of

1975, Stereo was sending duplicate tapes to about 70 different stations; the tapes were not customized to the various subscribers, and Stereo's costs in producing the tapes and maintaining its operations were fixed costs, not chargeable to a particular part of the product. Thus, Stereo's only saving was the $100 per month attributable to the direct cost of service to WXEZ. The station was not entitled to a further reduction for a proportional share of Stereo's fixed expenses.

Justice William B. Brown concurred with the majority's analysis of the damages issue but questioned the necessity of the conflict of laws discussion. Justice Brown saw no conflict between New York law and Ohio law as to the calculation of damages, because neither state's law specifically deals with the issue of the allocation of overhead expenses. Therefore, Justice Brown would have applied Ohio law. The fact that the parties chose New York law to govern their contract was "irrelevant," stated Justice Brown. The expectations of the parties would not be defeated by the application of Ohio law since "their contract (would be) governed by the very rules which they desired"

Schulke Radio Productions, Ltd. v. Midwestern Broadcasting Company, 453 N.E.2d 683 (Ohio 1983) [ELR 6:1:13]

Federal District Court rejects University of Pittsburgh's trademark infringement and unfair competition claims against manufacturer of merchandise bearing the university's insignia

A Federal District Court in Pennsylvania has ruled that Champion Products, Inc., a manufacturer of clothing and other items bearing the insignia of the University of

Pittsburgh, did not infringe the school's trademarks or engage in unfair competition. The court originally had ruled that the university's action was barred by laches (529 F.Supp. 464), but a Federal Court of Appeals reversed on the laches issue (686 F.2d 1040; ELR 4:11:5). The Court of Appeals stated that Pitt was not unfairly and belatedly seeking to avail itself of Champion's development of the athletic soft goods market since Pitt actually had expended considerable effort and funds in recent years to increase public recognition of its athletic program. The Court of Appeals concluded that purchasers of merchandise bearing the Pitt name and mascot presumably wished to associate with the university, that is, they would request a "Pitt T-shirt," not a "Champion T-shirt." The matter therefore was remanded to the District Court for a decision as to the scope of an injunction barring Champion from interfering, in the future, with Pitt's trademarks.

However, on remand, Federal District Court Judge Maurice Cohill, after restating the original findings of fact, declined to issue an injunction or other relief to the university. Judge Cohill first found that the university had failed to provide any evidence of a likelihood of confusion as required under section 43(a) of the Lanham Act. For example, Pitt had not taken a survey to demonstrate consumer confusion as to the source, authorization or sponsorship of the goods. The goods at issue were clearly marked as made by Champion, and the products were not advertised or described as "official" or in any other way sanctioned by Pitt.

While noting that his ruling on the likelihood of confusion issue was sufficient to preclude recovery by Pitt, Judge Cohill proceeded to consider the remaining elements of the university's trademark infringement claim. He pointed out that features of a product which are functional are not protected either by the Lanham Act or by state unfair competition law, and he concluded that the Pitt insignia, as used by Champion, were functional characteristics of Champion's goods. The insignia served the aesthetic function, according to Judge Cohill, of allowing the wearer of a garment to display his or her support for the university and its athletic teams. There was no evidence that consumers cared who made the clothing or whether the items were made under a license. Pitt was not entitled to a "perpetual monopoly" over the market for soft goods which would allow consumers to show allegiance to the university, stated the court.

Pitt also failed to demonstrate that its insignia had taken on a secondary meaning in the soft goods market prior to 1936 - the time when Champion entered that market - and that the university had priority of trademark use in commerce.

Champion did not intend to confuse the public and there was no likelihood of accidental confusion, Judge

Cohill concluded in entering judgment in favor of Champion.

University of Pittsburgh v. Champion Products, Inc., 566 F.Supp. 711 (W.D.Pa. 1983) [ELR 6:1:14]

Federal Court of Appeals in Wisconsin directs trial court to determine reasonable duration of contract in action brought by William B. Tanner Co. against radio station for unused advertising spots; but Federal District Court in Colorado awards damages to Tanner in separate action involving same "valid until used" contract language

In August 1966, the William B. Tanner Company entered into a contract with Sparta-Tomah Broadcasting Co., Inc., doing business as radio station WCOW, which provided that Tanner would furnish a promotional package to WCOW for a period of three years in exchange for $1,908 and 2,340 one-minute spot announcements on the station. In 1967, Tanner and WCOW entered into another one year "license," under which Tanner agreed to furnish the station with additional promotional material in exchange for $477 and 520 one-minute spots. The contracts stated that since the spots were "partial payment for service(s) received" they were to be "valid until used."

Tanner made no request for the use of the commercial air time during the period of the first or second contracts. Then, in 1974, Tanner requested and received the use of 34 spot announcements; and in 1978, the company used another 48 spot announcements. But when Tanner requested further commercial time in January 1979, WCOW advised Tanner that it would not schedule any more spots. Tanner's action for breach of contract followed.

A Federal District Court granted Tanner's motion for summary judgment, finding that the language of the contract was clear and unambiguous. WCOW had argued that the limited term of the contract with respect to the provision of promotional materials "created an ambiguity when considered with Tanner's apparently unlimited right to use the spots." But the court held that the spots were to be available to Tanner without any time limitation. Judgment was entered for Tanner in the amount of $9,775, utilizing published rates in effect in January 1979.

A Federal Court of Appeals has reversed the District Court ruling, and has remanded the case for the determination of a "reasonable time" to imply as to the duration of the contract. The court noted that the contract wording at issue has been a "significant boon to the legal profession" because a "raft" of cases have considered the declaration in Tanner's contracts that the sought-after spots were intended to be "valid until used." Many courts have viewed the question before them to be whether the contract was "ambiguous" (William B. Tanner, Inc. v. Waseca-Owatona Broadcasting, 549 F.Supp. 411 (D.Minn. 1982) (ELR 4:21:5)), but the courts have not reached consistent results. In this case, the Court of Appeals stated that it perceived no ambiguity in the words "valid until used." Nor did the actions of the parties reflect a misunderstanding with respect to the meaning of the words. WCOW honored Tanner's 1974 request for spots without protest and without any attempt to bill Tanner for air time; and another request was honored in 1978. Thus, the parties understood that the spots were to be useable for some period after Tanner's performance was completed, although they may have disagreed as to the proper length of this period.

The court concluded that while the contract was unambiguous in its expression, there was an "omission of scope" due to its failure to specify a time of performance for WCOW's obligation. Tanner argued that its option to run the spots was a commitment of potentially infinite duration. Since the parties did not so express their intention, and, given the reluctance of Wisconsin courts to construe a contract as having an indefinite term, the matter was remanded for a ruling on this issue.

In a similar but unrelated case, a Federal District Court in Colorado, construing the same language as the Wisconsin court, has determined that Tanner had a right to compensation for unused spots on radio station KQIL operated by Mesa Broadcasting Company. The Tanner-Mesa contracts were entered into in 1965, 1966, 1967, 1974 and 1975. Spots were run pursuant to these contracts during 1966-1974 with a balance of 3,477 unused spots. By continuing to run the spots upon request in

1978, with knowledge that Tanner was asserting its rights under the contracts, Mesa acknowledged the existence of those rights, stated the court, at least until November 1978 when the company declared that it would no longer continue to fulfill Tanner's requests.

The amount owed by Mesa to Tanner for the unused spots remains to be determined.

William B. Tanner Co., Inc. v. Sparta-Tomah Broadcasting Company, Inc., 716 F.2d 1155 (7th Cir. 1983); William B. Tanner Company, Inc. v. Mesa Broadcasting Company, 571 F.Supp. 28 (D.Colo. 1983) [ELR 6:1:14]

Dismissal of pay television company's antitrust claims against competitor is upheld; Court of

Appeals rules, in part, that pay-TV is not a relevant submarket separate from other entertainment

In early 1978, Continental Cablevision of Virginia, facing the costly prospect of installing cable hookups in multiple dwelling units in the Richmond area, gave apartment owners two options: either pay for the expense of wiring their buildings for cable, or give Continental exclusive pay television rights to their units. Many owners chose to give Continental the requested rights. Another pay television service operating in Richmond, known as Satellite Television & Associated Resources, Inc. (Star), sued Continental alleging that the company had entered into an illegal contract, combination and conspiracy with the apartment owners in violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act, and that Continental had monopolized and attempted to monopolize the pay television market in metropolitan Richmond in violation of Section 2 of the Sherman Act.

A Federal District Court dismissed the Clayton Act claim on the ground that Continental offered television programming, a service, and therefore was outside the scope of the Act. Continental's motion for summary judgment on all remaining claims was granted. The court ruled that the effects of Continental's exclusivity provision were procompetitive in the short run and not substantially anticompetitive in the long run. The court also found that Continental lacked the requisite intent and market power to have violated Section 2 of the Sherman Act.

The District Court's rulings have been upheld by a Federal Court of Appeals. The District Court's application of the rule of reason, rather than the per se rule, in determining the validity of the exclusivity provision was correct, stated the Court of Appeals. Star had argued that a per se determination was required because the exclusivity provision was equivalent to a tie-in between the transmission equipment installed in the buildings and the programming provided by Continental. But the court stated that the programming and the transmission equipment were one product, because the transmission equipment was only incidental to the provision of the programming service which was the "dominant factor" in the transaction.

In turning to the question of whether the exclusivity provision (which Continental no longer enforces or uses in its contracts) substantially lessened competition, the court first rejected Star's argument that the relevant product "submarket" consisted of the pay television service which was being provided to the apartment complexes. It had been stipulated that consumers likely would find other entertainment, such as movies shown in theaters, to be reasonably interchangeable with pay television programming. And Star had not shown that economic factors or consumer perceptions limited other entertainment purveyors' ability to compete.

The court also ruled against Star's contention that apartments are a distinct submarket since the owner or manager of a complex may regulate the consumer's access to pay television. Instead, the appeals court declared that Star's definition of the relevant geographic market was too limited.

Given Star's incorrect designations of the relevant product and geographic market, the District Court did not have the information necessary to measure the degree of market foreclosure, stated the Court of Appeals. Nevertheless the District Court correctly concluded that Continental's service to the apartment complexes increased competition by giving apartment owners a choice as to installation they would otherwise have been denied. And since the maximum foreclosure to Star may have been about eight percent of the households in Richmond, for a period of no more than 14 months between March 1979 and June 1980, the Court of Appeals refused to find that there had been a substantial reduction in competition in either the pay television industry or the entertainment industry in metropolitan Richmond, or that there would be a reduction in competition in the future.

The court concluded by observing that Continental was not shown to have "anything resembling monopoly power in any relevant market." And absent the probability of Continental's achieving monopoly power and the intent to achieve it, Star could not prevail on a claim of attempted monopolization.

Satellite Television & Associated Resources, Inc. v. Continental Cablevision of Virginia, Inc., 714 F.2d 351 (4th Cir. 1983) [ELR 6:1:15]

Texas statute regulating rates charged by broadcasters for political advertising is ruled unconstitutional, though sponsorship identification regulation is upheld as applied to candidates for nonfederal offices

A Federal Court of Appeals in Texas has declared unconstitutional a state statute setting the rates that radio and television stations may charge political advertisers, but has upheld the validity of a provision of the statute requiring sponsors of such advertising to identify themselves if the advertising is for candidates for nonfederal office or campaigns that do not involve federal issues.

The rate regulating statute prohibited a radio or television station from charging a rate for political advertising that would exceed the least unit charge made by the station to other advertisers for the same amount of time.

The sponsorship identification requirement calls for the disclosure of the name and address either of the agent who contracted for the broadcast or the person represented.

KVUE-TV sued the county attorney for Travis County seeking a declaratory judgment that the statute violated the United States Constitution and an injunction preventing the enforcement of the statute. KVUE contended that the statute violated the station's right to freedom of expression and also violated the supremacy clause of the Constitution because there is federal legislation concerning the same subjects.

A Federal District Court dismissed the action for lack of standing. The Court of Appeals, in reversing this judgment, first found that a justiciable case or controversy existed because: KVUE offered evidence that it suffered actual monetary losses during the time the statutory rates were charged; several advertisers filed protests with the station when KVUE increased its rates; and an advertiser testified that it might consider filing a complaint with the county attorney's office to settle the rate question.

In turning to the merits of the case, the court pointed out that federal regulation of broadcasting is comprehensive under the Communications Act. Congress has enacted legislation regulating both the permissible price for candidate advertising and the required identification for sponsors of political broadcasting. And, according to the court, the Federal Communications Commission has endorsed the view that the sponsorship identification regulations preempt the imposition by states of additional notice requirements on political advertising by federal candidates. Thus, the Texas sponsorship identification requirement impermissibly conflicted with federal law, but will remain valid to the extent that it regulates advertising for state elections or campaigns.

With respect to rate regulation, the court stated that Congress' goal was to place candidates on an equal footing with a station's most favored commercial advertisers but only for a specified, and very limited period prior to primary and general elections. The Texas statute broadened this access by extending the availability of regulated advertising rates to the entire year and by allowing noncandidates to take advantage of the rate. The statute therefore conflicted directly with the federal statute by lengthening the "campaign season," by encouraging greater, rather than lesser, campaign spending via year-round advertising, by imposing a heavier burden on broadcasters to make low cost time available to political advertisers, and by possibly limiting rather than increasing candidate access to the media by discouraging stations from making advertising time available to nonfederal candidates.

The court did reject KVUE's argument that the sponsorship identification provision of the statute violated the First Amendment. Rather, the provision was characterized as an "evenhanded" regulation to protect the integrity and reliability of the electoral process. The provision did not regulate the content of political messages but merely added the words "paid political announcement" and the sponsor's address to the federal identification requirements.

The United States Supreme Court has affirmed the Court of Appeals' decision, without hearing oral argument or issuing a written decision.

KVUE, Inc. v. Moore, 709 F.2d 922 (5th Cir. 1983), affirmed without opinion sub nom. Texas v. KVUE-TV Inc., 52 L.W. 3686 (U.S.Sup.Ct. 1984) [ELR 6:1:16]

Federal Court of Appeals upholds FCC allocation of four new VHF television station assignments

A Federal Court of Appeals has upheld the Federal Communications Commission's allocation of new VHF television assignments to Salt Lake City, Utah; Johnstown, Pennsylvania; Charleston, West Virginia; and Knoxville, Tennessee. The stations were inserted in the FCC's Television Table of Assignments - an allocation of television frequencies which was adopted to permit an efficient use of the available spectrum and to distribute channels fairly among states and communities. Ordinarily, such "drop-in" stations will not be permitted unless they conform to certain mileage separation requirements. And a waiver of the separation requirements is necessary if a drop-in station is short-spaced. The four new VHF stations were allocated after the FCC concluded that the proposed waivers of the mileage separation requirements for the stations was in the public interest.

The Court of Appeals noted that the allotment of broadcast frequencies involves technical and policy matters which Congress intended to leave to the discretion of the FCC. Furthermore, when the Commission issued its notice of proposed rulemaking in this proceeding, over 100 parties filed comments. And "exhaustive" economic studies were undertaken to assist the FCC in reaching the conclusion that the drop-in stations would promote the goals of greater programming diversity, presentation of divergent viewpoints, greater minority access to broadcasting, and increased competition. The court rejected the contention that the Commission was foreclosed from changing the Table of Assignments due to the potential adverse impact on UHF television service. In all, the FCC was found to have followed "a rational path from record to decision," stated the court in denying several petitions for review of the Commission's decision.

Springfield Television of Utah, Inc. v. Federal Communications Commission, 710 F.2d 620 (10th Cir. 1983) [ELR 6:1:17]

California courts uphold constitutionality of state penal statute prohibiting distribution of devices to facilitate unauthorized interception of subscription television transmissions

Under California Penal Code section 593e, it is a misdemeanor to willfully, and without authorization, manufacture, distribute or sell for profit devices that facilitate the interception or decoding of over-the-air transmissions by a subscription television service. Harold John

Babylon and Douglas Arthur Hyatt, after a court trial in Sacramento, were found guilty of violating section 593e. The charges were based on Babylon and Hyatt's purported sale of equipment capable of receiving the omnidirectional, high frequency microwave signal carrying Home Box Office programming to subscribers of California Satellite Systems, the exclusive distributor of HBO in the Sacramento area. California Satellite provides its subscribers with special equipment to convert the high frequency signal to a standard frequency suitable for reception on individual television sets. This was the type of equipment allegedly sold by Babylon and Hyatt.

On appeal, Babylon and Hyatt contended that section 593e was inapplicable to their activities because there were no subscription television services in the Sacramento area using over-the-air transmissions. Rather, the delivery system used by California Satellite was a multipoint distribution service.

The California Court of Appeal noted that different equipment is needed under various delivery systems in order to obtain reception adequate for viewing, but "the difference in delivery systems, and the technical appellations given to them cannot alter the fundamental fact that each has as its central purpose, the transmission of subscription or pay television signals." The HBO signal may not be distributed by an over-the-air encoded transmission but the legislative history of section 593e indicated an intent to protect all subscription television services.

Babylon and Hyatt also argued that the statute was unconstitutionally vague since the term "subscription television service" was used to refer to cable television, commercial television broadcasting and multipoint distribution services. But cable television clearly was not within the scope of section 593e. And the statute, as reasonably interpreted, sent a "clear message" that the unauthorized interception of subscription television transmissions would be considered a criminal offense.

The court also rejected the argument that the statute was overbroad because the equipment sold by Babylon and Hyatt could be used to receive legitimate transmissions other than the signals from a multipoint distribution service. According to the court, the knowledge and intent requirements of section 593e eliminate the possibility that the statute might "chill" constitutionally protected conduct.

Babylon and Hyatt also were unsuccessful in raising the ever-popular argument that the Federal Communications Act preempts the subject matter of section 593e. The court observed that Congress did not clearly reserve all criminal jurisdiction in the communications field to the federal government. Thus, the state could properly exercise its police power by making criminal the interception and decoding of subscription television transmissions. The judgments of the municipal court were affirmed accordingly.

The appellate department of the Los Angeles Superior Court also has considered section 593e in an action in which Ralph dewayne Patton was charged in a misdemeanor complaint with knowingly and willfully for profit manufacturing, distributing and selling a decoding device, not authorized by a licensed subscription television service, which enabled television sets to receive and to unscramble subscription television signals. The trial court had sustained Patton's demurrer to the complaint on the ground that the electronic audiovisual communications field has been preempted by section 605 of the Communications Act, rendering section 593e unconstitutional.

The Appellate Department reversed this ruling, finding that the state statute acts to further the purposes of section 605 and does not conflict with Congressional objectives. The matter therefore was remanded to the trial court with instructions to enter an order overruling Patton's demurrer and to conduct any further proceedings as might be required.

People v. Babylon, 194 Cal.Rptr. 134 (Cal.App. 1983); People v. Patton, 194 Cal.Rptr. 759 (App.Dept. 1983) [ELR 6:1:17]

Kansas Supreme Court rules that producers of television show "Lie Detector" are not entitled to enter state penitentiary to videotape polygraph examination of inmate seeking to appear on the show

The Supreme Court of Kansas has dashed the media aspirations of Joe Arney, an inmate of the state penitentiary at Lansing. Arney sought to appear on the television show "Lie Detector." Guests on the show are administered a polygraph examination by an expert technician. The examination and the results then are shown on television.

Arney, who maintained that he was innocent of the murder and other crimes of which he was convicted about ten years ago, contacted the producers of "Lie Detector" about an appearance. The producers requested permission to enter the prison in order to videotape the examination of Arney. After various bureaucratic delays, permission was denied. The producers of the show, in anticipation of receiving permission from the authorities, already had invested approximately $30,000 in preparing for the interview and filming.

The producers filed a petition seeking an order of mandamus directing prison officials to allow the visit as planned. The trial court noted that prison authorities had not established a written policy regarding access to inmates by the news media. Decisions as to access made on a case-by-case basis by the director of the penitentiary would be unavoidably arbitrary, in the trial court's view, and subject to review. The trial court balanced the interests involved and concluded that since Arney's interest in access to the media under the First Amendment outweighed those of the prison administration, the television show producers should be permitted access to the prison.

But the Kansas Supreme Court has reversed the trial court on the ground that the director of the prison had no affirmative duty to grant the requested access. Accepting, for purposes of discussion, the premise that "Lie Detector" indeed was qualified as a news entity, the court pointed out that an inmate's right of access to the news media is a qualified right. Prison officials only are obligated to regulate the right uniformly. And contrary to the allegation that there was no written policy governing inmate media access, the Supreme Court noted that the Kansas Secretary of Corrections had issued written procedures covering access to correctional facilities which were applicable in this case. The presence of written departmental criteria as to access, and the lack of any content-based discrimination by the director of the penitentiary, were sufficient to overcome the absence of a more detailed written policy expressly devoted to media access, stated the court.

Arney's claim of an absolute right of access to the media under the First Amendment therefore was denied. Arney had alternate means of communicating with the community; his constitutional rights, including the right to counsel and the pursuit of postconviction remedies, were not violated by the director's decision to deny the interview between Arney and the television producers.

The producers' claim of a "right to visitation" also was rejected.

In accordance with its findings, the Supreme Court declared that the director of the penitentiary had not abused his discretion in an illegal, arbitrary or unreasonable way so as to justify the application of mandamus, and the case was remanded with discretions to dismiss the action.

Arney v. Director, Kansas State Penitentiary, 671 P.2d 559 (Kans. 1983) [ELR 6:1:18]

Louisiana court rules that owner of "The Louisiana Hayride" did not breach packaging/syndication

contract; evidence indicated that "Elvis Presley" tapes were not intended to be available for packaging

On June 12, 1980, David Kent, the owner of "The Louisiana Hayride," entered into a memorandum agreement with Thomas Ayers and Robert Vernon by which Ayers and Vernon were to act as Kent's agents in connection with packaging and syndicating "certain of the past performances of country music stars" who appeared on the "Hayride" program. The agreement stated that Ayers and Vernon would receive 49% of the profits from any distribution agreement they arranged. Kent reserved the right to approve the material to be used in the package.

At some point prior to entering into the June 12th agreement, Kent had excerpted from the "Hay ride" tapes nine songs sung by Elvis Presley at the "Hayride" at a time when Presley's career was just beginning. Kent expected that the tape of the nine songs, which included Kent's explanatory narration and other material, would be made into an album. In accordance with this outlook, on June 25, 1980, Kent executed an option granting Ayers and Vernon the right to purchase all of Kent's right, title and interest in the tape, which was tentatively titled "Elvis ... Where It All Began," for the sum of $185,000 plus a royalty of $ 1.00 for each album sold. Although Ayers and Vernon never exercised the option, they did introduce Kent to the party who eventually bought on the option terms, the "Elvis tapes." Kent remitted 15% of the $185,000 purchase price to Ayers and Vernon as an agency fee.

Don't be cruel, declaimed Ayers and Vernon, who alleged in a lawsuit for breach of contract that the "Elvis tapes" were included in the June 12th agreement and that they therefore were entitled to 49% of the proceeds of the sale for their efforts to secure a buyer for the tape, rather than a mere 15% share. Kent asserted that the parties never intended that the June 12th agreement would cover the "Elvis tape" and the trial court agreed.

A Louisiana appellate court has affirmed the trial court judgment limiting Ayer and Vernon's recovery to 15% of the "Elvis tape" proceeds. The court found persuasive Kent's testimony that he had previously contracted with other parties for packaging the "Elvis tape," that the June 12th agreement referred only to "certain of the past performances of country music stars" (emphasis by the court), and that he expressly reserved the right of approval over the material to be packaged by Ayers and Vernon.

Ayers v. Kent, 438 So.2d 691 (La.App. 1983) [ELR 6:1:19]

Briefly Noted:

Defamation.

In an action for defamation, intentional infliction of severe emotional distress, and loss of consortium brought by a Massachusetts State police officer and his wife against a radio "talk show" host, the Supreme Judicial Court of Massachusetts has held that statements made during the radio broadcast about the officer were opinions based on nondefamatory, disclosed facts. Thus, the court entered a judgment for the defendants, Westinghouse Broadcasting Company and the broadcaster, Paul Benzaquin. On one of his talk show broadcasts, Benzaquin had aired his disgust regarding an incident that had occurred earlier in the day when a state policeman, Officer Fleming, had impounded Benzaquin's car for failing to have a front license plate, an inspection sticker and a current car registration. At the time Benzaquin was driving, he had his daughter and two grandsons in the car. The officer gave Benzaquin a ticket and asked him to leave his car in a nearby parking lot of an automobile dealership. Benzaquin and his family then got a ride home with a friend whom Benzaquin had called to pick them up. Later that day Benzaquin described the incident on the air, verbally abusing the officer and ridiculing him. The court found that references to the officer and his conduct could not have been understood as statements of fact, but rather represented Benzaquin's opinion which was not actionable. The court based its reasoning on the Restatement (Second) of Torts section 566 which states that statements of opinion based on disclosed or assumed nondefamatory facts are not actionable. Believing Benzaquin disclosed nondefamatory facts upon which he had based his opinion, the court held for the defendants.

Fleming v. Benzaquin, 454 N.E.2d 95 (Mass. 1983) [ELR 6:1:19]

Copyright.

Four music publishing companies owning certain copyrighted musical compositions, including "Tequila Sunrise" and "Lookin' for Love" have won a copyright infringement suit against Der Place, Inc. and its president, Richard Ranallo, operating a bar in Nebraska which featured live entertainment. The four musical compositions were performed in August of 1982 without permission from the American Society of Composers, Authors and Publishers (ASCAP) or any of the individual publishers. A Federal District Court has found that the five elements necessary to establish an infringement had been met, i.e. (1) the originality and authorship of the compositions. involved; (2) compliance with all formalities required to secure a copyright under Title 17; (3) that the plaintiffs are the proprietors of the copyrights involved in this action; (4) that the compositions were performed publicly for profit; and (5) that the defendants had not received permission from any of the claimants or their representatives for such performance. The court granted a partial summary judgment as to the liability of the defendants and an injunction prohibiting further infringing performances. The issue of the amount of statutory damages to be awarded was postponed until a later hearing when the parties were instructed to present evidence regarding the wilfulness, if any, of the defendants' actions in failing to secure the necessary licenses.

Fourth Floor Music, Inc. v. Der Place, Inc., 572 F.Supp. 41 (D.Neb. 1983) [ELR 6:1:19]

Attorneys' Fees.

Chrysalis Records has been awarded attorneys' fees and costs arising from the company's involvement in a dispute over the allocation of royalties. When Sparta Florida Group, Ltd. sued Chrysalis for the payment of royalties purportedly due from the sale of an unspecified record, Chrysalis brought an interpleader action against Push Publishing Co. and B&C Music Co. - companies which also asserted claims to the royalties. Chrysalis then paid royalty earnings to the clerk of the court pending the adjudication of the rights of the parties. A Federal District Court in New York noted that while the parties agreed that copyright disputes frequently arise in the music business, Chrysalis had established that such disputes rarely involve legal action. Therefore, since incurring costs and fees in royalty proceedings was not an ordinary cost of doing business for the company, Chrysalis' motion for attorneys' fees was granted, as was the company's motion for dismissal from the action.

Sparta Florida Music Group, Ltd. v. Chrysalis Records, Inc., 566 F.Supp. 321 (S.D.N.Y. 1983) [ELR 6:1:20]

Labor.

A new movie theater owner who doubled as the theater's sole projectionist has been granted injunctive relief by a Federal District Court against picketing in front of his theater by the projectionists' union. When the International Alliance of Theatrical Stage Employees &

Moving Picture Machine Operators was unable to successfully negotiate a full union contract for the employment of union projectionists with the theater owner, the union began to picket outside the only entrance to the theater. In addition, suppliers and their union employees were threatened for crossing the picket line and in one instance, prevented from delivering equipment to the new theater. One picketer displayed a T-shirt with the words "On Strike" which message was reinforced by the presence of a baseball bat. Based on these circumstances, the court found that the picketing was not directed at achieving the limited purpose of communicating with the public which would be proper informational picketing within the National Labor Relations Act section 8(b)(7)(C). Instead the evidence raised a substantial question of whether the picketing was intended as a signal to organized labor. The court concluded that the National Labor Relations Board had reasonable cause to believe that section 8(b)(7)(C) had been violated and that the granting of an injunction was just and proper, because the economic hardship that the new theater would suffer would be more damaging and long-lasting than a temporary halt to what seemed to be impermissible signal picketing. All picketing was suspended for 90 days to allow the new business to become established.

Baldovin v. International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators, 570 F.Supp. 1314 (S.D. Texas 1983) [ELR 6:1:20]

Cable Television.

A mandatory presumption contained in an Ohio statute providing that actual possession of any device which effects use of cable television service shall constitute prima facie evidence of intent to commit theft of cable television service has been held unconstitutional on its face by the Ohio Court of Appeals. The defendant in the case was the Chief of Police of an Ohio city who was found guilty of misdemeanor theft of cable television service. A sergeant conducting the investigation of the disappearance of several cable television converter units discovered an unauthorized converter unit on the Chief's television set at his residence. However, no direct evidence was presented at trial to show that the Chief actually had used the converter to obtain the extended service for which he had not subscribed. On appeal, the Ohio court found that the Ohio statute regulating such thefts violated the Due Process Clause of the 14th Amendment of the U.S. Constitution. In analyzing the validity of the statutory presumption, the court applied a test which defines a criminal statutory presumption as irrational or arbitrary and thus unconstitutional unless it could be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. The court found in this case that it could not be said that the trier of fact could properly presume all elements of the offense from the mere possession of the device. While there was evidence that a theft actually occurred, there was no evidence of the criminal act.

State v. Scott, 455 N.E.2d 1363 (Ohio App. 1983) [ELR 6:1:20]

Previously Reported:

The following cases, which were reported in previous issues of the Entertainment Law Reporter, have been published: Harry Fox Agency v. Mills Music, Inc., 720 F.2d 733 (5:7:3), and on March 26, 1984, the United States Supreme Court granted Mills Music's petition for certiorari; Harper & Row v. Nation Enterprises, 723 F.2d 195 (5:7:4); ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988 (5:8:10); Barr v. Dramatists Guild, Inc., 573 F.Supp. 555 (5:8:12); Christian Broadcasting Network v. Copyright Royalty Tribunal, 720 F.2d 1295 (5:8:14); Children's Television Programming and Advertising Practices, 49 Fed.Regis. 1704 (5:8:20); Eastwood v. Superior Court (National Enquirer), 198 Cal.Rptr. 342 (5:9:13), and the California Supreme Court denied the Enquirer's petition for a hearing on March 22, 1984. [ELR 6:1:20]

IN THE NEWS

Federal District Court grants summary judgment to Writers Guild in Department of Labor action challenging results of September 1983 Guild election

Federal District Court Judge Manuel Real has dismissed a lawsuit filed by the United States Department of Labor challenging the results of the board of directors election conducted by the Writers Guild of America West in September 1983. This most recent of a series of disputes involving Guild membership and election practices (see ELR 5:7:10) arose when Guild member Edmund Morris charged that several candidates in the September 1983 election were hyphenate members of the Guild and therefore were ineligible for office. After an investigation, the Department of Labor determined that two candidates were hyphenates who sould not have been allowed to run for Guild office. A lawsuit followed seeking to have the Guild remove the purported hyphenate who was elected, and possibly to rerun the entire election.

The Guild then argued that the National Labor Relations Board rather than the Department of Labor was the entity possessing subject matter jurisdiction as to election procedures and Judge Real apparently agreed. [June 1984] [ELR 6:1:21]

Municipal Court Judge orders trial for three filmmakers in deaths against Vic Morrow and two children on "Twilight Zone" set; charges against two other filmmakers are dismissed

A Los Angeles Municipal Court judge has ordered director John Landis, pilot Dorcey Wingo, and special effects coordinator Paul Stewart to stand trial on charges of three counts of involuntary manslaughter in connection with the deaths of actor Vic Morrow and two children when a helicopter flown by Wingo crashed during the filming of the motion picture "Twilight Zone." Judge Brian Crahan stated, in part: "The simple fact is, that three persons died in the final filming of the final segment, and their deaths did not occur by mere accident outside of the proximate scope of foreseeability of these three principles."

Similar charges against two other members of the film's crew (as reported in ELR 5:2:17), unit production manager Dan Allingham and associate producer George Folsey Jr., were dismissed. The child endangerment charges that were dismissed against Allingham and Folsey also were dismissed against Landis. The District

Attorney's office has attempted to reinstate the charges dismissed as to Allingham, Folsey and Landis; further proceedings have been scheduled. [June 1984] [ELR 6:1:21]

Federal District Court jury rejects Quad Cinema's antitrust claims against motion picture exhibitor

After lengthy antitrust proceedings (and a 37-day trial) involving the distribution of motion pictures in Manhattan, a Federal District Court jury has rejected Quad Cinema Corporation's claims against the Walter Reade Organization. Reade was the only organization, of the 22 motion picture distributors and exhibitors sued in the action, which refused to settle with Quad, the operator of four theaters in Greenwich Village.

Quad claimed that Reade had participated in two conspiracies in violation of the Sherman Act. One alleged conspiracy was the "splitting" of product so as to prevent the showing of such major motion pictures as "Superman" and "Star Wars" when these films were released in their first-time multiple showings in Manhattan. The other alleged conspiracy purportedly consisted of discrimination against Quad by the named exhibitors and distributors in the showing of films such as "Cousin, Cousine" and "La Cage aux Folies" when these films became available in the Greenwich Village area.

Quad alleged damages of approximately $2,900,000 (before trebling) involving the exhibition of more than 250 motion pictures from 1976 through 1980. The company previously had agreed to settlement payments speculated to be about $325,000 to $375,000 from each of the five major distributors sued. [June 1984] [ELR 6:1:21]

Rolling Stones-ABKCO lawsuit is settled

The Rolling Stones have settled a lawsuit against Abkco Music and Abkco Records in which it was alleged that Abkco failed to obtain synchronization rights for the video and cable use of the group's music, and that the payment of royalties was delayed on early Rolling Stones material. Under the settlement, Abkco will retain publishing and recording rights to many of the Rolling Stones' early works. Abkco agreed to continue to pay royalties to the group, and to facilitate such payments. [June 1984] [ELR 6:1:21]

DEPARTMENTS

In the Law Reviews:

Right of Privacy-Appropriation of a Person's Name, Portrait or Picture for Advertising Purposes Without Prior Written Consent: History and Scope in New York by Lawrence Edward Savell, 48 Albany Law Review 1 (1983)

Controlling the Market Power of Performing Rights Societies: An Administrative Substitute for Antitrust Regulation by Jay M. Fujitani, 72 California Law Review 103 (1984)

The Continuing Battle with the Performing Rights Societies: The Per Se Rule, The Rule of Reason Standard and Copyright Misuse by Marilyn E. Phelan, 15 Texas Tech Law Review 349 (1984)

Suing Media for Emotional Distress by Terrance C. Mead, 23 Washburn Law Journal 24 (1983)

"Give to the Invention Its Meaning and Worth": The Case for Compensating the Copyright Protector for Unauthorized Reproductions of Audio and Video Works for Home Use, 30 Wayne Law Review 15 5 (1983)

Public Use in Eminent Domain: Are There Limits after Oakland Raiders and Poletown? by Susan Crabtree, 20 California Western Law Review 82 (1983)

You've Got a Cable TV Franchise - So What?, 10 Current Municipal Problems 283 (1984) (published by Callaghan & Co., 3201 Old Glenview Road, Wilmette, IL)

Cable Television and the La Mirada Civic Theatre, 10 Current Municipal Problems 289 (1984) (published by Callaghan & Co., 3201 Old Glenview Road, Wilmette, IL)

The Misapplication of Antitrust Law to Professional Sports Leagues by Donald G. Kempf, Jr., 32 DePaul Law Review 625 (1983)

Collusion to Fix Wages and Other Conditions of Employment: Confrontation between Labor and Antitrust Law by L. Smith, 49 The Journal of Air Law and Commerce 289 (1983) (published by Southern Methodist University, Dallas, TX 75275)

The New NCAA Rules of the Game: Academic Integrity or Racism? by Linda S. Greene, 28 Saint Louis University Law Journal 101 (1984)

7-he Emergence of Modern First Amendment Doctrine by David M. Rabban, 50 University of Chicago Law Review 1205 (1983)

Let the Author Beware: The Rejuvenation of the American Law of Libel by Rodney A. Smolla, 132 University of Pennsylvania Law Review 1 (1983)

First Amendment Protection of Artistic Entertainment: Toward Reasonable Municipal Regulation of Video Games by John E. Sullivan, 36 Vanderbilt Law Review 1223 (1983)

Substantial Similarity Between Video Games: An Old Copyright Problem in a New Medium by Steven G. McKnight, 36 Vanderbilt Law Review 1277 (1983)

Title IX and Intercollegiate Athletics: Adducing Congressional Intent, 24 Boston College Law Review 1243 (1983)

Artist's Moral Rights: A European Evolution, An American Revolution by Dan Rosen, 2 Cardozo Arts & Entertainment Law Journal 155(1983)

Bankruptcy: The Death of Recording Contracts by Mitchell R. Julis and Ricardo A. Baez, 2 Cardozo Arts & Entertainment Law Journal 189 (1983)

Sound and Video-Recording and the Copyright Law: The German Approach by Ernest A. Seemann, 2 Cardozo Arts & Entertainment Law Journal 225 (1983)

The Right of Publicity, Section 43 (a) of the Lanham Act and Copyright Preemption: Preventing the

Unauthorized Commercial Exploitation of Uncopyrighted Works of Art, 2 Cardozo Arts & Entertainment Law Journal 265 (1983)

Videotex: A Welcome New Technology or an Orwellian Threat to Privacy?, 2 Cardozo Arts & Entertainment Law Journal 287 (1983)

No Monopoly on Monopoly: Anti-Monopoly, Inc. v. General Mills Fun Group, Inc., 2 Cardozo Arts and Entertainment Law Journal 313 (1983)

From Revolution to Constitution: Copyright, Compulsory Licenses and the Parodied Song by William J. Braithwaite, 18 University of British Columbia Law Review 35 (1984)

Comments on Judicial Nullification in Public Official and Public Figure Libel Suits by William P. Murphy, 86 West Virginia Law Review 269 (1984)

The Criminal as Hero in American Fiction by Teresa Godwin Phelps, 6 Wisconsin Law Review 1427 (1983)

Menora v. Illinois High School Association: Basketball Players' Free Exercise Rights Compromised- Technical Foul by Judith M. Mills, 6 Wisconsin Law Review 1487 (1983)
[ELR 6:1:22]