RECENT CASES

"E.T." again deactivates copyright infringement claim brought by author of play "Lokey from Maldemar" due to lack of substantial similarity

A copyright infringement and unfair competition action filed by Lisa Litchfield, the author of the copyrighted musical play "Lokey from Maldemar" against the creators of the motion picture "E.T. - The Extra-Terrestrial" has been dismissed by a Federal Court of Appeals. The court affirmed the ruling of a Federal District Court granting the E.T. parties' motion for summary judgment on the copyright infringement claim and dismissing the remaining claims (ELR 5:4:3).

Federal Court of Appeals Judge Wright, after reading the 1978 and 1980 versions of Lokey and the continuity script of E.T., agreed with the District Court's determination that no reasonable jury could find substantial similarity between E.T. and Lokey. To prove infringement, substantial similarity must be shown in both ideas and expression as measured by the comparison of plot, theme, dialogue, mood, setting, pace and sequence, and by the response of the "ordinary reasonable person" to the works.

Litchfield argued that there were too many similarities between E.T. and Lokey "especially in the sequence of events and incidents leading to the climax," for the court to rule that there was no material issue of fact. However, the appellate court discounted Litchfield's listing of similarities as "inherently subjective and unreliable'" and cautioned against placing reliance on a list which emphasized "random similarities scattered throughout the works." While agreeing that some similarities in the opening scenes of Lokey and E.T. "may be more than stock scenes," the court again noted that the requisite substantial similarity in events, mood, dialogue and characters was not present. The alleged plot similarities were not protectable.

Furthermore, Litchfield had not demonstrated similarity of expression as the "concept and feel of the works here are completely different ... E.T. concentrates on the development of the characters and the relationship between a boy and an extraterrestrial. Lokey uses caricatures to develop its theme of mankind divided by fear and hate. No lay observer would recognize E.T. as a dramatization or picturization of Lokey."

Judge Wright also rejected Litchfield's argument (not addressed by the District Court) that E.T. was an infringing derivative work. According to Litchfield, the similarities between her play and the movie constituted an incorporation of material from Lokey and showed that the movie was based on the play. Litchfield claimed that this incorporation, under section 106(2) of the Copyright Act, amounted to a derivative work even without a showing of substantial similarity. However, the court noted that the little available authority in this area suggests that a work is not derivative unless it has been substantially copied from a prior work. Section 106(2) does not, as Litchfield argued, alter the protection afforded by copyright law.

Litchfield then alleged that the E.T. parties violated section 43(a) of the Lanham Act. The basis for the claim of "misrepresentation of story authorship" apparently was derived from the case of Smith v. Montoro, 648 F.2d 602 (9th Cir. 1981) (ELR 3:6:1). In Smith, the court had held that an actor was entitled to state a claim for "reverse passing off" under the Lanham Act when a film allegedly was mislabeled to obscure his contribution to the film when the wrong person was given screen credit for the actor's onscreen performance. The lack of substantial similarity between the works at issue again foiled this claim, even assuming, stated the court, that Smith extends to cases of substantial similarity rather than being limited to the "bodily appropriation." Furthermore, as the E.T. parties' brief pointed out, Litchfield had failed to allege that Lokey had acquired a secondary meaning or that the public might be misled in believing that E.T. was a work authored by Litchfield. The complaint also failed to allege that screen credit to Melissa Mathison as the author of the E.T. screenplay was a false representation of origin. (Such an allegation would have been erroneous, in any event, stated the brief, because Mathison's screenplay was an "original" work.)

The appellate court concluded by upholding the dismissal of Litchfield's state law claims for unfair competition and misrepresentation, noting that those claims were preempted by federal copyright law insofar as they were restatements of the copyright infringement claims.

Litchfield v. Spielberg, Case No. 83-6045 (9th Cir., July 6, 1984) [ELR 6:3:3]

Fictional hero of ABC's television series "The Greatest American Hero" did not infringe Warner Bros.' copyright to Superman

The course of Warner Bros.' copyright infringement and unfair competition action against American Broadcasting Companies and the creators of "The Greatest American Hero" television series has come to rival the eventfulness of Superman's journey from Krypton to Earth (see ELR 4:2:1, 3:7:1). The most recent episode in the saga has concluded with a Federal Court of Appeals ruling that as a matter of law the leading character in the "Hero" series was not sufficiently similar to the character Superman to entitle Warner Bros. to present its claims to a jury.

The background of this ruling, briefly, is that Warners, Film Export and DC Comics Inc. are the owners of the copyrights in various works containing the character Superman, and have acquired copyright protection for the character itself. In 1978, Warners released the film "Superman, The Movie." ABC subsequently unsuccessfully sought a license from Warners for the production of a television series based on the early adventures of Superman to be entitled "Superboy." ABC then asked producer Stephen Cannell to create a weekly television series involving a superhero. Cannell developed "Hero," a series which focused on the life of the fictional character Ralph Hinkley, an average individual who reluctantly acquired certain superhuman attributes.

Warners sought a preliminary injunction that would have barred the showing of the "Hero" series. A Federal

District Court denied the company's request and this ruling was affirmed on appeal.

Then, in December 1981, Federal District Court Judge Motley, after conducting an extended pretrial conference, granted partial summary judgment to ABC on Warner's claim that the network's "promos" for the Hero series infringed Warner's copyrights; soon after, Judge Motley granted summary judgment to ABC on the entire copyright claim and on Warner's Lanham Act, common law unfair competition and New York anti-dilution statute claims.

In the appeal from Judge Motley's decision, the issue raised was whether the lack of substantial similarity between Superman and Ralph Hinkley was so clear as to fall "outside the range of reasonably disputed fact questions requiring resolution by a jury." Federal Court of Appeals Judge Newman, in a lengthy and forthright discussion, observed that copyright protection is available for characters portrayed in cartoons. And in an infringement claim involving such a graphic work, it must be determined whether an allegedly infringing character captures the "total concept and feel" of the copyrighted character. Judge Newman cautioned that "stirring one's memory of a copyrighted character is not the same as appearing to be substantially similar to that character, and only the latter is infringement."

Judge Newman noted that the "Hero" series did contain several visual effects and lines of dialogue that called Superman to mind, "sometimes by way of brief imitation, sometimes by mention of Superman, or another character from the Superman works, and sometimes by humorous parodying or ironic twisting of well-known Superman phrases." And Hinkley derived his powers from a magical costume consisting of the standard superhero issue leotard and cape (sans boots). But Hinkley exhibited his Superman-like abilities in a most unheroic, awkward and cowering manner. The court concluded that the "total perception of Hinkley was not substantially similar to that of Superman but rather was profoundly different." It was observed that Superman is a brave, fearless hero who performs his superhuman feats "with skill, verve and dash, clearly the master of his own destiny. Hinkley is perplexed by the superhuman powers his costume confers and uses them in a bumbling, comical fashion. In the genre of superheroes, Hinkley follows Superman as in the genre of detectives, Inspector Clouseau follows Sherlock Holmes."

The court did not rely, as ABC had suggested, on the principle that the skills shared by the heroes were ideas, rather than a protected form of expression, for such an analysis might eliminate copyright protection for a character. Although the talents and traits of a character each may be an idea, there is a protected "expressive aspect" in the combination of particular talents and traits. And in this case, the expressive aspect served to distinguish Hinkley as a "noninfringing character who simply has some of the superhuman traits popularized by the Superman character and now widely shared within the superhero genre."

The promos for the "Hero" series also did not present a jury issue as to infringement, ruled the court. The claim that certain scenes in the promos infringed the film Superman was "too extravagant to be maintained," in part because "Superman has no monopoly among fictional heroes on self-propelled flight in outer space."

Furthermore, the use of certain phrases associated with the Superman character did not constitute copyright infringement. The court noted that under the fair use doctrine, a person may use copyrighted words and phrases as commentary or parody. Parody serves to balance "the public interest in the free flow of ideas with the copyright holder's interest in the exclusive use of his/her work." And current mass communication encourages the dissemination of well-known phrases from successful copyrighted works. A copyrighted phrase still may not be applied without authorization to promote the sale of a commercial product. But an original work of parody "stands on a different footing from the products of a discount chain," declared the court. Thus ABC did not infringe Warners' rights by stating that Hinkley may have been unable to leap tall buildings in a single bound, may be slower than a speeding bullet and may be less powerful than a locomotive. And in view of the fact that Hinkley was presented in a program watched by a general audience of evening television viewers and not by children on a sleepy Saturday morning, the possible misperception of Hinkley as a Superman program by some younger viewers was not sufficient to establish infringement.

Warners brought to the court's attention the fact that the company conducted a survey in which one-third of the entire sample said that the "Hero" program reminded them of Superman. But Judge Newman pointed out that the "substantial similarity" that supports an inference of copying sufficient to establish infringement of a copyright is not a concept familiar to the public at large. When, as here, a trial judge has correctly ruled that two works are not substantially similar as a matter of law, that conclusion will stand regardless of the availability of survey evidence indicating that "some people applying some standard of their own were reminded by one work of the other."

Judge Motley's rulings on Warner's unfair competition and trademark dilution claims also were upheld. While the determination of "likelihood of confusion" frequently is a fairly disputed issue of fact, the issue may be resolved by summary judgment in appropriate cases. And in this case, a comparison of the Superman works with the Hero series and promos established as a matter of law a lack of substantial similarity that would create a likelihood of confusion as to source. The court engagingly stated: "We do not doubt there may be some viewers among the television audience who think that the Hero series was produced or authorized by those responsible for the Superman movies, television series or comics. Some may come to that conclusion with respect to every film or television program portraying a character with superhuman abilities. Perhaps some viewers think that every program with a dramatic courtroom lawyer was made by the producers of the Perry Mason series, or that every show featuring a doctor is a spin-off of the Marcus Welby series. The 'average lay observer' test, however, must be applied by fact-finders within an outer limit of reasonable fact-finding marked by the courts." Thus, the availability of survey evidence indicating that some viewers associated the "Hero" series with Superman did not create a reasonably disputed factual issue on the likelihood of confusion as to source when given the differences in the works at issue. These differences also precluded a jury determination of whether a misrepresentation of common source or sponsorship was conveyed by the "Hero" promos.

Warners also failed to present triable claims under New York's common law tort of unfair competition or under the anti-dilution statute since no reasonable jury could find that the Hero series or promos "blurred or tarnished" the Superman trademarks so as to cause dilution.

The court concluded by affirming Judge Motley's decision not to award fees or costs to the "Herd' parties.

Warner Bros., Inc. v. American Broadcasting Companies, Inc., 720 F.2d 231 (2d Cir. 1983) [ELR 6:3:3]

MCA granted partial summary judgment on "access" issue in copyright infringement action involving film "Animal House," but summary judgment is denied on other legal issues

One of the more provocative litigation topics is the copyright infringement claim based on the unsolicited submission of an idea or treatment for a literary work or dramatic presentation. Director John Badham's initiation into this far from sophomoric industry rite began in 1975 when he received a copy of a screenplay entitled "Frat Rats." At the time, Badham had an office at Universal Studios where he was engaged in post-production work on the film "Bingo Long and the Traveling All Stars." Badham's records indicated that after he read the screenplay, he returned it to the attorney for the author.

However, despite Badham's statement that he did not show the "Frat Rats" script to anyone and that he had no recollection of talking about the script to any executive at Universal, "Frat Rats" author James Hart alleged in his copyright infringement claim against MCA (Universal's parent company) that the creators of the Universal film "Animal House" had obtained access to his script via Badham. Federal District Court Judge Mariana R. Pfaelzer has ruled that the facts relied upon by Hart did not establish Universal's access to "Frat Rats."

Judge Pfaelzer pointed out that usually in an infringement claim, it is not possible to prove copying directly. Thus this element is established circumstantially by demonstrating that the person who composed the allegedly infringing work had access to the copyrighted material and that there is substantial similarity between the two works. Access is proven when a party shows that there has been a "reasonable opportunity" to view his or her work. In Judge Pfaelzer's view, Hart, without a shred of evidence., had constructed a "tortuous chain of hypothetical transmittals" to establish that the writers of the "Animal House" treatment, Chris Miller, Doug Kenney and Harold Ramis, had a reasonable opportunity to view the "Frat Rats" screenplay as a result of the Badham submission. The most significant factor for the court was that no "nexus" existed between Universal and Badham which might have created a reasonable possibility of access. Badham was not an executive responsible for developing Universal films, was not part of the same "work unit" as other Universal employees who were involved with the creators of the film, and had not interest in transmitting information, creative ideas or material to Universal employees or executives regarding films that he was not interested in directing.

The court further found that the receipt of the script by Badham, who was under contract to Universal, did not preclude granting summary judgment to the corporation on the question of access, given the presentation of uncontroverted evidence by Universal negating any transmission of Hart's work. There was no link between Badham and the alleged copiers other than the fact of being under contract to Universal. And one of the "realities" of the film business, noted the court, is that "countless unsolicited scripts are submitted to numbers of individuals on studio lots every day. Under these circumstances, it is clearly unreasonable to attribute the knowledge of any one individual - especially a non-employee - to every other individual just because they occupy offices on the same studio lot."

Badham's contacts with certain Universal executives working on "Animal House" also did not support a finding of access because Badham and the executives with whom he dealt did not make any creative contribution to "Animal House" and because Badham's project did not overlap in subject matter with the "Animal House" project.

While granting Universal's motion for partial summary judgment on the access issue, the court ruled against the company on several other aspects of the case, including Universal's contention that Hart's common law copyright claim was preempted by the Copyright Act of 1976. Universal argued that a cause of action for copyright infringement does not arise until the allegedly infringing work is exhibited to the public. "Animal House" was not released until the summer of 1978. Therefore, stated Universal, the Act, which became effective on January 1, 1978, preempted the common law copyright claim. But Hart had alleged that by the summer of 1977 there was widespread knowledge in the motion picture industry that Universal was producing "Animal House," and that, consequently, potential producers and financiers declined to become involved with "Frat Rats." This contention, if proven, would establish pecuniary damage to Hart prior to the release of "Animal House," stated Judge Pfaelzer; Universal's motion for partial summary judgment on this issue therefore was denied.

The court also allowed Hart to proceed with a pendent claim for unfair competition under California Business and Professions Code section 17203 on the basis of the allegation that Hart and William Kerby, who also worked on the "Frat Rats" script, were not given screen credit for the work allegedly copied in "Animal House." The court relied on the case of Smith v. Montoro (ELR 3:6:1). Judge Pfaelzer noted that although Smith construed section 43(a) of the Lanham Act, the court in that case drew upon the common law of unfair competition. Thus, it was "equally appropriate" to rely, in this unfair competition claim, upon the "persuasive authority" of Smith in concluding that the attempt to misappropriate another's talent and workmanship was not only "unfair" but a "wrongful" business practice under section 17203. Hart's remedy under California law in this case, however, would be limited to injunctive relief barring future acts of unfair competition.

The court did deny Hart's unfair competition claims based on the purported use of the title "Frat Rats" in connection with the television series "Delta House" (which was derived from "Animal House"), and based upon the lost opportunity to produce the film "Frat Rats" with accompanying screen credit for production services on that film. The law of unfair competition "protects an individual against the misappropriation of his efforts, it does not protect him against the nonrealization of his hopes," stated Judge Pfaelzer.

Universal also argued that Hart never assigned his rights in the first two drafts of the "Frat Rats" screenplay to Meta-Film, and that the company had standing to sue only for the material added to the script by Kerby.

Meta-Film's failure to record the assignment from Hart of the rights in the Kerby material prior to commencing litigation did not preclude the court's assertion of jurisdiction over the copyright claim. The recordation of the assignment agreements with the Copyright Office on December 22, 1983 was held to relate back to the filing of the action.

Meta-Film Associates, Inc., v. MCA, Inc., Case No. CV 79-l272 (C.D.Ca., May 9, 1984) [ELR 6:3:5]

Stray Cats' version of song "Jeannie, Jeannie, Jeannie" infringed writer's copyright despite compulsory license, because altered lyrics distorted original song, rules Federal District Court

The Stray Cats may be singing a different song since a Federal District Court has ruled that the changed and vulgarized lyrics in the group's rendition of "Jeannie, Jeannie, Jeannie" infringed co-writer George Motola's copyright.

"Jeannie, Jeannie, Jeannie" first was recorded and popularized in the early 1960s by Eddie Cochran. While the musical arrangement of the Stray Cats' recording remained similar to Cochran's version, their lyrics told another tale. In the Stray Cats recording, 85 of 191 words were changed, and the subject matter of the song shifted from dancing to "booze" and sex.

Motola argued that the changed lyrics were not authorized by the license entered into between EMI America Records and the Harry Fox Agency by which the Stray Cats were granted permission to distribute their record of the song in exchange for the payment of royalties to the copyright holder. It was pointed out that this license incorporated the terms and provisions of section 115 of the Copyright Act, which governs the rights of parties obtaining "compulsory licenses." Under a compulsory license, one secures, in addition to recording and distribution rights, a limited right to arrange or adapt a song to suit a particular performer's style or interpretation. But the adaptation cannot be so extensive as to allow the song to be "perverted, distorted or travestied." The Copyright Act also prohibits a compulsory license holder from changing the "basic melody" of the song or altering its "fundamental character." The consensual license to the Stray Cats did not alter these statutory limitations on the adaptation privilege.

Federal District Court Judge Pamela Ann Rymer, in reviewing relevant case law, referred to Stratchborneo v. Arc Music Corp., 357 F.Supp. 139 (S.D.N.Y. 1973), in which, despite lyrical and musical changes in the song "Mojo Workout" including a "more apparent lewd meaning" in the allegedly infringing version, it was found that the new version did not exceed the adaptation privilege. But in Stratchborneo, there were several conflicting claims to the authorship of a song whose lyrics "appeared to change nearly every time the song was performed." And the seven different versions of the song quoted in the opinion "were not nearly as divergent in language and tone as the two versions of the song involved in this case," stated Judge Rymer.

The Stray Cats' references to "wild parties" and "free booze" and the insertion of obscenities into the lyric had the effect of "perverting, distorting and travestying" Motola's composition; the consent of the copyright owner must be obtained before these kinds of changes are made in a protected work. Judge Rymer therefore granted Motola's request for partial summary judgment as to his cause of action for copyright infringement.

Motola v. EMI America Records, Case No. 82-6308-PAR (C.D.Ca., April 17, 1984) [ELR 6:3:6]

Video showcase publicly performed movies for profit in violation of exclusive rights of copyright owners, rules Federal District Court, even though each showcase viewing room seated no more than four customers at a time

A decision in which seven motion picture producers and distributors were awarded $44,000 damages for copyright infringement by a Federal District Court in Pennsylvania (ELR 5.7:11) has been published.

The opinion describes in detail the video showcase activities of two Erie, Pennsylvania businesses known as Maxwell's Video Showcase and Maxwell's Video Showcase East. The Maxwells have a front showroom area for the sale and rental of home video equipment and prerecorded video cassettes and the sale of blank video cassettes. They also contained viewing rooms which were private booths with space for seating either two, three or four viewers. One Maxwells facility initially contained 21 such rooms and was later expanded to contain 44 viewing rooms; the other Maxwells contained 41 rooms for "in-store rental." A viewer would select, from Maxwell's catalogue, the film to be viewed and then proceed to a room where the film would be shown, for the members of the renting party only, on a 19-inch color television set. Maxwell's employees operated the video cassette machines from a central area behind the counter in the front showroom. A fee was charged for the use of the room and for the rental of the video cassette copy of the film; popcorn and cold drinks also were available for viewers.

The motion picture producers and distributors alleged that Maxwell's showcase operation was a public perfor-niance for profit in violation of the copyright owners' exclusive right, under section 106 of the Copyright Act, to perform a work publicly despite having sold a particular copy of the work. The court stated that "The proposition that a copyright owner may dispose of a copy of his work and at the same time retain all underlying copyrights which are not expressly or impliedly disposed of with that copy is beyond contention." The copyright owners' sale of video cassette copies of their films which constituted a waiver of their exclusive right under section 109(a) to distribute those copies sold did not result in a waiver of any of the other exclusive rights set forth in section 106.

The court found that the type of video cassette showcasing engaged in by the Maxwells was a performance, was indeed public, and therefore infringed the rights of the copyright owners. Maxwells did not limit the use of its viewing rooms except to require that all viewers be either relatives or "close social acquaintances." This did not alter the public nature of the audiences at Maxwells, concluded the court, since the viewing rooms resembled "mini movie theaters." The showcasing operation was "not distinguishable in any significant manner from the exhibition of films at a conventional movie theater." The fact that each performance at Maxwells was limited to a maximum of four viewers did not render the performance any less public because "the potential exists for a substantial portion of the public to attend such performances over a period of time."

The court, in addition to granting summary judgment to the copyright owners, dismissed Maxwell's counterclaim alleging violations of the federal antitrust laws. A good faith effort to enforce one's copyright is not conduct which violates the antitrust laws, stated the court. Also dismissed were claims alleging malicious interference with the business relationships of the Maxwells and breach of an implied contract of good faith and fair dealing.

Columbia Pictures Industries, Inc. v. Redd Home Inc., 568 F.Supp. 494 (W.D.Pa. 1983) [ELR 6:3:6]

Right of publicity is not descendible in Ohio, rules Federal District Court in decision dismissing claim against creators of film "Raging Bull"

A Federal District Court in Ohio has dismissed an action brought by Louise Reeves alleging the violation of boxer Jimmy Reeves' right of publicity. Reeves' widow claimed that the United Artists' film "Raging Bull" dramatized without authorization, a fight that took place on September 24, 1941 between Reeves and Jake LaMotta. Louise Reeves claimed that United Artists and other parties associated with the film misappropriated the name, identity, character, ability and performance of Jimmy Reeves, thereby depriving Reeves' estate of a property right.

After reviewing the status of case law in this rapidly developing area, the court followed the Ohio Supreme Court's position on the right of publicity as set forth in Zacchini v. Scripps-Howard Broadcasting Co., 351 N.E.2d 454 (1976), rev'd on other grounds, 433 U.S. 562 (1977). In Zacchini, the court rejected the view that the right of publicity was a property right and declared that the right was more closely aligned with the right of privacy. Thus, under Ohio law, the right of publicity, like the right of privacy, is not descendible, and Jimmy Reeves' right of publicity, terminated at his death.

Reeves v. United Artists, 572 F.Supp. 1231 (N.D.Ohio 1983) [ELR 6:3:7]

Dismissal of defamation action against ABC is upheld; news report on investigation into "Charlie's Angels" production financing was privileged under California law, rules Federal Court of Appeals

In 1979, Jennifer Martin, an attorney for American Broadcasting Companies, Inc., charged that top network executives had colluded with producers Aaron Spelling and Leonard Goldberg to defraud actor Robert Wagner and his wife, the late Natalie Wood, of their 46% profit participation in the television show "Charlie's Angels" Martin claimed that the producers had inflated expenses and were permitted to do so by certain ABC officials. Ron Sunderland, an ABC Vice President, purportedly "bluntly" told Martin that Spelling and Goldberg were "blanking the Wagners out of their money."

The media shower of attention brought on by Martin's charges rained on many individuals, including George Reeves who, at the time was Senior Vice President for Theatrical Motion Pictures and Television Affairs for ABC and, as such, was Sunderland's superior. Reeves was interviewed on ABC's "World News Tonight" program on August 25, 1980 during a segment concerning Martin's accusations. The story mentioned the ongoing grand jury and SEC investigations into the allegations and noted that no indictments or charges had been filed. The broadcast contained Spelling's denial of the accusation and a brief excerpt from an interview with Reeves during which the ABC reporter first repeated Sunderland's purported statement to Martin. Reeves then responded as follows: "Now I said to Ron, I said, 'Ron, did you say that? That's crazy man. How the hell do you know something like that?' He said, 'Well, I ...I was just ...I blew my top.'I said ...he said, 'I don't even remember if I said that, George!'"

Reeves sued ABC for defamation, claiming that the excerpt used in the report did not reflect his denial of Martin's charges but rather indicated that he did not refute the charges and merely expressed shock that they were being revealed.

A Federal District Court granted summary judgment in favor of ABC on the defamation count of Reeves' complaint and this ruling has been upheld by a Federal Court Of Appeals. The court first agreed with the District Court that California law applied to the action since California was the domicile and principle place of business of Reeves. California Civil code section 47(4) grants an absolute privilege for a "fair and true report ... of judicial ... or other public official proceeding(s) ... or anything said in the course thereof." California courts never have ruled on the question whether the section 47 privilege applies to a news story regarding charges made in a secret grand jury proceeding. But according to the Court of Appeals' view of the relevant authorities, California case law has expressed a concern for protecting fair and true media reports, and this concern would extend even to reports of grand jury proceedings.

The court concluded that the "World News Tonight" story was both fair and true. Reeves urged that the question of whether the account was fair and true was a jury question. But the court stated that since the facts in the case were undisputed, the court could resolve the question as a matter of law. and the average viewer hearing Reeves' statement in the context of the broadcast, following Spelling's denial of Martin's charges, would conclude that Reeves also refuted the charges, stated the court. Thus, ABC's report was entitled to California's statutory privilege and summary judgment was properly granted.

Reeves v. American Broadcasting Companies, Inc., 719 F.2d 602 (2d Cir. 1983) [ELR 6:3:7]

"Polish jokes" in Paramount film "Flashdance" did not give rise to a cause of action, rules Federal District Court in decision dismissing case

A Federal District Court in Illinois has dismissed Anne Pawelek's complaint against Paramount Studios in which Pawelek questioned the propriety of the inclusion of "Polish jokes" in the motion picture "Flashdance." The court assumed the task of identifying the basis of Pawelek's cause of action (she represented herself) and suggested the possibility of a claim under various federal civic rights statutes or a claim under state law for defamation and intentional infliction of emotional distress. But the court stated that it had found no authority for the proposition that group defamation by a private party infringes any constitutional or statutory rights. And a potential defamation claim was defeated by Pawelek's failure to plead special damages. Illinois law requires proof of special damages unless the defamatory statement falls within one of the four per se defamatory categories. The jokes in "Flashdance" did not qualify, since they did not directly impair the ability of members of the Polish-American community to obtain employment or to conduct business.

Pawelek's complaint also could not be sustained as an action for intentional infliction of emotional distress, because there was no allegation that Paramount had engaged in extreme or outrageous conduct or that the class purportedly represented by Pawelek suffered emotional distress as a result of the complained-of conduct. The jokes included in "Flashdance," "however objectionable," did not go beyond all possible bounds of decency, stated the court. Having failed to detect a cognizable legal theory in Pawelek's pleadings, the court granted Paramount's motion to dismiss the action.

Pawelek v. Paramount Studios Corporation, 571 F.Supp. 1082 (N.D. Ill. 1983) [ELR 6:3:8]

Federal Court of Appeals denies injunctive relief to owners of "Grand Ole Opry" trademark in infringement action against operator of Country Shindig Opry

Grand Ole Opry aficionados are every bit as discerning as the claques at La Scala, according to a Federal Court of Appeals, which consequently denied a motion by WSM, Inc., the owner of the "Grand Ole Opry" trademark, for a preliminary injunction barring Dennis Hilton from using the name "Country Shindig Opry."

WSM of Tennessee first made commercial use of the world "opry" in 1927 when the WSM Barn Dance radio program, which immediately followed a program of classical music, was referred to as the "Grand Ole Opry." WSM registered the name "Grand Ole Opry" as a trademark in 1950 and also has registered the terms "Opryland USA," "Opryland Hotel" and "Opryland Talent Agency." The word "opry" itself was registered in January 1982.

Dennis Hilton began operating the Country Shindig in Osage Beach, Missouri in May 1970; in 1973, Hilton changed the name of his enterprise to "Denny Hilton's Country Shindig Opry Show."

WSM sued Hilton in 1982 alleging the infringement of the company's registered trademark, unfair competition and trademark dilution in violation of Missouri law.

A Federal District Court, after conducting an extensive review of the derivation of the word "opry" found that the term was generic and that there was no consumer confusion between the Country Shindig Opry and WSM's marks. The court therefore refused to issue the requested permanent injunction.

Federal Court of Appeals Judge John R. Gibson, in upholding the District Court's decision, first noted that the court's analysis of the word "opry" revealed that it was a "dialectical variation of opera, which has been in common use from the eighteenth century to the present, and that "`opry' has been and is now used to describe a show consisting of country music, dancing and comedy routines." The District Court also had found that the public was aware of the different ownership of the Grand Ole

Opry and Dennis Hilton's show and exhibited no confusion in distinguishing the two enterprises.

Judge Gibson then pointed out that while WSM's registration of "opry" was prima facie evidence of the validity of the registration, Hilton had presented sufficient evidence to rebut this presumption and to support the finding that "opry" is a generic term. It was testified that "opry" was in common use, generally as a satirical reference to classical grand opera, before WSM began using the term in 1927. Furthermore, relevant evidence showed that the current use of the word by the consuming public is of a generic nature. The fact that certain less than comprehensive dictionaries do not include the word "opry" did not, as WSM argued, negate the finding that the word is generic. Therefore, the cancellation of the "opry" registration was affirmed.

In turning to the issue of likelihood of confusion, Judge Gibson observed that the District Court had compared the advertising design of all of WSM's marks with Hilton's business title in finding no likelihood of confusion. The court further found that Hilton did not add the word "opry" to the name of his show in order to deceive the public into believing that the show was affiliated with the Grand Ole Opry or that Grand Ole Opry stars would be performing.

WSM's claim under section 43(a) of the Lanham Act that Hilton's use of the word "opry" constituted a false designation of origin or false representation also was rejected.

And the dilution claim was unsuccessful since such claims usually only apply if a mark is "arbitrary, coined, fanciful or has become distinctive by acquiring a secondary meaning." Opry did not have a distinctive quality apart from its generic nature, found the District Court. Therefore WSM did not have a valid claim under Missouri law. WSM argued that the term "Grand Ole Opry," when considered as a whole, is a distinctive mark. But the court stated that even if it accepted this argument, Hilton's use of "opry," always in connection with his business title, still was not likely to dilute any distinctive quality of WSM's mark.

WSM, Incorporated v. Hilton, 724 F.2d 1320 (8th Cir. 1984) [ELR 6:3:8]

Twentieth Century-Fox and General Cinema granted summary judgment in exhibitor's action under New Jersey Antitrust Act

Twentieth Century-Fox and theater owner General Cinema Corporation have prevailed in an action brought against them by Wood Plaza Theatre Corp., a New Jersey film exhibitor, alleging the violation of the state's

Antitrust Act. In affirming a trial court ruling dismissing Wood Plaza's action, a New Jersey appellate court found that Fox's arrangement with General Cinema for the exclusive exhibition of the company's films was not a per se violation of the Act.

Wood Plaza had contended that it was unlawfully denied an equal opportunity to exhibit certain Fox films pursuant to an alleged conspiracy between Fox and General Cinema to control the exhibition of the films, because Fox allegedly refused to license to Wood Plaza theaters in Union County, New Jersey, certain "predetermined" films, particularly "blockbusters" such as "The Empire Strikes Back." Wood Plaza claimed that Fox, by giving exclusive exhibition rights to General Cinema in an area which included Union County, or by controlling the bidding procedure for the predetermined films to enable General Cinema to outbid Wood Plaza, effectively excluded Wood Plaza from exhibiting such films.

The court noted that since there was no claim of price fixing or resale price maintenance, the rule of reason would be applied to determine the lawulness of the Fox-General Cinema activities. In all, the complained-of acts were found to be "perfectly proper vertical arrangements limited to Fox films." Summary judgment was granted accordingly to Fox and General Cinema.

Wood Plaza Theatre Corp. v. Twentieth Century-Fox Entertainment, Inc., Case No. A-1592-82T3 (N.J.App., May 16, 1984) [ELR 6:3:9]

Federal Court of Appeals affirms lower court decision not to order Olympic officials to schedule 5K and 10K races for women as part of L.A. Summer Games

While women made significant gains in the 1984 Olympic track and field program, runners from around the world were still disappointed that their recent lawsuit against the Olympic committees failed to force the inclusion of two more track races which have been in the men's program since 1912. Instead, a Federal Court of Appeals in California affirmed a District Court ruling which held that the women runners had not established the bias necessary for the granting of a preliminary mandatory injunction which would have ordered the inclusion of a 5,000 and a 10,000 meter race for women in the Summer Games. (ELR 6:1:8)

In August 1983, 82 female runners from 27 countries who compete in 5,000 and 10,000 meter track races and two runners' organizations filed an action against the International Olympic Committee, the International Amateur Athletic Federation, The Athletic Congress of the U.S., the Los Angeles Olympic Organizing Committee and the Los Angeles Coliseum Commission. The runners asserted that the failure to include these two events constituted genderbased discrimination in violation of equal protection rights under the 5th and 14th Amendments and the Unruh Civil Rights Act. The District Court decided that the irreparable harm the women runners would suffer if not allowed to compete outweighed the incremental administrative burden that the Olympics organizations would have to bear to accommodate the additional events. But the court nonetheless denied the requested injunction on the basis that the women had failed to demonstrate a fair chance of success on the merits of their gender discrimination claims.

The Court of Appeals analyzed the lower court decision first on statutory grounds. According to the Unruh Act, all people are entitled to the "full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind...." The District Court had reasoned that "the Olympic rules for including events are rationally related to the orderly administration of the Games." The runners argued that the proper standard should have been whether the Olympic rules were justified by a compelling societal interest.

Admitting that the lower court's "rationally related" statement was ambiguous and a result of difficult California case law, the Court of Appeals found it unnecessary to remand because the lower court decision was correct even though it relied on a wrong ground or gave a wrong reason.

The Court of Appeals gave two reasons for affirming on statutory grounds. First, the Unruh Act does not compel the creation of separate but equal events for women. The runners were not seeking to compete against men in their existing 5,000 and 10,000 meter races. Rather they argued that new competitive opportunities should be created for them. The decisional law interpreting the Act, stated the Court, does not provide support for the remedy they sought. Second, based on the California Supreme Court's interpretation of the Unruh Act, which is that the Act is intended to forbid arbitrary discrimination against any class of persons, the Court of Appeals found that the Olympic rule - Rule 32 - governing the process of inclusion of events in the Games, did not operate as a blanket exclusion of any class of persons and consequently was not arbitrary discrimination.

From the constitutional perspective, the Court of Appeals found that the rule is facially gender-neutral, simply describing the procedures without referring to the competitor's sex. The disproportionate impact of the rule alone does not violate the equal protection clause. To assess equal protection challenges such as this one which is gender neutral, courts must examine whether the regulation is indeed neutral and whether its adverse effects reflect invidious gender-based discrimination. The District Court concluded that the runners had failed to make the requisite showing and, after a thorough review of the record, the Court of Appeals determined that it could not overrule the lower court decision and reverse.

Judge Harry Pregerson wrote a dissent, claiming that the District Court had failed to correctly interpret the Unruh Act, and if it had, the runners would have shown a likelihood of success on the merits. Judge Pregerson agreed with the plaintiffs that a "compelling societal justification for the exclusion" was the proper legal standard to apply in this case, and that because the defendants did not show a compelling reason for the exclusion of the women from competing in these two races, the injunction should have issued. The Judge lamented the fact that the Olympic flame "will bum less brightly over the Los Angeles Olympic Games" because of the IOC's refusal to grant women athletes equal status by including all events in which women compete internationally.

Martin v. International Olympic Committee, No. 84-5859 (9th Cir., June 21, 1984) [ELR 6:3:9]

Injunction barring unauthorized commercial use of Olympic five-ring symbol is affirmed by Federal Court of Appeals

The United States Olympic Committee has obtained a permanent injunction against the unauthorized commercial use within the United States of the five-ring Olympic symbol by Intelicense Corporation and its sublicensee, International Sports Marketing.

In 1979, Intelicense entered into two agreements with the International Olympic Committee whereby Intelicense was granted the exclusive worldwide rights to be the marketing agent for the official pictograms of the International committee. The pictograms are graphic designs of athletes participating in various summer and winter Olympic sports shown against a background that incorporates the Olympic five-ring symbol. As a prerequisite to marketing the pictograms in the territory of each National Olympic Committee, the agreements provided that Intelicense had to secure the approval of each such national committee.

Intelicense attempted to obtain the approval of the United States Olympic Committee for its marketing plans, but was unsuccessful. However, the company proceeded to license the use of the pictograms on products marketed within the United States anyway. The USOC sued Intelicense, alleging the violation of section 380 of the Amateur Sports Act of 1978 and of the 1978 version of the International Olympic Committee charter. A Federal District Court issued a permanent injunction against Intelicense's unconsented-to marketing activities, and the injunction has been affirmed by a Federal Court of Appeals.

The appellate court noted that the Amateur Sports Act charges the United States Olympic Committee with the responsibility for financing the participation of the

United States in the Olympic movement. Section 380 states, in part: (a) Without the consent of the (USOC), any person who uses for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition - (1) the symbol of the IOC, consisting of five interlocking rings; or ... (3) any trademark, trade name, sign, symbol, or insignia falsely representing association with or authorization by, the IOC or the (USOC) ... shall be subject to suit in a civil action by the (USOC) for the remedies provided in the ... Trademark Act."

The United States Olympic Committee is the only national committee that does not receive formal governmental financial assistance. Section 380 enables the USOC to control the commercial use of Olympic-related designations and thus to raise funds from private sponsors. The executive officer of the USOC testified that Intelicense's activities would "dilute the market" in terms of obtaining corporate sponsors. During 1980-1982, noted the court, the United States Olympic Committee received 45% of its income from 44 corporate sponsors. If the USOC could not guarantee the exclusive right to market the Olympic symbol in exchange for corporate contributions, the number of sponsors might be greatly reduced, in the Committee's view.

Intelicense argued that because it was not falsely associated with the International Olympic Committee, its conduct fell outside the statutory proscription. However, Federal Court of Appeals Judge Irving R. Kaufman stated that, given the facts of the case, Congress's intent in enacting section 380, and the plain statutory language of subsection (a)(1), the court could not imagine "a more blatant violation of the Act."

Intelicense also argued that subsection (a)(1) did not apply to its conduct since the pictograms displayed the Olympic rings m conjunction with another design. But the statute forbids any commercial use without the consent of the USOC. And, stated the court, section 380 did not incorporate the Trademark Act's standards for infringement, i.e., requiring a showing that a trademark was used in a manner that was likely to cause confusion. The court agreed with an analysis of the section which concluded that Congress must have meant to place less of a burden on a complaining party with a section 380 claim than that placed on a party bringing an action under the Trademark Act.

Section 380 was not an unconstitutional taking of property, because Intelicense had no interest in the pictograms of the Olympic symbol at the time the Amateur Sports Act was enacted in 1978. And the company was not entitled to assert, as an authorized agent, a taking claim on behalf of the International Olympic Committee, because the International Committee had accepted the authority of the United States committee to control the marketing of the Olympic symbol in the United States.

United States Olympic Committee v. Intelicense Corporation, S.A., Docket Nos. 83-9025, 83-9063 (2d Cir., June 18, 1984) [ELR 6:3:10]

Arbitrator awards $7.3 million to domestic insurance companies in dispute arising from insurance coverage for NBCs right to telecast 1980 Summer Olympics

The Olympic insurance competition began in 1977 when the National Broadcasting Company acquired from the USSR the exclusive right to televise the 1980 Summer Olympic games in the United States in return for a fee of $85 million. Even before proceeding to the starting line, NBC obtained insurance with respect to the following contingencies: the failure of the United States to be represented by a team at the 1980 Olympics; the possible cancellation of the summer Olympics; or the repudiation of the NBC agreement by the Soviet Union. NBC obtained about $76 million of insurance from various insurers in London, including Underwriters Lloyds. This was supplemented by about $8 million of insurance from eight domestic insurance companies. The policies each excluded, among other things, any loss "Directly or indirectly occasioned by, happening through or in consequence of war, invasion, acts of foreign enemies, hostilities (etc.)...."

In 1979, NBCs insurance broker technically opened the insurance event by approaching the then insurance carriers to propose the deletion of the war-risk exclusion in consideration for the payment of an additional premium. Most of the insurers agreed to this proposal but six of the domestic insurers elected to retain the exclusionary language. NBC then sprinted to Lloyds to procure an additional insurance policy in the amount of the policies held by the six domestic insurers.

The dreaded hurdle did appear in December 1979 in the form of the Soviet Union's invasion of Afghanistan. Soon after, in April 1980, the United States Olympic Conmittee followed the recommendation of then President Carter and resolved not to send a team to the 1980 summer games in Moscow "in light of international events."

In May 1970, NBC presented to its insurers a claim for losses arising from the withdrawal of the American Olympic team, and, with the stamina of a champion, obtained payment from the insurers despite the exclusionary language of their policies. However, the domestic insurers did obtain the right from NBC to proceed against the Lloyds underwriting syndicate, a proceeding in which the contested issue was whether the non-participation of the United States in the summer Olympic games was within the warrisk exclusion.

Arbitrator Nathaniel T. Helman has determined that the Soviet invasion, if not directly related to the United States' withdrawal from the games, certainly was "indirectly" related.

Helman discounted the defending insurers' argument that the non-appearance of the United States was not the necessary result of the Soviet invasion. The "recommendations" of the President, the State Department and administrative officials, it was argued, represented intervening causes between the Soviet invasion and the United States' withdrawal from participation. But the use of the word "indirectly" in the phrase at issue "broadened the relationship between the Afghan invasion, to the ultimate withdrawal of the troops," stated arbitrator Helman. The "so-called 'intervening factors' cannot serve to prevent the claimants from asserting the right to recover under the War Risk clause."

The arbitrator concluded that each of the claimants was entitled to an award against the underwriters for the payments made to NBC, amounting to a total of $7,290,000.

In the Matter of Arbitration Between National Broadcasting Company, Inc. and The Underwriting Members of Lloyd's (April 23, 1984) [ELR 6:3:10]

Admission of children to "R" rated film did not involve tortious conduct by theater owner, rules Philadelphia court

Perhaps misguided by the academic tone of the title of its feature film - "Private Lessons" - a theater owner allowed two children, ages 11 and 8, to view the movie. But "Private Lessons" was advertised to the public as rated "R" by the Motion Picture Association of America. The rating carries a notice stating: "Under 17 requires accompanying parent or adult guardian." An action was filed against the theater owner for the alleged infliction of emotional distress and mental anguish on the minor theatergoers.

A Philadelphia County Court has dismissed the claim. In doing so, the court ruled that the theater owner, by advertising the MPAA's rating, did not assume a duty to enforce the audience guidelines suggested by the rating. The rating system, because of the vagueness of its standards, has not become a legally binding regulatory scheme, noted the court.

Rosen v. Budco, Inc., 10 Phila.Cnty.Rptr. 112 (Phila. Co. 1983) [ELR 6:3:11]

United States Supreme Court upholds reversal of ruling finding Consumer Reports liable for product disparagement; appellate court correctly conducted "de novo" review of "actual malice" determination

The product disparagement action filed by Bose Corporation, a manufacturer of stereo loudspeakers, against Consumers Union reached the United States Supreme Court on a "peculiar wavelength," according to Justice John Paul Stevens. Nevertheless, the court, in a 6-3 decision, resolved the somewhat wandering claims raised in the action by reaffirming the principle of independent appellate review of lower court determinations of "actual malice." In doing so, the Supreme Court stated that the "clearly erroneous" standard of Rule 52(a) of the Federal Rules of Civil Procedure does not prescribe the standard of review to be applied by an appellate court in considering "actual malice" in a case governed by New York Times v. Sullivan, 376 U.S. 254 (1964).

The action arose from the publication in Consumer Reports, in May 1970, of an article evaluating the quality of various brands of loudspeaker systems. In discussing the Bose 901, a somewhat unconventional system, the article stated, in part: "Worse, individual instruments heard through the Bose system seemed to grow to gigantic proportions and tended to wander about the room. For instance, a violin appeared to be 10 feet wide and a piano stretched from wall to wall." The article suggested that a prospective buyer should carefully listen to the system prior to investing in it. Bose requested a retraction of the allegedly inaccurate statements and, upon the magazine's refusal to comply, filed its product disparagement action. A Federal District Court denied Consumer Union's motion for summary judgment. Then after a lengthy trial, the court ruled that Bose was a "public figure" for the purposes of its case, and that the First Amendment therefore precluded recovery unless it was shown by clear and convincing evidence that the magazine had made a false, disparaging statement with actual malice (ELR 3:11:7; 3:24:5). However, the court ruled that the article did contain a false statement of fact concerning the tendency of the instruments to wander, because the sound apparently wandered "along the wall" rather than "about the room." The District Court also found that the statement was disparaging, and that Bose thus had met its burden of proving that Consumers Union had published a false statement of material fact with knowledge that it was false or with reckless disregard of its truth or falsity.

The District Court's decision was reversed on appeal (ELR 4:16:4). The Court of Appeals accepted the finding that the comment about wandering instruments was disparaging and assumed, without deciding, that the statement was one of fact, rather than opinion and that it was false. But the appeals court, after performing a de novo review of the record, found no clear and convincing evidence that Consumers Union published the "wandering about the room" statement with knowledge that it was false or with reckless disregard of whether it was false or not.

Justice Stevens began the Supreme Court's review of the case by setting forth in detail the evidence on the actual malice issue, focusing on the testimony of Arnold Seligson, the engineer who supervised the test of the Bose system and prepared the report upon which the published article was based. Justice Stevens then considered the basis for the District Court's determination that "no reasonable reader" would understand the words "wandering about the room" as describing the lateral movement of sound along a wall which is an effect an average listener might expect to encounter. The District Court had discounted the credibility of Seligson's testimony that his statement was intended to mean "along the wall." But Justice Stevens observed that the District Court did not identify any independent evidence that Seligson realized the inaccuracy of the statement, or entertained serious doubts about its truthfulness, at the time of publication.

Justice Stevens invoked the obligation of appellate courts in cases raising First Amendment issues to make an independent examination of the whole record. Rule 52(a) does not forbid such an examination. While the rule requires that "due regard" be given to a trial judge's determination of credibility, the rule does not inhibit an appellate court's power to correct errors of law, including those that involve a mixed finding of law and fact. In all, Justice Stevens ringingly declared "the requirement of independent appellate review reiterated in New York

Times v. Sullivan is a rule of federal constitutional law. It emerged from the exigency of deciding concrete cases; it is law in its purest form under our common law heritage. It reflects a deeply held conviction that judges - and particularly members of this Court - must exercise such review in order to preserve the precious liberties established and ordained by the Constitution. . . . Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of actual malice." Seligson's discredited and perhaps inaccurate testimony in this case was not a sufficient basis to establish clear and convincing evidence of actual malice so as to place his statement beyond the limits of the First Amendment's "broad protective umbrella."

In dissent, Justice Rehnquist stated the view that the constitutional requirement of actual malice does not invoke any standard of review other than the "clearly erroneous" standard. The Court of Appeals, stated Justice Rehnquist, never did rebut the District Court's conclusion that Seligson had actual knowledge that what he printed was false, but rather, after its de novo review concluded that the engineer's language was merely "imprecise." This was a conclusion reached by the appellate court, according to Justice Rehnquist, after an evaluation of the credibility of Seligson's testimony, not on the basis of an "objective review of the facts in the record," and as such was a conclusion that was inappropriate for the appellate court as "factual second guessing."

Bose Corporation v. Consumers Union of United States, Inc., Case No. 82-1246 (U.S.Sup.Ct., April 30, 1984) [ELR 6:3:12]

Ban on editorials by noncommercial broadcasters violates First Amendment, United States Supreme Court rules

Where is Emily Litella when we need her? (Litella will be remembered as the somewhat befuddled and charming character created by Gilda Radner on "Saturday Night Live" who often replied to SNL "editorials." Her irate views on "Soviet jewelry" and "violins in the streets" are fondly remembered by her many fans.) Public broadcasting stations may well wonder where Litella is now that the United States Supreme Court has ruled, in a 5-4 decision, that the Public Broadcasting Act's ban on editorializing by noncommercial television and radio stations violates the First Amendment.

The Public Broadcasting Act of 1967 established the Corporation for Public Broadcasting, a nonprofit corporation authorized to distribute federal funds to noncommercial television and radio stations in support of station operations and educational programming. Section 399 of the Act was amended in 1981 to read: "No noncommercial educational broadcasting station which receives a grant from the Corporation for Public Broadcasting ... may engage in editorializing. No noncommercial educational broadcasting station may support or oppose any candidate for public office."

Pacifica Foundation, a nonprofit corporation that owns and operates several noncommercial educational broadcasting stations and whose licensees have received grants from the Corporation, brought an action in 1979 challenging the constitutionality of the first sentence of section 399. A Federal District Court granted summary judgment in favor of Pacifica, the League of Women

Voters and Congressman Henry Waxman, a member of Pacifica's listening audience, on the ground that the ban violated the First Amendment. The court concluded that the govenment's asserted fear that funded noncommercial broadcasters would become "propaganda organs for the government" was not sufficiently compelling to warrant the statutory restriction on speech. The government appealed directly from the District Court judgment to the United States Supreme Court, and in a long opinion, Justice Brennan affirmed the District Court judgment.

Justice Brennan pointed out that section 399 operates to restrict the expression of editorial opinion on matters of public importance - communications which are entitled to "the most exacting degree of First Amendment protection" - and he observed that "Were a similar ban on editorializing applied to newspapers and magazines, we would not hesitate to strike it down as violative of the First Amendment." But broadcasting is distinguished by the fact of spectrum scarcity. As a result, licensees have incurred an obligation to provide the public with a balanced presentation of views on diverse matters of public concern. Any restrictions on this obligation have been upheld only when narrowly designed to further a substantial governmental interest. Justice Brennan found that the restraint imposed by section 399 did not satisfy the requirements for permissible broadcast regulation.

First, Justice Brennan stated, the section 399 ban was directed specifically at a form of speech that "lies at the heart of First Amendment protection," namely, the expression of editorial opinion on controversial issues of public importance. Second, the ban was based solely on the content of the suppressed speech.

The government argued that the ban was necessary to protect noncommercial stations from being coerced, as a result of federal financing, into being "vehicles" for government propagandizing or the objects of governmental influence; and to keep the stations from becoming outlets for private interest groups wishing to express some partisan viewpoint. But the court noted that the interests asserted by the government would not be substantially advanced by section 399. The Public Broadcasting Act is set up to insulate local stations from government interference: the Corporation for Public Broadcasting has a private bipartisan structure with significant limitations on its powers; the Corporation is forbidden to own or operate any television or radio station; public broadcasting receives long-term rather than yearly appropriations; and grants are obtained pursuant to objective criteria. Furthermore, the editorial "voice" of the hundreds of public radio and television stations in the United States is likely to reflect the varied local communities in which the stations operate. Thus, the risk that forceful editorializing by the management of certain stations on particular issues might spark Congressional resentment and jeopardize all of public broadcasting was not "sufficiently pressing" to warrant section 399's ban, stated the Court.

The Court adverted to the government's concern that audiences might perceive a public broadcaster's editorial to be the official view of the government. Congress could alleviate this concem by requiring a disclaimer stating that the editorial represented the views of the station's management and not those of the government.

Section 399 also would not serve the government's asserted interest in preventing noncommercial stations from becoming a "privileged" outlet for the political opinions of station owners and managers; these opinions could be forwarded in any event by such means as management's power to control program selection, interview guests and the presentation of news reports. Again, other less intrusive means, such as the fairness doctrine, are available to prevent public broadcasting stations from becoming forums for the one-sided presentation of narrow partisan positions.

In all, Justice Brennan stated, section 399 "impermissibly sweeps within its prohibition a wide range of speech by wholly private stations on topics that do not take a directly partisan stand or that have nothing whatever to do with federal, state or local government.... Moreover, the public's 'paramount right' to be fully and broadly informed on matters of public importance... is not well served by the restriction, for its effect is plainly to diminish rather than augment 'the volume and quality of coverage' of controversial issues."

A government argument (not presented in the District Court) justifying section 399 on the basis of Congress' spending power also was rejected by the court.

In dissent, Justice Rehnquist, joined by Chief Justice Burger and Justice White, stated the view that the First Amendment does not prevent Congress from conditioning the receipt of public funds by noncommercial educational broadcasters on an agreement to refrain from editorializing. The condition imposed had a rational relationship to Congress' purpose in providing a subsidy, and was not aimed primarily at the suppression of "dangerous" ideas. According to Justice Rehnquist, Congress had determined that taxpayers would prefer not to see the management of local educational stations promulgate "its own private views on the air at taxpayer expense." Congress has not prevented noncommercial stations from airing programs and documentaries dealing with controversial subjects, so long as management itself does not expressly endorse a particular viewpoint. And station management may communicate its own views on those subjects through any medium other than subsidized public broadcasting.

In joining Justice Rehnquist's opinion, Justice White stated the belief that the editorializing and candidate endorsement proscriptions of section 399 must "stand or fall together" and also that Congress may condition the use of government funds on noncommercial stations agreeing to abstain from political endorsements.

Justice Stevens, in dissent, stated the position that the interest in maintaining government neutrality in the "free market of ideas" would outweigh the impact on expression resulting from section 399. Justice Stevens noted that the statute did not exclude Pacifica from the "marketplace for ideas"; did not curtail the expression of opinion by individual commentators on Pacifica stations; and that the statutory restriction is completely neutral in its application, because it prohibits all editorials without any distinction as to the subject matter or point of view expressed. And, noted Justice Stevens, there is more than a theoretical possibility that future grantees might be influenced by the "ever present tie of the political purse string, even if those strings are never actually pulled." Justice Stevens concluded by stating that there was no sensible basis for considering section 399 a restriction on the expression of a station's viewpoint and that the government did have an overriding interest in "forestalling the creation of propaganda organs for the government."

Federal Communications Commission v. League of Women Voters of California, Case No. 82-912 (U.S.Sup.Ct., July 2, 1984) [ELR 6:3:13]

United States Supreme Court rules that Oklahoma ban on alcoholic beverage advertising carried by state's cable television systems is pre-empted by federal law

The United States Supreme Court has ruled that the application of Oklahoma's ban on alcoholic beverage advertising to out-of-state signals carried by cable television operators is pre-empted by federal law.

While it is lawful to sell and consume alcoholic beverages in Oklahoma as the wind comes sweeping down the plain, the advertising of such beverages has been prohibited by the state constitution. Television stations in the state were not permitted to broadcast alcoholic beverage commercials as part of their locally produced programming; and stations also were required to block out all such advertising carried on national network programming. However, the state Attorney General had ruled that the ban did not apply to advertisements appearing in newspapers, magazines and other publications printed outside Oklahoma, even though sold and distributed in the state. A similar nonrestrictive policy was applied to cable television operators, who were permitted to re-transmit out-of-state signals containing alcoholic beverage commercials to their subscribers. In March 1980, however, the Oklahoma Attorney General declared that the retransmission of such advertisements would be considered a violation of the advertising ban. Richard A. Crisp, the director of the Oklahoma Alcoholic Beverage Control Board, warned the cable operators that criminal prosecution would result from the continued carriage of the now-proscribed out-of-state advertisements.

The operators of several cable television systems challenged the new policy and a Federal District Court in Oklahoma entered a permanent injunction against the enforcement of the advertising ban, holding that the ban was an unconstitutional restriction on cable operators' right to engage in protected commercial speech. A Federal Court of Appeals reversed the District Court ruling and held that although the commercials at issue were protected by the First Amendment, Oklahoma's ban was a valid restriction on commercial speech. (ELR 5:18:16)

In delivering the unanimous decision of the United States Supreme Court, Justice Brennan first adverted to the Court of Appeals' failure to discuss the question of whether the application of Oklahoma law to the cable operators was preempted by federal regulation. This is-

Solicitor General on behalf of the Federal Communications Commission. Further, the parties had been directed by the court to brief and argue the apparent conflict between Oklahoma and federal law, and the District Court had made findings on the relevant factual questions. Consequently, Justice Brennan proceeded to consider, and base the Supreme Court's opinion on, the conflict between the advertising ban and federal law rather than upon First Amendment grounds.

The Federal Communications Commission, pursuant to its authority under the Communications Act has "unambiguously" expressed its intent to pre-empt any state or local regulation of the signals carried by cable television operators. State and local authorities have been given responsibility for granting franchises to cable operators and for overseeing such "local incidents of cable operations as delineating franchise areas, regulating the construction of cable franchises, and maintaining rights of may." The Commission retained exclusive jurisdiction over all "operational" aspects of cable communications, including signal carriage. The Court noted that "to the extent it has been invoked to control the distant broadcast and nonbroadcast signals imported by cable operators, the Oklahoma advertising ban plainly reaches beyond the regulatory authority reserved to local authorities by the Commission's rules, and trespassed into the exclusive domain of the FCC."

Justice Brennan then reviewed the three principal conflicts between the Oklahoma statute and specific federal regulations. The FCCs "must-carry" rules require certain cable television operators to transmit broadcast signals located within a 35-mile zone of the operator. In some cases, this required Oklahoma cable operators to carry signals from Missouri and Kansas. Such signals must be carried in full, including any alcoholic beverage commercials. Furthermore, FCC regulations permit cable operators to import out-of-state television broadcast signals and retransmit those signals to their subscribers. Again, many of these distant broadcast signals contain commercials that are lawful under federal law and in the states where the programming originated. Under the Oklahoma advertising ban, cable operators were required to either delete the alcoholic beverage commercials or face criminal prosecution. The cable operators also carry non-broadcast cable services such as pay cable, and the Commission has determined that state regulation of these services is precluded by federal law. If the Oklahoma ban were enforced, the public might be deprived of the wide variety of programming options that cable systems provide, a variety which the FCC consistently has encouraged as in the public interest.

Justice Brennan then cited, in support of the Court's ruling, Congress' approach to cable television as manifest in the Copyright Revision Act of 1976. Section 111 of the 1976 Act established a program of compulsory copyright licensing that permits cable systems to retransmit distant broadcast signals without obtaining permission from the copyright owner. Each system is required to pay royalty fees to a central royalty fund based on a percentage of its gross revenues. One of the requirements for participating in the compulsory license program is that cable operators not delete or alter commercial advertising on the broadcast signals it transmits.

The Oklahoma regulation would force cable operators to lose the advantages of compulsory licensing (assuming they chose to continue importing distant broadcast signals).

Oklahoma argued that the corn might not be as high as an elephant's eye but that the Twenty-first Amendment "rescued" the advertising ban from pre-emption. But the Twenty-first Amendment has not deprived the federal government of all authority to regulate interstate commerce involving alcoholic beverages, stated Justice Brennan. In this case, the FCC presented an important and substantial federal interest in the uniform national regulation of signal carriage by cable television systems in order to ensure the widespread availability of diverse cable services. This significant objective confronted Oklahoma's goal of discouraging the consumption of intoxicating beverages - a "modest" interest, concluded Justice Brennan, which the state chose to pursue in a narrow and selective manner and which only indirectly affected its Twenty-first Amendment control over the time, place and manner of the sale of alcoholic beverages. Therefore, the enforcement of Oklahoma's statute was found barred by the Supremacy Clause.

It should be noted that state regulation of alcoholic beverage advertising by broadcasters has received somewhat different treatment by the Supreme Court. The Court has denied certiorari in the case of Dunagin v. The City of Oxford, Mississippi, 718 F.2d 738 (5th Cir. 1983) (ELR 6:2:15), a decision that upheld Mississippi's ban on alcoholic beverage advertising by broadcasters, newspapers and billboard companies. Cable operators were excluded from the Mississippi ban.

Capital Cities Cable, Inc. v. Crisp, Case No. 82-1795 (U.S. Sup.Ct., June 18, 1984) [ELR 6:3:14]

State regulations requiring cable-TV operators to build institutional/industrial network and requiring dedication of certain channels for public access are not unconstitutional, Federal District Court in Rhode Island rules

Today, cable television is a household word. We have read about it. We have watched it, and we have talked about it. Yet, federal judges can't seem to classify this new medium. Some liken it to newspapers and award frill First Amendment protections to cable operators. Others, like those in the Tenth Circuit, have equated cable with television and therefore approve of its regulation. Recently, a Federal District Court in Rhode Island followed the lead of the Tenth Circuit and approved cable access regulations which impinged on cable operators' editorial control. The court found that due to the monopolistic character of cable, Rhode Island's cable regulations did not violate the First or Fourteenth Amendments.

The court rendered this decision in a suit brought by Berkshire Cablevision of Rhode Island, Inc., during the Newport County franchise award proceedings. Berkshire sued the administrator of Rhode Island Division of Public Utilities and Carriers (DPUC) because he promulgated rules requiring cable franchise owners to construct an institutional/industrial network and dedicate certain channels for public access. Berkshire attacked these regulations as unconstitutional. It contended that the regulations violate the First Amendment by stripping cable operators of their editorial control and by requiring operators to service all religious and parochial schools. It further charged that the regulations violated the Fourteenth Amendment by depriving cable operators of their property without just compensation. Berkshire asked the court for a declaration of the unconstitutionality of the regulations and an injunction against franchise proceedings which would have awarded the franchise based on compliance with these regulations. The court rejected both requests.

The court's opinion first addressed the First Amendment questions. Recognizing that cable television law is still at its infancy stages, the court sought guidance from the settled area of newspaper and broadcast jurisprudence. The court noted that the Eighth Circuit equated cable and print, but the court concluded that "the two media are constitutionally distinguishable." Although cable operators, newspapers publishers and television broadcasters each perform editorial functions, the court felt that the law should reflect their different approaches and circumstances.

The court noted that the newspaper industry has been practically unregulated while cable and television has not. In fact, cable requires the use of public rights-of-way and therefore must abide by government regulations. The court also pointed at the monopolistic nature of cable. Once a cable operator has a franchise, it no longer faces competition. According to the court, it has a natural monopoly as it is not cost effective for another operator to build in the same area. This results in a scarcity of cable communication systems and it is this scarcity which legitimizes cable regulation, according to the court.

In arriving at its holding, the court recognized that the D.C. and Eighth Circuits have rejected the "economic scarcity" argument as a legitimate rationale for regulating cable. However, the court decided to follow a more recent Tenth Circuit decision which did recognize this argument.

After concluding that the First Amendment does not clothe cable with regulatory immunity, the court analyzed the constitutionality of the DPUC's regulations.

The court found that the regulations were content neutral because all individuals had access to channels on a first-come firstserved basis. Even so, the rules did limit the cable operators' editorial control and therefore had to pass the O'Brian test. United States v. O'Brian, 391 U.S. 367 (1968). Under O'Brian, government regulations pass constitutional muster only if they serve a substantial government purpose and only minimally interfere with free expression. According to the court, the DPUC's regulations passed this test. The court felt that the regulations assured an "unfettered flow of information" by making community participation in cable production accessible; and, it found the regulations unintrusive because they allocated for public access no more than seven of fifty or more channels.

The court applied another test to determine whether the DPUC violated the First and Fourteenth amendments by requiring operators to provide service to all religious institutions and parochial schools. The test requires that "the challenged governmental action must have a secular purpose, its principal or primary effect must neither advance nor inhibit religion and it must not foster excessive government entanglement with religion." The regulations survived the court's constitutional scrutiny. According to the court, the DPUC's regulations serve a valid secular purpose by promoting broad public access to cable. The court found the rules neither advanced nor inhibited religion; they simply provided amenities to religious institutions because they are easily identifiable and usually have close ties to the community. Furthermore, the cable operator could charge reasonable fees for their services. If the regulations only recognized certain religious groups, then they would violate the constitution according to the court. However, the rules provided access to all religious institutions and therefore the court felt that they complied with the First

Amendment. Moreover, because the government's involvement ended with the system's construction, the court concluded that the DPUC's regulations did not lead to "excessive entanglement between the government and religious institutions."

Berkshire also charged that the DPUC violated the Fourteenth Amendment by requiring the operator to build an institutional/industrial network at his own expense and without a guaranteed rate of return on its investment. The court disagreed and listed four reasons for finding that the rules do not violate the Fourteenth Amendment. First, the regulations furthered an important government purpose by promoting public access to cable. Second, the operators still have control of their other channels and also have access to the institutional network. Third, the regulations did not prevent the operators from charging reasonable fees for the use of the network. Finally, the operators did not suffer from a physical occupation of their property.

Berkshire Cablevision of R.I v. Burke, 571 F.Supp. 976 (D.R.I. 1983) [ELR 6:3:15]

Briefly Noted:

Sports.

A female junior high school student in Missouri, Nichole Force, has been granted injunctive relief by a Federal District Court judge allowing her to compete for a place on her school's football team. By refusing her the opportunity to try out for the team, Nichole alleged that the defendants (the school district and its superintendent, the junior high school and its principal, and the

Missouri State High School Activities Association which governs interscholastic competition between secondary schools) violated her right to equal protection under the 14th Amendment since the refusal was based solely on her being female instead of male. The test for determining the validity of a gender-based classification depends upon showing that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. The defendants justified the gender-based classification here by arguing that important governmental objectives were at stake, namely: (1) maximization of equal athletic educational programs for all students; (2) maintenance of safe athletic educational programs; (3) compliance with Title IX; and (4) compliance with the constitution and bylaws of the High School Activities Association. The court found each of these points unpersuasive. First, the refusal to allow girls to compete would probably not result in maximizing the participation of both sexes. Second, there was no evidence that Nichole could not safely participate in the football program nor was there a sufficiently substantial relationship between the objective of maintaining the safety of the athletes and a blanket rule prohibiting female students from trying out for the team. Third, there was nothing in Title IX which would mandate the action taken by the defendants, so allowing Nichole to compete would not violate Title IX regulations. Finally, the Association's bylaws, which included a rule prohibiting a member of the opposite sex from competing on the same team in interscholastic football, was subject to equal protection clause requirements. Applying these requirements, the court held that such a rule could not be enforced as there was no substantial relationship between the rule and any important governmental objective.

Force v. Pierce City R-VI School District, 570 F.Supp. 1020 (W.D. Mo. 1983) [ELR 6:3:16]

Antitrust.

On appeal from a summary judgment in an antitrust action against A & M Records and other defendants, a Federal Court of Appeals has held that prospective corporate shareholder Jack Solinger lacked standing to sue in his own name because he was injured in his business or property by defendants' conduct. Solinger had planned to form a corporation which would later acquire shares of IMS, the corporate victim of alleged violations. Solinger alleged that the defendants improperly allocated territory and refused to deal with the corporation to be acquired by his proposed corporation, thereby causing Solinger's deal to abort. Solinger then claimed he, as well as the corporation, were injured by the collapse of the deal. Solinger's claim of standing to sue was weakened by a recent Supreme Court reaffirmation of the traditional view that negates standing to sue for shareholders, and a fortiori, prospective shareholders. The court did recognize that by defendants' conduct the value of the shares of IMS stock may be reduced and thereby discourage future acquisition by the corporation. However, the court concluded that Solinger was not injured and the lower court decision was affirmed.

Solinger v. A. & M. Records, Inc., 718 F.2d 298 (9th Cir. 1983) [ELR 6:3:17]

Copyright.

A Federal District Court in Vermont has dismissed a radio station owner's counterclaim for abuse of process against Broadcast Music, Inc. (BMI) because it lacked any allegation that BMI had actually obtained any advantage or caused any injury to the station beyond that which it was entitled to by suit for copyright infringement. BMI brought the action to enjoin Hunter Broadcasting, Inc., from the allegedly unlicensed broadcast of music on its radio station and to collect damages for prior allegedly unlicensed broadcasts. Hunter responded by denying BMI's claims and asserted a counterclaim for damages for abuse of process. In addition, Hunter requested a jury trial. The court held that to state a claim for abuse of process, a defendant must allege that there had been "an improper, illegal or unwarranted use of court processes with an ulterior motive or for an ulterior purpose" which damaged the plaintiff. Merely alleging such motives, however, has been deemed insufficient, and that, noted the court, was the flaw in Hunter's counterclaim. Therefore, the counterclaim failed to state a claim. The court also struck Hunter's request for a jury, following the Second Circuit Court view that where a copyright plaintiff is seeking only statutory damages, the determination of damages is left to the judge rather than a jury.

Broadcast Music, Inc. v. Hunter Broadcasting, Inc., No. 83-342 (D.Vt. 1984) [ELR 6:3:17]

Arbitration.

A California Court of Appeal has affirmed the denial of a film investment partnership's petition for a writ of prohibition to prevent arbitration proceedings between it and a film production manager. International Film

Investors (IFI) entered into a written agreement with Friedman/Meyer Productions (F/M) for the production of a movie based on the comic strip "Brenda Starr." IFI was primarily responsible for securing financing and exploiting various rights while F/M was primarily responsible for actual production. The two companies also agreed that IFI had the right to remove F/M and take over film production if F/M principals were indicted for tax fraud following a then-pending federal grand jury investigation. F/M then hired David Silver as production manager for the film. The principals of F/M were subsequently indicted and IFI exercised its takeover rights. Silver then filed a claim against F/M with the Arbitration Tribunal of the Directors Guild of America for failure to pay money due under his contract. The arbitrator joined IFI on the basis of a stipulation between F/M and Silver, even though IFI was not a party to the F/M-Silver employment agreement or a signatory to the Directors

Guild Basic Agreement which provided for arbitration of disputes. Nonetheless, the court held that Silver was entitled to arbitration of his claim against F/M which had been taken over by IFI, because his agreement with F/M provided for arbitration, because he was entitled to an expeditious resolution of his claim, and because he was not involved in the pending out-of-state litigation between the two companies.

International Film Investors, L.P v. Arbitration Tribunal of the Directors Guild of America, 199 Cal.Rptr. 690 (Cal.App. 1984) [ELR 6:3:17]

First Amendment.

The U.S. Supreme Court has upheld the issuance of a protective order prohibiting two newspapers from publishing or using, in advance of trial, information gained in pretrial discovery in a defamation action that had been brought against them. From 1973 through 1979, the Seattle Times and the Walla Walla UnionBulletin published stories about the Aquarian Foundation and its spiritual leader, Keith Rhinehart. The Aquarian Foundation is a religious group with nearly 1,000 members, mostly from Washington, who believe in life after death and the ability to communicate with the dead through a medium. Rhinehart brought an action in Washington state court on behalf of himself and the Foundation against the newspapers and their reporters alleging defamation and invasion of privacy. The defendants denied the allegations and began extensive discovery. The trial court issued a protective order covering all information obtained through discovery pertaining to the financial affairs of the plaintiffs, Foundation members, contributors, or clients and prohibited the newspapers from using the information except to prepare for and try the case. The newspapers asserted the right to disseminate this information based on the First Amendment which, they argued, imposes strict limits on the availability of any judicial order that has the effect of restricting expression. The Supreme Court determined that the protective order furthered an important or substantial governmental interest unrelated to the suppression of expression and that the limitation of First Amendment freedoms is no greater than necessary to protect the particular governmental interest involved. By protecting this information, the court prevented the potential abuse of publicly releasing information that could be damaging to reputation and privacy, the Supreme Court determined.

Seattle Times Co. v. Rhinehart, No. 82-1721 (U.S.Sup.Ct., May 21, 1984) [ELR 6:3:17]

Defamation.

The Supreme Court of Arkansas has reversed and remanded a case in which two private individuals were awarded compensatory damages for being defamed in a television news broadcast which incorrectly depicted them as participants in a shopping center robbery. One evening when Andre Smith and Barry Simon were shopping in a store in a Little Rock shopping center, the police received a call that the store was being robbed by two men. Policemen converged on the scene, handcuffed and searched Smith and Simon and placed them in a squad car. The men were later released when the officers decided the caller had been mistaken and that no crime was in the making. A camera crew from the local television station filmed the incident and a reporter, who happened to be at the scene, filed a report that appeared on the news that night. The reporter based her story on information from a police scanner, vague responses from a store clerk she interviewed, and questioning of the police which elicited a "no comment" response. Though the two men were not named, the newscast showed scenes of them being placed in the squad car. The State Supreme Court, however, vacated the award of compensatory damages because of the impropriety of submitting the issue of punitive damages to the jury. The court cited Gertz where it was led that an award of punitive damages can only be made where it has been proven with convincing clarity that the defendant broadcast the story with "actual malice." Because the record was devoid of such evidence, and because evidence of defendant's financial condition was permitted to be heard, the court found it was error not only to submit the issue to the jury, but that even the award of compensatory damages had been tainted.

KARK-TV v. Simon, 656 S.W.2d 702 (Ark. 1983) [ELR 6:3:18]

Defamation.

The Ohio Supreme Court, in a 4-3 decision, has reversed a lower court verdict for a defendant television station owner and instead has imposed liability on the defendant for defaming a supper club named in two television news broadcasts which linked the club with gambling and organized crime. In making its decision, the court enunciated for the first time, the state's standard of review - ordinary negligence shown by a preponderance of the evidence - for defamation actions involving private individuals and the media. Embers Supper Club brought an action for damages against Scripps-Howard Broadcasting Company (WCPO-TV) for two separate broadcasts it aired detailing a raid on the club in which gambling paraphernalia had been seized. The broadcasts indicated that handbook operators from another suburb had set up operations in the club. The defendant alleged that the broadcasts were based on an official police report. However, the chief executive officer of the club testified that no one from the station ever contacted him to verify the facts contained in the broadcast. Later, the club's cook was cited for a gambling offense, but the case was dismissed and no one affiliated with the club was charged with any gambling activity. Applying the ordinary negligence standard whether the defendant acted reasonably in attempting to discover the truth or falsity or defamatory character of the publication - the court held it was error to direct a verdict for the defendant. The court was unpersuaded by the defendant's argument that it was privileged to publish government information without incurring liability, because the broadcasts included references which were not part of official records. A dissent questioned whether the broadcasts were defamatory and asserted that the information was true and an accurate rephrasing of the police reports.

Embers Supper Club, Inc. v. Scripps-Howard Broadcasting Co., 457 N.E.2d 1164 (Ohio 1984) [ELR 6:3:18]

Invasion of Privacy.

In response to a complaint brought by former professional golfer Kenneth Venturi for invasion of privacy on the theory of misappropriation of his likeness in an advertisement, the Connecticut Supreme Court has held that Venturi failed to prove his claim for punitive damages and thus has upheld a lower court's decision for the defendant. In 1963, while competing in the Hartford (Connecticut) Open Golf Tournament, Venturi posed for a photograph with William Savitt, president of Savitt, Inc., a local retail jewelry store. Fourteen years later, Venturi returned to Hartford to narrate the telecast of the Hartford Golf Tournament for CBS. The day before Venturi's appearance, an ad appeared in the local newspaper and in a publication disseminated at the tournament, depicting Savitt with Venturi who was holding a diamond putter made by Savitt. The court attributed the failure of Venturi's claim to his improperly pleaded damages. Venturi did not seek compensatory or general damages, but only sought punitive damages. However, the court found that Venturi had failed to prove that Savitt was recklessly indifferent to Venturi's rights or intentionally and wantonly violated his rights, or that there was malice in publishing the ad. Further, Venturi failed to offer any evidence as to his litigation, expenses which were essential since damages could not exceed the amount of the litigation expenses. Failing to sustain his burden of proof and to offer evidence as to litigation expenses, the court never reached Venturi's other claimed errors by the lower court.

Venturi v Savitt, Inc., 468 A.2d 933 (Conn. 1983) [ELR 6:3:18]

IN THE NEWS

Motion Picture Association of America's "PG-13" rating category begins its run

On July 1, 1984, the Motion Picture Association of America incorporated a fifth rating category, "PG-13," into its voluntary movie rating system. It is the first rating to be introduced since the system was instituted in 1968. The PG-13 rating, which is advisory and which does not restrict admission to theaters on the basis of age, states, "Parents are strongly cautioned to give special guidance for attendance of children under 13. Some material may be inappropriate for young children." This statement will accompany the rating in advertising (except for those ads not large enough to accommodate the full legend) and on preview trailers.

According to trade reports, the new rating, while conceivably placing more mature PG movies beyond the viewing of a young audience, also might enable movies which would otherwise be rated R, to receive the PG-13 designation. While the rating does not offer any specific guidelines as to the language, violence, or sexual content of the movies which will fall within the PG-13 category, there apparently will be a "language rule" whereby the one-time use of a ,'sexually explicit expletive" will not result in an R rating, but rather a PG-13. However, the repeated use of the expletive would likely result in an R rating as would the depiction of "real tough, persistent violence" or nudity "with sexual orientation."

MPAA President Jack Valenti and National Theater Owners Association President Joel Resnick, in announcing the new rating category, commented that the category was propounded in response to the criticism of studios, theater owners and the public that few films receive either a general audience (G) rating or an X rating which prohibits admission of persons under 17. Hence, the remaining PG and R categories have become "overburdened." (PG suggests parental guidance because some material in a film "may not be suitable for children." The R rating restricts those under 17 from attending certain movies unless accompanied by a parent or adult guardian.) Of the 338 films rated by the MPAA in 1983, 11 (3.3 per cent) were rated G and only two (.6 per cent) were rated X; 208 (61.5 per cent) were rated R and 117 (34.6 per cent) were rated PG. The PG-13 category therefore will provide a "waystation" between the R and PG ratings.

The MPAA rejected, due to the impractibility of enforcement, a more restrictive PG-13 rating which would have barred children 12 and under from seeing films that were considered "too violent or intense." However, Mr. Valenti has commented that parents previously may have "thought it was OK to send their kids to any movie that carried a PG. Now, hopefully, they'll think twice." [Aug. 1984] [ELR 6:3:19]

"Conan" destroys Dallas rating board's attempt to ban theater attendance by youngsters under 16

A municipal court jury in Dallas has thwarted a decision by that city's Motion Picture Classification Board to rate "Conan the Destroyer" as "not suitable" for children under 16. When Universal Pictures challenged the Board's classification of "Conan," which was accorded a PG rating by the system administered by the Motion Picture Association of America, the Board sought a preliminary injunction to prevent the exhibition of the film unless newspaper and theater advertising displayed the board's rating designation. Exhibitors are subject to fines for admitting anyone under 16 to an unsuitable film.

The Dallas board previously has been overruled in its attempts to reclassify the ratings for the films "Poltergeist," "Elephant Man," "Prophecy," and "Lion of the Desert." [Aug. 1984] [ELR 6:3:19]

California revises regulations governing employment of performers under 18

The California Child Labor Regulation Panel has announced new state regulations governing the employment of minors in the entertainment industry, an undertaking inspired, in part, by the hope of deterring "runaway" production, while protecting the welfare and safety of child performers.

The new regulations permit a six-hour work day for minors who are 16 or 17 (increasing to eight hours on nonschool day), a five-hour work day for children age 12 to 16, and a four-hour work day for those 11 and younger. The regulations also specify, for each age range from infants to age 18, the maximum work time, rest periods, instruction time and start and cut-off times, with the cut-off time now extended beyond the previously set 6:30 R M. according to age group. However, minors are not permitted to work more than eight hours during any 24-hour period no matter what time work ends.

The regulations further state that studio teachers may refuse to allow the employment of a minor on a set or location and may remove the youngster if the conditions present a danger to "the health, safety or morals of the minor." There is also a stipulation that a parent or guardian of minors under 16 must be "present with and accompany such minor on the set or location and be within sight or sound of said minor at all times' " The regulations prevent minors from working close to explosives or functioning parts of equipment which a reasonable person would consider dangerous. [Aug. 1984] [ELR 6:3:19]

Directors Guild and AMPTP reach accord on new three-year contract

The Directors Guild of America has approved a new three-year contract with the Alliance of Motion Picture and Television Producers. Under the terms of the contract, the Guild's share of the revenues received by the studios from home video cassette distribution will increase from 1.2 per cent to 1.5 per cent of 20 per cent of the wholesale price of the video cassettes; the Guild's share goes up to 1.8 per cent after an initial $1,000,000 in revenue is received.

During negotiations between the parties, the Guild had argued that the directors royalty share should be based on an amount known as the "distributor's gross," i.e., the total wholesale revenue. Upon agreeing, instead, to a greater share of the "producer's gross" (the 20 per cent figure), the Guild received a $1,000,000 payment to its health plan. The health plan also will benefit from an increase in employer contributions.

The Guild also contracted for increases (totalling 20 per cent) in minimum salaries; increased television series "bonuses;' increased payments for the use of excerpts, and greater creative rights such as the right of television directors to complete a first cut of a television series episode or movie prior to being scheduled for another assignment. [Aug. 1984] [ELR 6:3:20]

Producer David Merrick settles lawsuit against Paramount Pictures for $6 million

Producer David Merrick has received $6 million in settlement of his lawsuit against Paramount Pictures conceming sums allegedly due Merrick in connection with the 1974 film "The Great Gatsby" and other disputes between the parties.

Merrick had claimed that Paramount "wrongfully interfered" in the production of the film, causing the negative cost to become inflated; that certain items were "fraudulently" included in the cost of production; that Paramount failed to give its "best efforts" to the worldwide distribution and marketing of "Gatsby"; and that its gross earnings statements to Merrick were "fraudulent and substantially false." [Aug. 1984] [ELR 6:3:20]

United States Olympic Committee awarded $96,600 in attorneys fees from organizers of the "Gay Games"

A Federal District Court has awarded the United States Olympic Committee $96,600 in attorneys fees from the organizers of the "Gay Games.' a San Francisco-based sports competition for homosexuals. The USOC had successfully sued the group for trademark infringement for the unauthorized use of the title Gay Olympics in connection with a 1982 athletic competition. (ELR 5:11:19) [Aug. 1984] [ELR 6:3:20]

Burger King agrees to cease broadcasting "Mr. Rogers" parody commercials

The Burger King Corp. has agreed to Fred Rogers' request that the company refrain from airing a television commercial that parodies his children's show "Mr. Rogers' Neighborhood." The commercial presented an actor as "Mr. Rodney" teaching his audience to say the word "McFry" (as in McDonald's "mcfries" its hamburgers). [Aug. 1984] [ELR 6:3:20]

Dispute over "Ghostbusters" title is vaporized by settlement

Filmation Studios and Columbia Pictures have reached an out-of-court settlement of a dispute over the title of Columbia's film "Ghostbusters." Filmation had filed an action in Los Angeles Superior Court claiming a prior interest in the tide in connection with one of the company's childrens programs. The terms of the settlement were not disclosed. [Aug. 1984] [ELR 6:3:20]

Former University of South Carolina head football coach is awarded $150,000 in contract dispute

Former University of South Carolina football coach Richard Bell has been awarded $150,000 by a Federal District Court jury in his breach of contract action against the school.

Bell had a four-year contract with the University but was fired after the first year in which the school's team won four games and lost seven. The University claimed that Ben was terminated for "failing to perform assigned duties," i.e., refusing to make certain staff changes. Bell argued that the hiring and firing of assistant coaches was within his authority and not subject to the direction of the athletic director who had suggested the changes.

Earlier in the proceeding, Judge Clyde H. Hamilton dismissed Bell's libel and slander claims against the University's athletic director, finding that Bell had not shown that the complained-of statements were made in reckless disregard of the truth. [Aug. 1984] [ELR 6:3:20]

Ontario government announces plan to censor and classify videocassettes

The Ontario Film Review Board (previously known as the Ontario Censor Board) will begin censoring and classifying commercially distributed videocassettes in the same manner as feature films are classified. Although the regulations affecting videocassettes have not been set forth, Ontario's current censorship standards for films are more restrictive than Canada's federal criminal code; and the videocassette regulations are expected to be similarly restrictive. [Aug. 1984] [ELR 6:3:20]

WASHINGTON MONITOR

Federal Communications Commission determines that CBS News did not intentionally distort "60 Minutes" report on automobile insurance fraud

The Federal Communications Commission has determined that CBS News did not engage in "intentional distortion" in presenting a "60 Minutes" report on automobile insurance fraud.

The report, entitled "It's No Accident," was broadcast on December 9, 1979 and gave rise to Dr. Carl Galloway's filing of an FCC complaint and a slander action. In the slander action, Dr. Galloway, a Los Angeles physician, claimed that the broadcast defamed him by stating that a private investigator had obtained a falsified medical report bearing Dr. Galloway's signature; Galloway maintained that he never signed the medical report.

After a well-'publicized trial, the jury voted 10-2 in favor of CBS (ELR 5:2:17). Galloway has appealed this verdict.

The FCC upheld the decision of its fairness and political programming branch and rejected Galloway's complaint since there was no evidence to substantiate the claim of deliberate distortion or staging. [Aug. 1984] [ELR 6:3:21]

Federal Communications Commission votes to repeal rules limiting ownership of broadcast properties

The Federal Communications Commission has voted to eliminate its regulation prohibiting any single entity from owning more than seven AM radio stations, seven FM radio stations, and seven television stations. By 1990, broadcasters will be permitted to own an unlimited number of media properties. The three television networks, however, will be barred from purchasing a television station in a market where the network retains an affiliate. Prior to 1990, broadcasters will be limited to owning 12 stations in each media category.

The Commission stated that given the growth in the communications industry since the regulation was enacted in 1953, the repeal of the ownership rules would not likely affect the number of diverse viewpoints available to the public. [Aug. 1984] [ELR 6:3:21]

Federal Communications Commission eliminates programming and commercial time regulations for television broadcasters

The Federal Communications Commission has voted to repeal broadcast regulations governing the amount of news and local programming that commercial television stations have been required to carry. The 16-minute-an-hour limitation on advertisements also has been eliminated. In the past, according to news reports, stations have been required to devote five per cent of their broadcast time to locally produced programming, at least five per cent to news, public affairs and informational programming, and at least ten per cent to "nonentertainment" programming. Now, the only remaining nonstatutory obligation of a licensee will be the discussion of issues of local community concern.

The Commission has suggested that broadcasters, instead of maintaining comprehensive programming logs, may document programming by submitting quarterly issues program listings. And instead of requiring broadcasters to meet nonentertainment programming guidelines, licensees will be asked upon renewal what percentage of such programming a station has aired.

Federal Communications Commission denies Nevada attempt to regulate rates for cable television program services

The Federal Communications Commission has denied the Nevada Public Service Commission's petition to regulate the rates of "tiered" services for cable television, such as Home Box Office and The Disney Channel, which are offered to subscribers for a fee above that paid for basic cable service (i.e. the retransmission of local over-the-air television signals). Furthermore, the FCC stated that no law prevents cable operators from charging subscribers additional fees for various news, sports, health, weather and music video networks.

In support of its decision not to reconsider a November 1983 order which declared that cable systems are exempt from local regulation of tiered services, the Commission cited the recent United States Supreme Court decision in Capital Cities Cable, Inc. v. Crisp (see the Recent Cases section of this issue).

In other matters related to cable television regulation, the Commission has denied proposals to reinstate and expand the syndicated program exclusivity rules and to expand protection for sporting events carried by distant signals; and it has denied a petition by nine electric utility companies to revise the Commission's pole attachment complaint rule and policies. [Aug. 1984] [ELR 6:3:21]

DEPARTMENTS

Book Note:

"Trademarks and Unfair Competition (Second Edition)" by J. Thomas McCarthy

The importance of the law of trademarks and unfair competition to the entertainment industry is readily apparent to readers of the Entertainment Law Reporter. Each month brings new cases involving titles, merchandising, credits, or advertising, all involving this area of intellectual property law - an area that is separate and distinct from copyright and contracts.

In 1973, University of San Francisco law professor J. Thomas McCarthy published a textbook descriptively entitled "Trademarks and Unfair Competition." It was wellreceived by reviewers, readers, and the courts. Indeed, according to the book's publisher, it has been cited as authority in more than 200 published decisions. The book was updated with annual pocket-part supplements, but eventually, the flow of developments in this area of the law outstripped the ability of supplements to keep the book current. In the 10 years following its publication, more than 3000 trademark decisions were handed down, and Congress amended the Lanham Act nine times. As a result, Professor McCarthy has just published a new edition of his book - one that trademark and entertainment lawyers will welcome.

Approximately 40% of the Second Edition is newly written material, including much of the book's chapter on Literary, Artistic and Entertainment Rights. This 110-page chapter covers literary titles, character protection, by-line and screen credits, the right of publicity, the misappropriation doctrine, and the protection of musical recordings, performances and sporting events. While this chapter is the one of most obvious interest to entertainment lawyers, other sections of the book will be useful as well. There are, for example, chapters on trademark registration, assignments and licensing, and infringement and unfair competition litigation procedures. The book includes illustrative forms such as complaints, trademark registration application forms, and a sample licensing agreement.

"Trademarks and Unfair Competition" was written with practicing lawyers in mind. Its footnotes contain extensive case citations in support of the text's succinct statement of legal doctrine. Professor McCarthy's own opinions are clearly labeled as such and even are set out in separate sections entitled "Comment." Indeed, if the book has any shortcomings at all, it is that Professor McCarthy is, if anything, too reserved with his commentary. For example, he notes that "a distinctive voice can be protected against unfair appropriation by others," citing the Bert Lahr case. However, he then reports that "Actress Shirley Booth met disappointment in the courts when her claims ... against a television commercial which concededly used an imitation of her voice were rejected." Readers will have to study the opinions in those two cases themselves to find out whether there were factual distinctions between them, or whether they express different views of the law. Similarly, Professor McCarthy writes that "unauthorized biography" cases (which have held that the First Amendment outweighs the right of publicity) are "clearly distinguishable" from celebrity impersonation cases, such as those involving the Estate of Elvis Presley and the Marx Brothers (in which the right of publicity outweighed the First Amendment). There are those who are unable to perceive a significant distinction between such cases, and Professor McCarthy's book does not explain why the distinction is clear to others. This is a disappointment because Professor McCarthy's stature in the field and the quality of his writing would have made his views on these subjects a valuable thing to have.

In Professor McCarthy's defense, there probably was a desire to keep the book to a useable two volumes. A law review length analysis of every topic would have ballooned the book to ten volumes at least. Indeed, as Professor McCarthy himself explains in his preface, the problem with "getting 'the law' out of precedent" is that - in the words of Judge Wysanski - "it is delusive to treat opinions written by different judges at different times as pieces of a jigsaw puzzle which can be, by effort, fitted correctly into a single pattern." Professor McCarthy explains that "Often, a single, clear pattern is difficult to discern from the cases. Any author is sorely tempted to saw the rough edges off of legal precedents so as to fit them into a simplistic mold. But it is a disservice to lawyers for a legal author to confuse the reality of the law with the author's subjective opinions as to what he thinks the law is or should be."

Those who need a manageable and lucid guide to trademark and unfair competition law will find Professor McCarthy's book to be an essential part of their library. It is published by The Lawyers Co-Operative Publishing Co., Aqueduct Building, Rochester, New York 14694. The Second Edition is $139 for the two-volume set, and supplementation will be available. [ELR 6:3:22]

In the Law Reviews:

The Loyola Entertainment Law Journal has published an Entertaiment Law Survey of 1982-1983 cases including Movies and Television, Music, Books and Magazines, Sports, Right of Publicity, Libel and Privacy, Trademarks and Unfair Competition, Cable and Subscription Television, Advertising, Tax and Labor. The Survey is available from Loyola of Los Angeles Entertainment

Law Journal, 1441 West Olympic Boulevard, Los Angeles, CA 90015.

Columbia University School of Law and Volunteer Lawyers for the Arts have published Volume 8, No. 4 of Art and the Law which contains the following articles:

The Rights of Composers and Lyricists: Before and After Bernstein by Franklin J. Havlicek and J. Clark Kelso, 8/4 Art and the Law 439 (1984)

Fine Art Appraisers: The Art, the Craft and the Legal Design by Debra B. Homer, 8/4 Art and the Law 457 (1984)

Copyright Protection for Fictional Characters: A TrademarkBased Approach to Replace Nichols by Lawrence L. Davidow, 8/4 Art and the Law 513 (1984)

Authorship and Copyright of "Works Made for Hire": Bugs in the Statutory System by Paul Gallay, 8/4 Art and the Law 573 (1984)

The University of Miami School of Law has published Volume 1, No. 1 of the Entertainment and Sports Law Journal. It contains the following articles:

Footprints over the Caribbean: Bringing Program Protection in Step with Satellite Technology by David Ladd, Lewis Flacks and David E. Leibowitz, 1 Entertainment and Sports Law Journal 1 (1984)

Responding to an NCAA Investigation, or, What to Do When an Official Inquiry Comes by Charles Alan Wright, 1 Entertainment and Sports Law Journal 19 (1984)

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