BUSINESS AFFAIRS

Producing for Public Television (Part 1)

by Lionel S. Sobel

"Triplets in Need of Support." That is what the ad in the New York Times said. And there in the middle of the ad was an enticing though stiffly-posed photograph of the triplets in question. The youngsters for whom support was sought were not children, however, nor were they even animals. Instead, they were shiny and bright Emmy Award statuettes, all three of them won just this year by the television series Inside Story.

Inside Story is (or perhaps was) a half-hour weekly program reporting and critiquing the performance of the news media. "The only regular program about the press on American network television," is the way the show's producers described it in the New York Times. Originally, the series had been scheduled to begin a new season, its fourth, this fall. Even its slot and on-air host were set: Thursdays at 10 p.m., with former NBC News correspondent Edwin Newman. Last August however - only weeks before Inside Story won its three Emmys - the program's executive producer, Ned Schnurman, announced that the series had been withdrawn from the fall schedule.

Was this just another, and not at all unusual, case of critical acclaim exceeding a television show's ratings and network support? The answer to this question is yes ... and no. Yes, the ratings were small. But no, the series had not lost the support of its network. lndeed, Barry Chase, the network's vice president for public affairs programs, immediately announced that his company was anxious for Inside Story to return.

If the program was scheduled, and its network "anxious" for it to return, why was Inside Story canceled, and what kind of "support" were its producers seeking in their New York Times ad? Intriguing questions, these. The answers reveal both the beauty and the bane of producing for public television. They do, because the network that carried Inside Story was not Edwin Newman's old employer NBC, nor was it ABC or CBS. Inside Story's network was PBS. And that makes all the difference.

Financial Support

Inside Story was withdrawn from PBS's fall schedule by the series' own producers, because they did not have enough money to make the show. In the past, the program's production costs were funded by grants from the General Electric Corporation. This year, GE decided not to renew its financial support. GE had never made a permanent or even longterm commitment to the show, and the time had simply come for GE to do other things with those dollars. Inside Story's producers were unable to find a new underwriter in time for the fall season, and that is why the program was canceled. The New York Times ad, which ran October 1st on the paper's Op-Ed page, seeks financial support for the 1985 season. "To my knowledge, and to those at PBS," Mr. Schnurman told the press, "it is the first time in the history of public broadcasting that an individual program has taken such a step to secure funding." Mr. Schnurman is looking for $1.5 million to produce 13 half-hour episodes. In return, the program's underwriter will receive subdued on-air credits - plus the right to have those three Emmys "spend their summer vacations" in the underwriter's "trophy case."

Those who are accustomed to producing for commercial television networks, but are not familiar with public television, may find Inside Story's plight to be a very curious matter. If PBS is "anxious" for the program to return, as PBS says it is, why do the program's producers have to seek their own funding? Doesn't PBS pay its producers licensing fees covering most of their production expenses? ABC, CBS and NBC pay such fees to their producers. Indeed, licensing fees paid by the three commercial networks now average $325,000 per half-hour episode - almost three times the amount per episode that Inside Story needs to resume production. Commercial network producers may have to deficit finance a portion of their production costs, and hope to recoup that deficit (and more) through the syndication of their programs at a later date. But signing up sponsorship for commercial network programs is the job of the network, not the producer. Why has PBS kicked this task back to Inside Story's producers? The answers to these questions are rooted in fundamental differences - many of them the result of federal law - between commercial television on the one hand and public television on the other.

Inside Story's own story is not unique. It was not, in other words, treated any differently by PBS than other public television programs. To understand what happened to Inside Story, it is necessary to appreciate the many ways in which PBS differs from ABC, CBS and NBC.

Program Production

The commercial networks do of course produce programming themselves. They also acquire, in exchange for substantial licensing fees, the network broadcast rights to programs produced by others. PBS, on the other hand, does not produce programs itself. Furthermore, although PBS does acquire the public television rights to programs produced by others, PBS does not pay licensing fees to those producers, at least not from PBS's own funds (and frequently, not at all).

The commercial networks also compensate their television station affiliates for broadcasting network programs. PBS, on the other hand, does not compensate its affiliates. In fact, public television stations pay PBS for its services and for the right to broadcast programs PBS has acquired.

Decision Making

Commercial network decisions concerning programming and scheduling are made centrally by a small number of people. Recently, a flattering profile in The Wall Street Journal described Harvey Shephard as the person who decides what "85 million people watch on the CBS Television Network every day." He is, the Journal said, "the gatekeeper for 3,500 hours of entertainment programs - all shows except news and sports - on CBS every year." Mr. Shephard does not literally work alone. A staff of 42 reports to him, and he in turn works with B. Donald Grant, president of the CBS entertainment division. The point however is that all 44 of these people work within CBS. And the same is true at ABC and NBC, where programming and scheduling decisions are made by Lewis Ehrlict and Brandon Tartikoff and their in-house colleagues.

PBS has a programming department as well. It is headed by senior vice president Suzanne Weil. But Ms. Weil does not have nearly as much power over programming and scheduling as her counterparts have at the commercial networks. By design, program and scheduling decisions at PBS are made by public television stations themselves. Stations make these decisions by voting, with their dollars, on which programs they wish to fund collectively, and by deciding, individually, whether and when to broadcast programs acquired and distributed by PBS.

Indeed, the independence from PBS that public stations enjoy has on occasion been a source of annoyance to producers and viewers alike. As a result of that independence, national print advertising for PBS programs is less efficient than it otherwise might be. For example, a recent ad in Newsweek urging readers to watch Washington Week in Review could not state with certainty the day and time the program would be broadcast in every reader's area. Instead, the ad - like other similar ads in national magazines and newspapers - had to end with the not-very-helpful advice, "Consult your local listings for day and time in your community."

In 1980, when public stations in Texas and Alabama decided not to broadcast a PBS-acquired docudrama entitled Death of a Princess, the stations' viewers and subscribers objected. Indeed, they objected so strenuously that they filed lawsuits against the two stations alleging that the stations' refusal to broadcast the program violated the First Amendment rights of viewers who wanted to watch it. Ultimately, the courts sided with the stations, ruling that public (as well as commercial) television stations have an independent right and responsibility to select their own programming. Muir v. Alabama Educational Television Commission, 688 F.2d 1033 (5th Cir. 1982) (ELR 4:18:4). The law, in other words, does not require or even encourage public stations to carry a program, simply because it is offered by PBS.

Alternatives to PBS Distribution

Producers whose programs are rejected by Mr. Shephard at CBS or by the "gatekeepers" at ABC or NBC usually write off all hope of gaining access to the airwaves of any of their affiliates. On the other hand, producers whose programs are declined by PBS still can reach its affiliates through one or more of the four regional networks that also service public stations: the Central Educational Network in Chicago, the Eastern Educational Television Network in Boston, the Pacific Mountain Network in Denver, and the Southern Educational Communications Association in Columbia, South Carolina.

Furthermore, producers - including those whose programs have been rejected by PBS - have the right to lease transmission time on PBS's own satellite system for as little as $350 to $450 per hour. PBS's satellite system includes four separate channels. And every public television station has the equipment to receive - and record for later broadcast - at least two simultaneous satellite feeds. Thus, producers can easily get their programs to public stations. The basis on which the stations are permitted to broadcast those programs - whether free or for a fee, once or several times, within a specified period or for an unlimited time is left to the producer. PBS will notify all public stations, using PBS's own teletype system, of the date and time the producer's program will be satellite-fed and of the terms on which the producer will allow it to be broadcast. Producers who want to promote the use of their programs more fully by dealing directly with public station managers may rent pre-addressed mailing labels from PBS for only $10. In all, PBS makes it quite easy for producers to compete for air time with PBS's own offerings, even in cases where producers are asking stations to second-guess decisions made by PBS's programming department.

Network Operating Funds

PBS and the commercial networks also raise their own operating funds differently. The commercial networks make money by selling advertising time. PBS does not sell advertising. Indeed, it is prohibited by law from doing so. (In 1981 Congress did authorize a temporary advertising experiment to study the effects that advertising could have on public television operations and funding. As a result, an "Advertising Demonstration Program" was conducted during 1982 and 1983. But the advertising time sold during that experiment was not sold by PBS. It was sold and broadcast by nine individual public television stations, each acting independently.)

PBS's own operating funds come, for the most part, from public television stations themselves in the form of membership and meeting registration fees. PBS earns some money by selling goods and services such as videotapes and satellite transmission time. PBS also receives grants from the Corporation for Public Broadcasting which account for a small percentage of PBS's income. In fiscal year 1984, revenue from all three of these sources amounted to less than $60 million, however. By comparison, each of the commercial networks spend an estimated $1.5 billion per year simply producing and acquiring programming (to say nothing of what they spend on network overhead and affiliated station payments).

Ratings

One of the most interesting differences - for better or worse - between PBS and the commercial networks is in their ratings. One of PBS's biggest programs of the new season is Heritage: Civilization and the Jews. The nine-part series premiered on October 1st and garnered a rating of 5.5 and an 8 share. The second episode did almost as well with a rating of 5.3 and an 8 share. PBS was "Very pleased about Heritage's showing," a network spokeswoman told the press. "We believe we've got a hit."

Though such ratings may be "a hit" by PBS standards, they would be dismal - indeed, fatal - by commercial network standards. The same week that Heritage premiered, CBS's Dallas ranked first in viewership with a rating of 26.4 and a share of 44. Ripley's Believe It or Not on ABC ranked 63rd that week; but with a rating of 8.6 and a share of 14, it still had more viewers than Heritage. The lowest ranked prime-time commercial network program that week was a LaRouche for President paid political advertisement on ABC; and even it outpointed Heritage with a 6.3 rating and 11 share.

During the 1983-84 season, CBS had an average primetime rating of 18.1, ABC a 17.2, and NBC a 14.9. By comparison, the highest-rated PBS broadcast of all time was a 1980 National Geographic Special entitled "The Sharks" which had a rating of 17.4. The 25th highest rated PBS program of all time was a 1983 episode of Nova which garnered a rating of 9.7. This is not to suggest that people do not watch PBS programs. Each rating point represents some 850,000 television households. Thus even a relatively low rating of 5.5 means that Heritage was viewed in 4,675,000 homes no small crowd by anyone's standards, except those of the commercial networks.

Ratings of course dominate the decisions of commercial network programmers, because advertising time is sold on the basis of its cost per viewer. Hence, the greater the ratings, the more valuable per minute advertising becomes. Since neither PBS nor its public station affiliates sell advertising time, ratings do not directly influence their revenues. Thus ratings are far less critical to PBS programmers than they are to commercial network programmers. Naturally, PBS programmers do not schedule programs that have no appeal to viewers. But PBS programmers have the luxury - some would say an obligation - to base their decisions on the aesthetic, informational and educational qualities of a program, so long as it will appeal to say a couple of million TV households.

Another interesting difference between PBS and the commercial networks concerns those who produce for each. Commercial network programs are produced by the networks themselves, by the major film and TV studios, and by independent television production companies. Though studios and independents frequently produce for more than one commercial network (and for pay-TV networks as well), none of them also produce for PBS. More than half of PBS's first-run schedule is

pendent producers account for about a third of the schedule. And the balance is acquired overseas, especially from the BBC.

Nature of Programming

The nature of the programming offered by PBS and by the commercial networks differs, though the differences seem to be diminishing. The commercial networks offer comedy, action-adventure, and dramatic shows, while PBS is known for its cultural and educational programming. PBS and the commercial networks all offer national news programs. (PBS's The MacNeil/Lehrer

Report is now an hour in length as compared to the networks' half-hour news shows. But some public stations think that MacNeil/Lehrer is too long, and thus there has been some speculation that it may eventually return to its original half-hour length.) The commercial networks carry a heavy dose of sports, something PBS is not renowned for, though over the years, PBS has carried many professional tennis tournaments. The commercial networks also broadcast motion pictures, both theatrical features and made-for-TV movies. PBS offers fewer motion pictures, but does carry some and may broadcast more in the future. This November, for example, PBS will carry Gideon's Trumpet, a made-for-TV movie that debuted on commercial TV some years ago and is now being showed on public television for the first time. Also on PBS's November schedule is Testament - a movie which opened last year as a theatrical feature, even though it was originally made for PBS's drama anthology series American Playhouse.

The most startling distinction between PBS and the commercial networks is the amount of money their programs cost to produce. The commercial networks spend an estimated $1.5 billion each per year producing or acquiring programs, while PBS programs cost approximately $125 million a year to produce.

Program Quality

Given their enormous disparity in production costs, it might be expected that PBS programs are inferior to commercial network programs in technical and content quality. In fact, there is no perceptible difference. PBS has detailed technical quality standards, and broadcast tapes are previewed and evaluated for 71 different technical characteristics. Content quality is more subjective, of course, and is - as the saying goes - usually in the eye of the beholder' Nevertheless, in the news and documentary category, PBS was justifiably proud to win 19 Emmys this year, compared to ABC's eleven, CBS's ten, and NBC's nine. Ironically, three of PBS's Emmys were those won by Inside Story. When GE decided not to renew its financial support for inside Story, the series' own producers had to come up with a new source of funding for the same reason that the producers of every PBS series must find financial support themselves: PBS does not have enough money of its own, nor (under current law) does it have any way to get enough money, to pay producers for programs.

There are many other potential sources to which producers may turn for money. The interesting questions are:

- Who are these sources?
- How should they be approached?

- What can they be offered in return for their money"
And
- What is the likelihood they will respond favorably?

Part 2 of this article will turn to these questions next month.

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[ELR 6:6:3]

RECENT CASES

Federal Court of Appeals affirms trial court decision that songwriter failed to prove copyright infringement by Bee Gees despite expert testimony of "striking similarities"

A Federal Court of Appeals has kept the Bee Gees "Stayin Alive" by affirming a trial court's judgment notwithstanding the verdict that despite striking similarities and a jury decision in his favor, Ronald Selle had failed to prove that the Bee Gees stole the music for their hit song "How Deep Is Your Love" from Selle's "Let It End."

Selle wrote and copyrighted "Let It End" in 1975. Sometime later he sent a tape and lead sheet of the music to eleven recording and publishing companies. The song was also performed two or three times by Selle and his band in the Chicago area. Of the eleven companies which Selle sent the song to, eight returned the material and three did not respond.

In May of 1978 Selle became aware of the Bee Gees' song "How Deep Is Your Love" while listening to the radio and subsequently by hearing it as part of the soundtrack to the movie "Saturday Night Fever." Though the lyrics were different Selle recognized the music as his own. Believing that the Bee Gees had stolen the music for their song from "Let It End" Selle brought suit against the Bee Gees, Paramount Pictures Corp., which made and distributed the movie "Saturday Night Fever," and Phonodisc, Inc. (now known as Polygram Distributors, Inc.) which made and distributed the cassette tape of "How Deep Is Your Love."

The Bee Gees, an internationally known group, are comprised of three brothers - Maurice, Barry and Robin Gibb. Because none of the Gibb brothers reads or writes music, their practice is to sing and tape record their tunes. Members of their staff later transcribe the songs to lead sheets which are then registered for copyright.

The Bee Gees' contended that the song "How Deep Is Your Love" was independently created by them in 1977 while they were recording an album in a chateau in northern France.

At trial the Bee Gees introduced evidence of a work tape which recorded the actual process of creation. On it, the jury was able to hear the Bee Gees create the tune while their keyboard player accompanied them on piano.

Selle maintained that notwithstanding this worktape, the Bee Gees must have heard the song from one of the publishing or recording companies which had received copies of his song. Furthermore, Selle argued that even without evidence that the Bee Gees actually heard the songs that were sent to these companies, access could be inferred as a result of the striking similarities between the songs in question.

Selle introduced testimony by Arrand Parsons, a professor of music at Northwestern University, who prepared several charts comparing the musical notes in each song. According to Parsons, in the first eight bars of each song, twenty-four out of thirty-four notes in Selle's composition and twenty-four out of forty notes in the Bee Gees' composition were identical. Similarly, in the last four bars of both songs, fourteen notes in each were identical in pitch and eleven of the fourteen rhythmical impulses were identical.

Parsons declined to say that the similarities could only have resulted from copying; but he did testify that "the two songs had such striking similarities that they could not have been written independent of one another." Furthermore, he stated that he did not know of any other two songs which were as identical in pitch and rhythm as the two songs in contention.

Finally, Selle seemed well on his way to victory when Maurice Gibb mistakenly identified the melody to "Let It End" as the music to "How Deep Is Your Love."

The jury agreed with Selle and came in with a verdict against the Bee Gees. The District Court judge, however, believed that such a finding was "at war with the undisputed facts" and therefore granted the Bee Gees' motion for a judgment notwithstanding the verdict. (ELR 5:5:8)

The issue on appeal was whether the lower court erred in setting aside the jury's verdict despite "expert testimony" that the two songs were "strikingly similar."

Selle argued that the lower court misunderstood the theory of proof of copyright infringement on which he based his claim. It was his contention that copyright infringement could be established, despite the absence of direct proof of access, if the songs in question were strikingly similar. Thus, because it had been established by the expert testimony of Arrand Parsons that the two songs were "strikingly similar," an inference of access could have been drawn and Selle should have prevailed. The appellate court disagreed.

The court recognized that if the songs in question were so strikingly similar that the possibility of independent creation was precluded, an inference of access might be drawn. But, it added, striking similarity could not be considered in isolation. "There must be at least some other evidence which would establish a reasonable possibility that the complaining work was available to the alleged infringer. . . . Thus, although it has frequently been written that striking similarity alone can establish access, the decided cases suggest that the circumstances would be most unusual."

Consequently, the appellate court held that the lower court's ruling was proper because it was based on Selle's "inability to raise more than speculation that the Bee Gees had access to his song."

Moreover, in addition the court held that the lower court's ruling was proper because Selle had failed to meet his burden of proving that the melody in the Bee

Gee's "How Deep Is Your Love" was "strikingly similar" to the melody in "Let It End."

According to the appellate court, the mere fact that Parsons compared the musical notes in question and then concluded that the two works could not have been created independent of one another was insufficient. It reiterated the fact that the test for proving striking similarities is a stringent one. Thus, it is not simply a question of comparing the number of identical notes in each composition, but rather, one seeking to prove striking similarities is required to undertake a more careful examination of other more distinguishing characteristics.

For instance, one factor which needs consideration is the uniqueness of the sections which are alleged to be similar. If the sections are common or somewhat ordinary, then the probability of independent creation is heightened. On the other hand, if the sections in question are particularly intricate, this would seem to indicate that the compositions are related and thus diminishes the probability of independent creation. Finally, one additional factor in determining whether one work is strikingly similar to another is that "the similarities should appear in a sufficiently unique or complex context as to make it unlikely that both pieces were copied from a prior common source."

With these principles in mind the appellate court proceeded to explain why Arrand Parsons' testimony failed to prove that the works in contention were strikingly similar.

For one thing, Parsons offered no testimony as to the complexity or uniqueness of the two works. This was particularly detrimental here, because popular songs are all relatively short "and tend to built on or repeat a basic theme."

This absence of testimony was further compounded by the fact that Selle failed to offer evidence to rebut the defendants' exhibit 27. Exhibit 27 was comprised of a tape, on which had been recorded segments from "How Deep Is Your Love" and "Let It End." Interspersed in these segments were a number of other diverse compositions ranging from a Beatles composition to portions of Beethoven's Fifth Symphony. The court noted that these compositions all shared "at least superficial similarities when played on the same musical instrument."

The point of Exhibit 27 was to show that there were possibilities, other than copying, which explained the similarities in the two songs. Thus, Selle's failure to introduce expert testimony challenging these "superficial similarities" was fatal to his cause. "These circumstances indicate that the plaintiff failed to sustain his burden of proof on the issue of 'striking similarity' in its legal sense - that is, similarity which reasonably precludes the possibility of any explanation other than copying."

Selle v. Gibb, 741 F.2d 896 (7th Cir. 1984) [ELR 6:6:7]

Federal Court of Appeals affirms trial court ruling granting summary judgment to ABC Sports in copyright infringement suit brought by composers of "Monday Night Football" theme

ABC Sports scored again in its bid to thwart songwriters' claim of copyright infringement. A Federal Court of Appeals has affirmed a trial court's holding that ABC did not infringe the copyright to a musical composition written by Jack Cortner, Jon Silberman and Joe Sicurella and used by ABC as the theme song for

"Monday Night Football," because the songwriters had assigned all of their rights in the song to ABC.

In 1976 Jack Cortner, Jon Silberman and Joe Sicurella wrote a musical piece which came to be known as "ABC's Monday Night Football Theme." The songwriters' rights to these songs were subsequently assigned to the SST Group, Inc., a corporation controlled by the writers, which in turn assigned the rights to the song to ABC. This transfer of rights was contained in three separate contracts.

In the first contract, the songwriters assigned to SST all rights to the song in exchange for the promise by SST to pay specified royalties for the various rights granted. In addition, SST was granted the right to assign or transfer to another entity the rights assigned to it by the songwriters. This right of assignment, however, was conditioned upon the composers' written consent.

The second contract was an agreement between the composers and SST, in which the songwriters represented that they wrote and composed the musical composition known as "ABC's Monday Night Football Theme" and agreed to assign all of their rights to SST. Furthermore, the songwriters also consented "to the assignment of the contract, the composition, or any copyright therein, to a third party, subject, however to the payment of the royalties herein specified.'"

In the third contract SST agreed to furnish to ABC for its Monday Night Football television show music composed by the songwriters in exchange for payments by ABC to SST in the amount of $9,000 and an agreement by ABC to furnish "such payments as might be required to be made by ABC to the three composers under the attached songwriter's contract." In addition, ABC was granted all publishing and mechanical rights in the musical composition as "its sole and exclusive property, with no obligation to broadcast them."

On November 8, 1976, ABC filed a claim with the Copyright Office to the theme composed by the three writers. ABC used this music as its theme song for "Monday Night Football" from 1976 through 1980.

In 1980, ABC commissioned Robert Israel and Score Productions to write a new, but similar derivative theme, for future use on the "Monday Night Football" program. When this song was completed, ABC registered it with the Copyright Office and listed Israel and Score Productions as employees for hire. Subsequently, ABC discontinued use of the original song and instead replaced it with the new, derivative version.

In December of 1982, the songwriters instituted an action against ABC Sports, Robert Israel and Score Productions seeking injunctive relief and an accounting for royalties due, alleging that the defendants had infringed their copyright by copying their original copyrighted theme and by recording and performing the replacement.

ABC moved for summary judgment on the grounds that it had not infringed the 1976 copyright because ABC was the sole and exclusive owner of all the rights to the musical composition written by the songwriters and used by Israel. The motion was granted and the complaint was dismissed. (ELR 5:10:11)

The first issue that the appellate court addressed was whether ABC had acquired the entire copyright interest in the musical theme from the writers. Because ABC had assumed SST's obligation to pay the writers any royalties owed to them from the exploitation of the theme, the court held that ABC had not acquired the entire copyright interest and that the writers had a sufficient beneficial interest in the copyright to give them standing to sue.

Having decided that the songwriters had retained a beneficial interest in the copyright to the "Monday Night Football theme," the court next had to determine whether ABC and its employees for hire - Robert Israel and Score Productions - could be found liable for infringing this beneficial interest.

The appellate court began its analysis by recognizing that the lawful owner of a copyright is not capable of infringing an interest in that which is owned by it. Similarly, pursuant to the Copyright Act of 1976, the copyright owner owns a number of rights in the copyrighted work including the right to reproduce it and the right to prepare derivative works based upon the original work. Furthermore, one who owns a copyright may employ others to create derivative works for hire. In that case, absent an agreement to the contrary with the employees for hire, the copyright owner acquires the copyright to the new material in the derivative work.

Based upon these principles the court held that "ABC, being the owner of legal title to the underlying copyrighted theme, cannot be held liable for infringement under the Copyright Act and that defendants Israel and Score, being either employees for hire ... or persons commissioned by ABC ... to create a work derived from the preexisting theme, cannot be liable for infringement."

Conner v. Israel, 732 F.2d 267 (2d Cir. 1984) [ELR 6:6:8]

Comedy writer's claim that "Stir Crazy" infringed copyrighted screenplay and story treatments is dismissed by Federal District Court; pendent state law claims for breach of contract and confidential relationship are dismissed without prejudice

Writer Andrew Smith's claim that the movie "Stir Crazy" infringed his story treatments and screenplay for a prison rodeo story has been gored by the finely honed opinion of a Federal District Court in New York. The court awarded summary judgment to producer Hannah Weinstein (now deceased) and to Columbia Pictures and various other creative parties associated with the film.

Smith stated that in 1975 he revealed to his then close friend Weinstein that he was working on a screenplay involving a prison rodeo. Smith's effort was inspired by an article in The Wall Street Journal about the annual prison rodeo held at Huntsville Prison in Texas. Weinstein allegedly responded enthusiastically to Smith and suggested that she might produce his work. Smith and Weinstein did work together, after a brief falling-out, but within a short time, their professional involvement again terminated. Weinstein went on to refer the prison rodeo concept to Columbia Pictures, and Columbia eventually approved playwright Bruce Jay Friedman's final shooting script for the movie entitled "Stir Crazy."

As described by Federal District Court Judge Sofaer, "'Stir Crazy' is the story of two unsuccessful New York actors, one white with an urbane, sensitive nature and the other black and streetwise, who move to the Sunbelt to find greener pastures for their talents, get falsely convicted for robbing a bank, and are imprisoned for long terms. The black protagonist, Harry, played by Richard Pryor, quickly works his way into the prison subculture.... In the meantime, Skip, the white protagonist, discovers, to his and everyone else's surprise, that he is a master rodeo rider. The warden looks to Skip to win him big money in the annual prison rodeo, and Skip agrees. . . . Skip [and Harry] plan and execute an escape on rodeo day. At the end of the film, Skip and Harry drive off to freedom with the social worker sister of their attorney, who meanwhile has fallen in love with Skip, and has established his and Harry's innocence on the bank-robbery charge."

In Smith's full length script "The Klu Klux Klocks Company," as well as in his earlier prison rodeo story treatments, all of which were reviewed by the court, a rodeo indeed provided a central plot device. But the court determined that "Stir Crazy" was not substantially similar to Smith's works as a matter of law "under the most generous conceivable application of this standard." Smith did not show that Weinstein or Columbia utilized any more than the general theme of a prison rodeo - a theme which was not copyrightable since the rodeo was a newsworthy event in the public domain. And any similarities in the works were "at a level of expression either too general or too insignificant to be protectible." Smith also did not establish proof of character infringement. A "city boy," a "top hand," or a black protagonist played by Richard Pryor, were characterizations "too general to deserve protection."

The dissimilarities between "Stir Crazy" and Smith's ideas and treatments provided further support for the court's finding of no copyright violation. Although Judge Sofaer opined that "Stir Crazy" was a work with "little literary value," he nevertheless had to admit that the screenplay was 'subtle, witty, well written, and credible enough to be good humor; it has no overt sexual scenes...; the characters ... are well developed and cleverly used." In contrast, Smith's treatments and script, stated the court, were "heavy handed, with overt and tasteless sexual scenes, and characters and portrayals that are dull and incredible. . . ." In all, "Even assuming that 'Stir Crazy' was written with the KKK script in hand, the numerous differences undercut substantial similarity. . . . The story and characters in 'Stir Crazy' do not even stir one's memory of any copyrighted idea or characters in KKK or Smith's other treatments."

Smith also had brought before the court, under pendent jurisdiction, state law claims for unfair competition, breach of contract and breach of confidential relationship.

The court dismissed these claims, without prejudice, because: the federal claim in the case was being dismissed at a very early stage, i.e., after discovery, on a motion for summary judgment; the state law contract and breach of confidential relationship claims would turn on evidence and legal principles "largely different from and irrelevant to the federal claim"; and the state law issues were complex enough to require the special expertise of the state courts of California. It was further pointed out that questions were raised as to which state's law would apply and that the laws of California and New York differ on certain key elements of Smith's action, especially with respect to the breach of confidential relationship claim. And, in deciding questions relevant to the movie industry, the California courts often have the benefit of amicus curiae briefs submitted by writer or producer organizations and therefore may render more "surefooted" readings.

Smith also alleged that the Columbia parties had engaged in unfair competition in that the similarity between "Stir Crazy" and his works would confuse customers and damage the marketability of his script. The court ruled that to the extent Smith was asserting that the alleged acts of unfair competition deprived Smith of financial gain from the use of his ideas, this claim was based on rights equivalent to those protected by the Copyright Act and thus was preempted under section 301(a) of the Act. If Smith was asserting that the Columbia parties were marketing a similar product resulting in consumer confusion as to source, he offered no evidence of confusion sufficient to create a genuine issue of material fact.

The court concluded by discussing Smith's separate claims against Weinstein arising out of her alleged breach of express and implied contracts as well as of their alleged confidential relationship. Smith stated that Weinstein had agreed, expressly or implicitly, to pay him for the value of his ideas if she decided to use them. The court noted that "A party may by contract agree to pay for ideas, even though such ideas could not be protected by copyright law." Smith's breach of confidence claim also was found not equivalent to a right under the Copyright Act. Thus, while granting summary judgment to all of the parties on the copyright and unfair competition claims, the court declared that Smith's state law claims were not preempted by federal law, and hence, dismissed these claims without prejudice to their assertion in state court.

Smith v. Weinstein, 578 F.Supp. 1297 (S.D.N.Y. 1984) [ELR 6:6:9]

Federal Court of Appeals issues preliminary injunction blocking proposed joint venture between Warner Communications and Polygram Records

A Federal Court of Appeals has granted the Federal Trade Commission's motion for a preliminary injunction barring the proposed joint venture involving the record operations of Warner Communications and Polygram Records pending the completion of administrative proceedings in the matter.

Warner, at the time the merger was proposed in 1983, was the second largest distributor of prerecorded music in the United States. The company operates three record labels (Warner, Atlantic and Elektra/Asylum), and accounts for 18.9 percent of the domestic market in prerecorded music products, a market which includes all recorded sound performances sold to consumers in the form of singles, longplaying albums, cassettes, tapes, eight-track cartridges and compact discs. Polygram Records, which is owned by N.V. Philips and Siemens AG, was, in 1983, the sixth largest distributor of prerecorded music in the United States with a 7.1 percent share of the market. Under the terms of the proposed joint venture, Warner and Polygram were to merge part of their record operations: Polygram would close its operations in the United States; and the joint venture company would distribute Polygram product. The combined firm would become the world's largest recorded distributor with about 26 percent of the United States market. The market share of the top four record distributors would increase from 67 percent to 75 percent of the domestic market.

The Federal Trade Commission's objections to the venture did not make the easy-listening charts. The Commission alleged that the proposed venture would violate section 7 of the Clayton Act and section 5 of the Federal Trade Commission Act. The Commission sought a preliminary injunction under section 13(b) of the Federal Trade Commission Act to block the proposed merger until the completion of administrative proceedings.

A Federal District Court denied the Commission's motion for a preliminary injunction. The Commission then filed an Emergency Motion for Injunction Pending Appeal, which was granted by the Federal Court of Appeals (ELR 5:12:19). The Court of Appeals has now reversed the District Court's ruling on the ground that the court had applied an incorrect legal standard in denying the requested injunctive relief.

The Court of Appeals pointed out that under section 13(b), injunctive relief is available to the FTC upon "a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest. . . ." The section imposes a "lighter burden" on the Commission than that imposed by the traditional equity standard, because the Commission need not show irreparable harm to obtain an injunction. The District Court order had included frequent references, in its conclusions of law, to the lack of "collusion" in the recorded music market. It thereby appeared to the Court of Appeals that the District Court applied section 1 of the Sherman Act in ruling upon the FTC's motion. Section 1 prohibits every unreasonable "contract, combination ... or conspiracy in restraint of trade or commerce." In contrast, section 7 of the Clayton Act requires "far less than a showing of collusion. Section 7 prohibits mergers whose effect 'may be substantially to lessen competition, or to tend to create a monopoly.'" By adverting to a collusion standard, rather than requiring only a showing of a reasonable probability of anticompetitive effect, the District Court applied an incorrect legal standard, conclude-,d the Court of Appeals.

The Court then found that the Commission met its burden of raising "serious, substantial ... and difficult" questions requiring thorough investigation and deliberation by the Commission, in the first instance, of the possible anticompetitive effects of the proposed merger. It was noted that the parties had presented conflicting evidence on the relevant product market, market concentration, market shares, barriers to entry, and the merger's probable effect on competition. In order to arrive at a preliminary assessment of the merger's impact on competition, the court first discussed the "critical" definition of the relevant market. The Commission contended that the relevant market consisted of prerecorded music; Warner and Polygram argued that the relevant market was recorded music, which includes "home tapes" of prerecorded music. The court pointed out that "prerecorded music, unlike home tapes, is a ready-to-play product, sold in an attractive package which often includes artwork and liner notes. These characteristics suggest that prerecorded music and home tapes are not interchangeable." Also, there is a price difference of approximately 300 percent between home tapes and prerecorded music, and the Commission presented evidence that an increase in the price of prerecorded music would not cause a massive shift to home taping.

The court then reviewed, and declared "tenable," the Commission's evidence showing: moderate concentration at the distributor level in the prerecorded music market; a trend toward increased concentration among record distributors; difficulty in entering the distribution market; and the likelihood that the proposed joint venture would accelerate the trend toward increased concentration. Without resolving the conflicts in the evidence, or undertaking an extensive analysis of the antitrust issues, the court held that the Commission met its burden of showing a likelihood of success on the merits of its action.

The record companies were unsuccessful in this proceeding in their attempt to justify the proposed merger on the ground that Polygram would be leaving the distribution market due to economic necessity, and that the merger therefore would not be the cause for a reduction in the number of distributors and any resulting anticompetitive effects. The court chose not to resolve the question of "how much weight, if any, should be given to the weak financial condition of a company in a section 7 case," but did hold that a company's stated intention to leave the market or its financial woes would not alone suffice to justify a merger.

The public equities of the case also were found to support injunctive relief on behalf of the FTC in that the denial of a preliminary injunction might preclude effective relief if the Commission prevails and divestiture is ordered. The proposed joint venture would involve the dismantling of Polygram's distribution operation. Then, if the joint venture were not upheld, it would be "exceedingly difficult" for the company to revive operations. Furthermore, concentration in the distribution market would mean that Polygram might find it impossible to arrange an appropriate alternate distribution arrangement. The private equities asserted by Warner and Polygram - Polygram's difficulties in signing artists, retaining employees, and the company's financial weakness - did not outweigh the Commission's showing of a likelihood of success.

A preliminary injunction therefore was warranted, ruled the Court of Appeals. The injunction will remain in effect until the completion of administrative proceedings which the Commission was ordered to expedite.

After the court's ruling, an administrative trial of the Commission's action was "temporarily halted" in response to Warner and Polygram's request for a recess.

Federal Trade Commission v. Warner Communications Inc., 742 F.2d 1156 (9th Cir. 1984) [ELR 6:6:10]

Summary judgment granted to BMI against unlicensed jukebox owner because court finds owner's argument that it applied for registration certificate to be implausible and unpersuasive

"Play it again Sam," but this time affix the certificate of registration. That was the thrust of the warning that Judge Barker gave when she granted BMI's motion for summary judgment and awarded $2,000 to BMI and against P & R Amusement and Ken Pickett, an officer, director and shareholder of P & R. The court sustained BMI's motion because it concluded that P & R had offered no credible evidence to rebut BMI's claim that P & R had operated a jukebox without first obtaining the requisite certificate of registration.

The 1976 Copyright Act requires jukebox owners to obtain a copyright registration certificate which is issued upon receipt of an application for a compulsory license. Jukebox operators must then affix this registration certificate to the machine "in a position where it can be readily examined by the public."

P & R Amusement leased a jukebox to the Cloverdale Auto/Truck Stop in Cloverdale, Indiana. On September

28, 1981, P & R publicly performed eight compositions on the jukebox without first obtaining the required certificate of registration which was to be affixed to the jukebox.

BMI, the owner of the public performance rights to the songs, brought an action seeking injunctive relief, statutory damages, costs and attorneys' fees. Arguing that P & R had no defense, BMI moved for summary judgment.

In granting BMI's motion the court held that BMI had presented sufficient evidence to prove each element necessary in order to prove copyright infringement: "1. originality and authorship of the compositions involved ... 2. compliance by the copyright holders with all formalities required to secure the relevant copyright ... 3. BMI's proprietorship of these copyrights ... 4. public performance of the compositions involved for profit ... 5. and defendants' allowance of the performance of the compositions without the required licenses and without BMI's permission."

P & R did not contest BMI's claim with respect to the first four elements, but it did argue that it had filed an application for a registration certificate within the time period required by the Copyright Act. However, P & R said, "for some 'unknown' reason the application and registration fees were not processed by the Copyright Office." In addition, P & R argued that its good faith was evidenced by the fact that after being notified of its alleged infringement it promptly refiled its application for a registration certificate with the Copyright Office.

Judge Barker found these assertions "unpersuasive and implausible" because P & R was aware of the registration requirement because it had registered other jukeboxes in the past. Thus, the court held that P & R had a duty to check with the Copyright Office after about a month, once it realized that the certificate had not been issued.

Moreover, the court stated that P & R's argument was legally insufficient "because the gravamen of this case is the failure to affix the certificate to the jukebox...." Thus, evidence of P & R's attempt to receive a certificate of registration would not go to the question of liability but rather it would go towards the mitigation of damages.

BMI elected, pursuant to the 1976 Copyright Act, to recover statutory damages for each infringement. Hence, the court had to determine how many times infringements had occurred and what statutory amount to award.

BMI submitted an affidavit from one of its field representatives in support of its allegation that P & R had publicly performed eight copyrighted musical works without the required certificate of registration.

P & R did not contest BMI's allegations as to the first three songs but it did maintain, in an affidavit by Pickett, that "selections four through eight ... were not on the machine in question." The problem with this assertion, however, was that P & R offered no evidence other than to deny the facts alleged in BMI's affidavit. This was in the court's opinion far from sufficient. "Pickett's affidavit ... represents the most self-serving sort of declaration since Pickett is the only person whose interests are served by this statement."

Having concluded that P & R failed to raise any genuine issue of material fact, the court granted BMI's motion for summary judgment.

Judge Barker was not without some sympathy towards P & R. Recognizing "the small-business nature of defendant's operation," the court, in its discretion, awarded the minimum statutory award of $250 per infringement as well as costs and attorneys' fees. This was, in Judge

Barker's opinion, sufficient to compensate BMI and to deter future would-be infringers from failing to obtain the required certificate of registration from the Copyright Office.

Broadcast Music, Inc. v. P & R Amusement, Inc., Cause No. TH 82-259-C (S.D. Ind., May 18, 1984) [ELR 6:6:11]

Restaurant that hired union musicians pursuant to AF of M contract form was an "employer" liable for unemployment insurance contributions, rules California appellate court, despite absence of a collective bargaining agreement between the restaurant and the union

In order to determine whether an entity hiring musicians would be required to withhold unemployment insurance contributions, section 680 of the California Unemployment Insurance Code defined an "employer" as any person contracting for the services of musicians and meeting four specific conditions. One of the conditions in this brief-lived statute (enacted in 1971; repealed in 1982) was that the "person" had "executed a written agreement with a labor organization representing the musicians which provides that such person is the 'employer' of such musicians, and assumes liability to provide for and pay unemployment insurance taxes upon their wages."

Between 1970 and 1974, Far West Services, Inc., hired both union and non-union musicians to perform in its restaurants. Far West entered into written contracts with the musicians, or in the case of a group, its leader. Non-union musicians signed contracts prepared by Far West;

members of the American Federation of Musicians signed standard Form B contracts in which it was stated that Far West was the musician's employer and assumed the unemployment insurance tax liability. The musicians forwarded a copy of the signed Form B contract to the union for review and approval. Far West also required union musicians to sign a side contract in which the musicians agreed that they were independent contractors and that "the musicians collectively or their leader as employer of such musicians shall . . . pay the . . . taxes . . . connected with this engagement . . ." The union did not receive a copy of this side contract.

Eventually, the California Employment Development Department determined that Far West was responsible for $66,132.16 in unpaid unemployment and disability insurance contributions. Far West paid the disputed assessment and then petitioned for a refund. An administrative law judge's ruling against the company was upheld by the California Unemployment Insurance Appeals Board. But a San Diego trial court judge granted the company's petition for a refund. The trial court found that Far West did not intend to enter into any agreement with the musician's union via its use of the Form B contract.

The trial court judgment has been reversed by a California appellate court.

On appeal, the Employment Development Department argued that the Form B contract was valid, binding and enforceable as among Far West, the signatory musician and the union, and imposed a statutory tax obligation under section 680 upon Far West. The undisclosed side contract, according to the Employment Development Department, did not interfere with "the statutory policy of placing a primary tax obligation on the business contracting with the musicians in order to guarantee that the state is not deprived of its tax receipts to fund musicians' unemployment benefits which otherwise occurs by reason of the instability and poor bargaining position of itinerate musical groups."

The appellate court, in agreeing with the Employment Development Department, pointed out that prior to the enactment of section 680, courts had held that Form B contracts, "in spite of their seemingly clear language," did not create the employment relationship necessary to require the withholding of unemployment insurance contributions by the hiring party. But Far West's use of Form B in all of its dealings with union musicians (knowing that a copy of the contract would be submitted to the union) amounted to "a written agreement with a labor organization" under section 680, according to the court, although Far West never executed a collective bargaining agreement with the union, thereby rendering Far West an employer for purposes of unemployment insurance contributions.

The union may not have been an express signatory to the Form B contracts between Far West and a solo musician or the leader of a musical group, but "the nature of the contracts and the record shows the union was an implied . . . party to the Form B contract." The fact that the union did not actually sign and return a copy of the contract to Far West did not excuse Far West from the company's obligation. The evidence established, for the court, the contractual relationship among the parties. The union provided the forms and dictated the text of Form B; Far West and the musicians agreed to all the provisions contained in the contract, including the specific agreement to abide by the union's constitution and bylaws, rules and regulations; and Far West accepted the designation "employer" as well as the obligation to pay unemployment insurance contributions. In all, "while a Form B contract is not a collective bargaining agreement, it nevertheless establishes a similar relationship between the parties with the same result while the particular musicians are temporarily working for the employer. For the Form B contract contains the same basic terms and conditions of employment peculiar to the music entertainment industry and binds the employer as well as the employee to provisions not dissimilar from . . . an ordinary collective bargaining agreement." Furthermore, Far West did not delete the contribution withholding provision from the Form B contract it knew had to be approved by the union; it "avoided it by a surreptitious side agreement." As a result, the court concluded that Far West entered into an effectively binding agreement with the union in concert with union musicians for "(to) conclude otherwise would render the Form B contract a nullity regarding the binding of the employer and employee to the union regulations."

The court declined to heed Far West's "'now you see it, now you don't' subterfuge" under which the company made the union believe that the only contract involved was the Form B agreement. The side contract declaring the musician an independent contractor was "a simple scam" to avoid both union problems and compliance with section 680, stated the court, and would thwart the statute's purpose of insuring the adequate growth of the unemployment insurance fund.

The court also rejected Far West's contention that section 680 denied the company equal protection of the laws under the United States and California Constitutions. Far West contended that there was no rational basis to differentiate between a restaurant employing union musicians and a restaurant employing nonunion musicians, i.e., that the labor union membership of some musicians did not constitute a significant classification to require restaurants hiring union musicians to pay unemployment insurance contributions. The court found that there did exist a reasonable distinction between restaurants hiring union musicians and those hiring nonunion musicians - the restaurants hiring nonunion musicians would be free to negotiate contracts under any terms they could obtain. By the enacting section 680, the legislature sought to facilitate the collection of unemployment insurance contributions on behalf of union musicians - a legitimate state purpose supporting a constitutionally valid classification.

The Form B contract also did not violate the National Labor Relations Act, as argued by Far West, concluded the court.

Since 1983, musicians have been subject to the general provisions of California's Unemployment Insurance law, regardless of their union status. As a result, restaurants and other employers must make unemployment insurance contributions if they have an employer-employee relationship with musicians, but not if the musicians' services "are in the nature of a single transaction" rather than as part of "a continuing relationship." (Cal. Unemployment Insurance Code section 621.)

Far West Services, Inc. v. Livingston, 156 Cal.App.3d 931, 203 Cal.Rptr. 486 (1984) [ELR 6:6:12]

Arbitrator rules that American Broadcasting Company's photograph release form did not violate still photographer's rights under collective bargaining agreement

Arbitrator Paul W. Rothschild has found that American Broadcasting Company's photograph release forms did not violate still photographer Bruce Herman's rights under the 1979-1982 collective bargaining agreement between ABC and the International Photographers Guild, Local 659 of the International Alliance of Theatrical and Stage Employees.

In early 1979, ABC adopted a policy of requiring all of its photographers, whether or not union-represented, to execute two forms concerning the copyright ownership of still photographs. As described by Mr. Rothschild, with respect to photographs taken of programs produced by ABC, photographers were required to acknowledge that the photographs taken at ABC's request would be deemed "works for hire" and that ABC would retain "all right, title and interest in such photographs." In the second form, which covered programs produced by independent producers for broadcast on ABC, the photographers, in addition to agreeing that ABC would retain all right, title and interest in the photographs, were asked to agree that in the event that ABC elected to use the photographs for "secondary or subsidiary commercial uses" other than advertising, publicity, promotional and related uses, the photographers would "negotiate in good faith ... with ABC ... a supplementary fee for such additional uses."

The use of the forms apparently was developed in response to the company's concern that without an acknowledgement of ABC's ownership and control of the works, the photographs might be used for "competitive merchandising purposes." The forms also were prepared in response to the "works made for hire" provision of section 201(b) of the Copyright Act of 1976. The section provides that in the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright. Section 101 of the Act defines a "work made for hire" as including " a work prepared by an employee within the scope of his or her employment." Thus, as between an employer and an employee, absent a contrary written agreement, an employer owns the copyright to the product of the employees work. (For additional information about the works for hire section, see ELR 5:9:3.)

Herman, in November 1979, refused to sign the unconditional release forms provided by ABC, stating that he objected to releasing title to his photographs for "an indefinite period of time." Although he was a Group I industry experience roster still photographer, Herman was not thereafter employed by ABC.

In his grievance proceeding, Herman contended that the company violated its collective bargaining agreement with his union by its refusal to employ him because of the release form dispute and by its unilateral imposition of the release form as a condition of employment. Herman sought access to employment at ABC despite his failure to sign the release form, and to be "made whole for any wages and benefits he may have ... lost as a result of the Company's wrongdoing."

The company viewed Herman's refusal to sign the release forms as an attempt to obtain ownership rights in his photographs. ABC stated that Herman thus was demanding "better conditions," making him contractually "unavailable" for employment under paragraph 68(b) of the collective bargaining agreement. (The cited examples of an unavailable" employee were still photographers who would demand overscale wages, an extra-long lunch period, screen credit, an equipment rental fee or a profit participation.)

Arbitrator Rothschild, ruling in favor of ABC, stated that Herman was not being required to give up property rights to which he was entitled, but rather was attempting to obtain rights to which he was not entitled. While "arguably unnecessary, the release form policy was not an unwarranted or unreasonable burden" as argued by Herman, but rather was "clearly in good faith with a legitimate goal of preventing both abuse and litigation." (Testimony at the arbitration proceeding did not set forth specific instances where a still photographer engaged in the unauthorized use of material, but a representative of MCA/Universal indicated that there was widespread concern among the studios over potential misuse of photographs and described various methods to prevent such misuse, including release forms similar to those prepared by ABC.)

Furthermore, it was noted that Local 659, in early 1979, learned of the release form policy and of ABC's intent not to hire photographers who would not sign the form; and the union did not object to the policy or seek negotiations concerning its application prior to the initiation of Herman's grievance procedure, some two and one-half years later.

Mr. Rothschild therefore declared that ABC did not violate the collective bargaining agreement when it refused to hire Herman on the basis of his noncompliance with the release form policy and that the imposition of the policy as a condition of employment did not violate the collective bargaining agreement.

In the Matter of the Arbitration between American Broadcasting Company and International Photographers Guild, Local 659, of the International Alliance of Theatrical and Stage Employees, (Grievance of Bruce Zachary Herman, August 3, 1984) [ELR 6:6:13]

Former USFL "Eligibility Rule" violated Sherman Act, Federal District Court rules in suit brought by punter Bob Boris

In a decision which may ultimately have an impact on the enforceability of the NFL's player eligibility rule, a Federal District Court in California has ruled that the USFL's "Eligibility Rule," as it existed in 1983, violated the Sherman Antitrust Act. Judge Laughlin E. Waters held that the "Eligibility Rule," as it was applied to Bob Boris, constituted a "group boycott," and "was therefore a per se violation of section 1 of the Sherman Act." In so holding, the court granted in part Boris' motion for partial summary judgment against the USFL and the Arizona Wranglers, a USFL team. Judge Waters denied a part of Boris' motion stating that the issue of whether the USFL's "Territorial Schools Rule" violated the Sherman Act was "an issue that must be resolved by the 'rule of reason' at the trial of this action."

Boris played football at the University of Arizona during the 1980-81 and 1981-82 seasons and for the first three games of the '82-'83 season. After the third game of the '82-'83 season, Boris voluntarily withdrew from school.

In October 1982, Boris entered into a contract with Professional Sports Management, Inc., a management firm for professional athletes. As a result of entering into this contract, Boris became ineligible to ever again participate in amateur collegiate football based on the rules and regulations of the NCAA. Between February 1983 and May 1983, PSMI attempted to obtain employment for Boris with a USFL team. However, PSMI was unsuccessful in obtaining even a tryout for Boris with a USFL team because of the USFL's "Eligibility Rule" and "Territorial Schools Rule."

The USFL and its member teams had earlier agreed among themselves to adhere to and enforce the "Eligibility Rule" which provided that "no person shall be eligible to play or be selected as a player unless (1) all college football eligibility of such player has expired, or

(2) at least five years shall have elapsed since the player first entered or attended a recognized junior college, college, or university...."

The USFL's "Territorial Schools Rule" provided, in essence, that "each member team of the USFL shall be assigned five 'territorial schools.' Each year, each USFL member team may select five players from each of its 'territorial schools' and identify those players to other teams in the league. After those players have been so identified, all other teams in the league, pursuant to the USFL member teams' agreement, will not deal with any of those players, unless the team selecting those players sells or waives its rights to such a player."

The University of Arizona was a territorial school of the Arizona Wranglers. Under the "Territorial Schools Rule," the Wranglers had the option to select Boris in the January 1985 draft, after his theoretical college eligibility had expired pursuant to the USFL "Eligibility

Rule." The Wranglers were not required to exercise their option until December 1984 and they refused to consider waiving or selling their rights.

In late 1983, Boris filed suit against the USFL and the Wranglers alleging that the USFL's "Eligibility Rule" and "Territorial Schools Rule" violated the Sherman Act and that Boris was therefore entitled to damages and an injunction. In January 1984, Boris made a motion for partial summary judgment on these issues.

In granting Boris' motion in regards to the USFL "Eligibility Rule," Judge Waters made several findings in support of his conclusion that the "Eligibility Rule" constituted a "group boycott." Judge Waters first found that although the USFL advanced several reasons in support of its eligibility rule, the principal reason for the adoption of the rule was "to respond to apparent demands made by college football programs and thereby to gain better access to these programs towards the end of selecting the best college players available." Judge Waters stated that "as written, the 'Eligibility Rule' imposes an absolute exclusion on all persons who still have theoretical collegiate athletic eligibility remaining" and it "does not provide procedural safeguards whereby an individual may contest his exclusion under the 'Eligibility Rule.'"

Judge Waters also found that given the issues presented in this case, USFL teams can be considered "economic competitors." As such, the enforcement of the "Eligibility Rule" "involved combining for the primary purpose of coercing or excluding third parties, and did in fact have the effect of coercing or excluding those third party individuals deemed ineligible by the Rule."

Finally, Judge Waters concluded that the USFL and its member teams had applied the "Eligibility Rule" in conjunction with the "Territorial Schools Rule" so as to render Boris ineligible to play professional football with any USFL team, and Boris was therefore entitled to partial summary judgment in regards to the "Eligibility Rule."

In early September of this year, Boris and the USFL reached an out-of-court settlement on the issue of damages. Boris' attorney, John L'Estrange, said the settlement included legal fees and compensation, but he did not disclose the amount.

Boris did eventually get an opportunity to play in the USFL after the Wranglers traded him to the Oklahoma Outlaws. However, the Outlaws cut Boris from the team last season.

The USFL had been confronted with a challenge to its eligibility rule even before the Boris case. Herschel Walker, then a junior at the University of Georgia, decided to give up college football to play professionally in the USFL. Walker was granted an exemption from the league's eligibility rule after Walker's lawyer reportedly threatened to sue over the matter. Walker signed a five-year contract with the USFL's New Jersey Generals for a reported $6 million to become the first college underclassman to be signed by a USFL team.

After the Boris decision, the USFL changed its rule to allow underclassmen to apply for eligibility, a system somewhat similar to the NBA's. Pursuant to the new system, the USFL allowed its New Orleans Breakers team to sign Marcus Dupree, a former running back at the University of Oklahoma. Had the USFL chosen to stick by its previous rule, Dupree would not have been eligible to play in the USFL until 1987. Reports placed the value of Dupree's fiveyear contract with the Breakers at $6 million.

Boris v. USFL, Civil Action No. 83-4980-LEW (kx) (C.D. Cal., February 28, 1984) [ELR 6:6:14]

Federal Court of Appeals affirms ruling in favor of NFL in suit brought by member of now-defunct World Football League alleging NFL violated anti-trust laws by refusing to grant membership in NFL

There may be "Bears" in Chicago, but there aren't "Grizzlies" in Memphis, at least not as far as the NFL is concerned. In affirming a Federal District Court's summary judgment ruling in favor of the NFL, a Federal Court of Appeals has held that the Mid-South Grizzlies of the nowdefunct WFL failed to show any "actual or potential injury to competition resulting from the rejection of their application for an NFL franchise."

In 1974 and 1975 the Grizzlies were a member team in the WFL with its home team location in Memphis, Tennessee. However, the WFL disbanded about halfway through the 1975 football season. Subsequently, the Grizzlies applied for membership in the NFL. The NFL had no franchise in Memphis and the granting of a Memphis franchise would not have infringed upon the "home territory" of any NFL member under the league's rules. Nevertheless, the NFL rejected the Grizzlies' application.

The NFL stated several reasons for its decision including "scheduling difficulties created by the presence of an odd number of teams, a long-running collective bargaining dispute with league players, and several pending antitrust lawsuits...."

In December 1979, the Grizzlies filed suit against the NFL. The Grizzlies alleged that the refusal to grant their application was a result of a conspiracy between the NFL and its member teams to "punish, intimidate, and restrain" the Grizzlies from participating in professional football because they had competed with the NFL as a member of the WFL; that no valid reason for their rejection was articulated by the NFL, and that such rejection amounted to an unreasonable restraint of trade, or a group boycott; and that the exclusion, so motivated, violated antitrust laws.

The NFL made a motion for summary judgment. A Federal District Court in Pennsylvania granted the NFL's motion, holding that the Grizzlies had more than sufficient discovery to fully develop their case and that as a matter of law the Grizzlies had failed to show any actual or potential injury to support their antitrust claims. The Grizzlies appealed that ruling contending that the District Court erred in granting summary judgment while the Grizzlies' discovery requests were outstanding, and when there were disputed facts material to the legal issues presented.

Federal Court of Appeals Judge Gibbons, in affirming the District Court's ruling, first addressed the issue of whether the summary judgment motion was ripe for decision without further discovery. Judge Gibbons stated that to preserve a Rule 56(f) contention that summary judgment should be delayed pending further discovery, it is necessary to file an affidavit setting forth the specific reasons for such a delay. Judge Gibbons found that the Grizzlies failed to file such an affidavit, and without it the Grizzlies reply brief raised "no more than a merely colorable claim" that further discovery would lead to relevant evidence to resolve this matter. Judge Gibbons further stated that the irrelevance of most of the pending discovery requests showed just how speculative the Grizzlies' Rule 56(f) showing was, even assuming that it should be considered without an affidavit. For these reasons, Judge Gibbons concluded that the trial court did not err in considering the motion for summary judgment on the present record.

The Court of Appeals next considered the merits of the District Court's decision. It was the Grizzlies contention that the 1966 statute which authorized "NFL acquisition of monopoly power in the professional football market" (i.e., the NFL-AFL merger) required not only that the NFL refrain from abusing that power against potential competitors, but that it take affirmative steps to share its market power with others. Judge Gibbons noted that such a reading of the statute poses two issues. One is the issue of abuse of monopoly power against potential rivals of the NFL and the other is the issue of admitting others to share in the NFL's dominant market position. As Judge Gibbons stated, although the former might well result in antitrust liability, only the latter is present in this case.

Judge Gibbons pointed out that there are two possible sources of any NFL obligation to permit entry to its market: the 1966 statute, and the Sherman Act. Judge Gibbons found that "since the 1966 statute is not directed at the preservation of competition in the market for professional football, and cannot be construed as conferring any economic benefit on the class to which the Grizzlies belong," the statute "does not oblige the NFL to permit entry by any particular applicant to the NFL shared market power." Therefore, the 1966 statute does not provide a basis for relief for the Grizzlies.

Judge Gibbons then pointed out that Sherman Act liability requires an injury to competition. It was the Grizzlies contention that there were material issues of disputed fact as to the accuracy of the NFL's reasons for rejecting the Grizzlies application and that at trial the Grizzlies could prove an illegal motive behind the NFL decision. Judge Gibbons stated that even assuming such disputed fact issues were present, "those disputed facts are not material, under section 1 of the Sherman Act, if the acts complained of produced no injury to competition."

After considering all of the arguments put forth by the Grizzlies, Judge Gibbons found that they had "failed to show how competition in any arguably relevant market would be improved if they were given a share of the NFL's monopoly power," and that since "the Grizzlies have shown no actual or potential injury to competition resulting from the rejection of their application for an NFL franchise, they cannot succeed on their section 1 Sherman Act claim." For these reasons, the Court of Appeals concluded that there were no disputed fact issues material to the legal issues presented and therefore the trial court properly granted summary judgment for the NFL.

The United States Supreme Court refused to hear the case.

Mid-South Grizzlies v. NFL, 720 F.2d 772 (3d Cir. 1983) [ELR 6:6:15]

Federal Court of Appeals permits NCAA and Lowell University to exclude Canadian ice hockey player from participating in intercollegiate hockey

A legal face-off between Canadian ice hockey player Robert Spath and the NCAA has resulted in a courtroom victory for the NCAA and its eligibility rules. A Federal Court of Appeals has ruled that Spath failed to show a likelihood of success on the merits of his equal protection, due process, and state law claims against the NCAA. In so holding, the appellate court vacated a District Court order restraining the NCAA from enforcing its eligibility rules against Spath.

Spath was a senior and fourth-year student at the University of Lowell on an athletic scholarship. Spath had played three years on the Lowell ice hockey team, and was ready to play his fourth and supposedly final year when the university told him that his college eligibility had expired under NCAA rules. The applicable rule "limits participation in intercollegiate competition to four years, and ... each year of organized competition anywhere in the particular sport after age 20 is to be counted."

Spath, who is Canadian, had played hockey on a team after his 20th birthday and before coming to Lowell. Accordingly, having played three years at Lowell and on a Canadian team before coming to Lowell, Spath allegedly "had run out his time." Under NCAA rules, if the university had permitted Spath to play his senior year, Lowell would have been "subject to NCAA sanctions, including forfeiture of any games in which the disqualified athlete competed." The university did apply for an exemption for Spath, but that request was denied.

Being finally disqualified, Spath brought a civil rights action against the NCAA and Lowell "seeking a declaration of rights and affirmative relief by way of an order allowing him to play." A Federal District Court in Massachusetts granted Spath a temporary restraining order. The case was later tried and taken under advisement with the temporary restraining order "continued until further order of court." The NCAA immediately appealed that order.

Federal Court of Appeals Judge Bailey Aldrich, in reversing the District Court's order, stated that although restraining orders are not appealable, this order amounted to a preliminary injunction, in substance, since the case had been tried on the merits and the order had been "continued without time limitation."

Judge Aldrich pointed out that the District Court's final decision on the merits will go "beyond deciding whether one college student can play hockey, and it is therefore "extremely important" that the requirements for granting preliminary relief be met. Of those requirements, Judge Aldrich found that Spath had "too severely failed with respect to showing a likelihood of success" on the merits of his equal protection, due process, and state law claims.

The appellate court first addressed Spath's equal protection claim. It was Spath's contention that "Canadians, for various reasons, play more competitive hockey, after age 20 and before coming to college, than do Americans, and that the Bylaw is particularly directed against aliens." For that reason, Spath sought "close scrutiny of the purposes underlying the rule."

Judge Aldrich stated that "there being no fundamental right to education, . . . there could hardly be thought to be a fundamental right to play intercollegiate ice hockey." Judge Aldrich further stated that as far as Spath was concerned, the NCAA Bylaw was "facially neutral," and therefore the heavy burden is on Spath to prove that the NCAA "purposefully discriminated against aliens as a class."

Spath presented evidence from the "legislative history" of the NCAA Bylaws which recognized that "perhaps more aliens ... would be affected by an age and experience rule than would Americans' " However, as Judge Aldrich found, the NCAA debates on the rule "related primarily to the desirability ... of restricting older and more experienced players generally, with the emphasis being on experience. The most the record might show is an overall awareness of a possible greater impact on aliens." For these reasons, Judge Aldrich concluded that Spath had "not approached the point of establishing the constitutionally required 'purposeful intent' to discriminate against aliens because of their alienage." Judge Aldrich further concluded that the rule was reasonable since in college athletics "fairness suggests restrictions against those who may be excessively qualified."

The court next addressed Spath's due process claim that "his scholarship gave him a contractual 'property' interest in playing ice hockey for Lowell, and the right was denied without proper procedure." Judge Aldrich stated that "even if we assume Spath's scholarship affords him a contractual right to play, rather than merely to have his tuition paid, . . . we fail to see what further procedures were required." As Judge Aldrich noted, Lowell had applied to the NCAA for a special exemption, but that was denied. Furthermore, the NCAA rule was "effective, published, and accessible to anyone interested, from 1980 forward," and therefore, Spath had notice of the rule. Judge Aldrich stated that "the NCAA could not be charged with giving personal notice to every student."

Spath's final contention was that his scholarship included an obligation to allow him to play. In rejecting this contention, Judge Aldrich noted that Spath's scholarship "made clear reference to the NCAA rules, and it is difficult to conceive how Lowell could be thought to have obligated itself to violate them." Judge Aldrich further noted that "it is equally difficult to think a court would order a college to place a student on a varsity team as a matter of contract." Judge Aldrich stated that "specific performance of a personal service contract, irrespective of the NCAA rule that might require forfeiture of Lowell's games, seems out of the question." Judge Aldrich further stated that Spath's claim that the "NCAA wrongfully induced Lowell to break a contract is altogether frivolous."

Spath v. NCAA, 728 F.2d 25 (1st Cir. 1984) [ELR 6:6:16]

Federal District Court upholds local government authority to prevent increase in basic cable service rates via cable operator's retiering of basic service

When a cable television company enters into an exclusive franchise agreement with a municipality to provide cable service to local residents, the cable company generally agrees to furnish a basic service package in return for the monthly fee paid by subscribers. Thus, when Cox Cable New Orleans, Inc. began operating in New Orleans, Cox agreed to furnish the city's residents with a basic package of 31 stations for $7.95 per month. The package included the seven "must carry" stations required by Federal Communications Commission rules, plus the signals of ESPN, the USA Network and several "superstations," but the package did not include pay television services such as Home Box Office, Showtime and The Movie Channel.

In late July 1984, Cox declared its intention to raise the rates charged to its subscribers for the 31-channel basic service. Cox planned to restructure its basic service into two tiers - one known as "Introductory Cable" with eleven channels, and the other known as "New Orleans Plus" with 22 channels. Cox then would charge $4.95 per month for the Introductory service and $6.00 per month for the Plus service. Perhaps anticipating a negative reaction, Cox filed an action in Federal District Court seeking to restrain city officials from filing suit or passing any ordinance which would prevent the company from implementing its "retiering" proposal or which would penalize the company for this change in the terms of its franchise.

The rate increase went into effect on August 1, 1984. On August 2nd, the court issued a temporary restraining order (and subsequently a preliminary injunction) in favor of the city. The injunction required Cox to roll back its rates to the level charged prior to August 1st. As a result, Cox announced that effective September 1st, subscribers would receive the 11-channel Introductory package for $7.95, and the 22-channel Plus service for an additional $3.00 fee. In this way, Cox calculated that it would obtain its rate hike while complying with the city's effort to maintain the established $7.95 rate for basic service.

The wondrous transformation of a 31-channel basic service into an 11-channel service generated various state and federal court proceedings, including Cox's motion for a declaration that the company could delete, without substitution, any or all non-must-carry signals from its basic tier without obtaining the approval of the city. Cox argued that it was entitled to remove program offerings from its basic service without the city's approval since any franchise provisions requiring the company to provide services beyond the FCC's must-carry signals were preempted by federal law and therefore void.

The court first determined, after lengthy consideration, that it possessed jurisdiction to rule on Cox's motion. Judge Veronica Wicker then determined whether the FCC had expressed an intent to preempt local regulation of basic cable service rates. In accordance with the test recently set forth in Capital Cities Cable, Inc. v. Crisp, 104 S.Ct. 2694 (1984) (ELR 6:3:14), Judge Wicker held that the Commission has not preempted local rate regulation and that "to the extent, if any that the Commission ... may purport to have done so in the Community II decision (see report below) such actions ... would be beyond its regulatory authority and, therefore, null and void." While the Commission has the authority to regulate the cable industry, the Commission consistently has left to local governments the exclusive authority to regulate the rates for basic cable service, the court observed. Over the years, the Commission has accommodated a "structured dualism" of combined federal-local regulation under which local regulatory bodies are given the authority to regulate the rates for the installation of cable equipment and for "regular subscriber services," i.e., "services regularly furnished to all subscribers." Furthermore, federal regulations prohibit cable operators from changing the rates charged subscribers except as authorized by the franchising authority.

In 1974, the Commission clarified its regulations by distinguishing between regular subscriber service subject to regulation at the local level and "specialized programming" or "pay television" for which a per-program or per-channel charge is made. Local government regulation of such special pay services is preempted. Indeed, the FCC found that neither local nor federal regulation of the rates for such special services was warranted.

But what constitutes "regular subscriber service"? Judge Wicker stated that basic subscriber service is not necessarily limited to the must-carry signals, as argued by Cox. Rather, in this case, Cox's basic 31-channel service "was in its entirety an element of regular subscriber service," since it was received by all Cox subscribers.

Cox argued that the FCC's original ruling in In re Community Cable TV (see ELR 6:6:19) supported the ompany's position that the city could not prevent Cox from retiering its basic service. But the court stated that Community I concerned proposed state regulation of an "expanded tier" as distinct from a "basic" tier. And the basic tier service in Community I did include nonmandatory signals in addition to the must-carry signals. Local regulation of the expanded tier was preempted because it was not regularly provided to all of the company's subscribers. Thus, in Judge Wicker's view, Community I "broke no new ground and has no bearing on this case. It concerns rate regulation of a non-basic tier only, where local regulation has been preempted since 1972."

Cox also cited in support of its position the FCC's opinion declining to reconsider its decision in Community Cable (Community 11). In Community II, the Commission again stated that local regulation extends to "that service regularly provided to all subscribers." Footnote 6 of the FCC's opinion was particularly significant, according to the court, for in this footnote, the Commission stated: "There is no magic number of channels which constitutes basic service, save for the minimal requirement of all mandatory signals. ... Of course, if an operator chooses to provide discretionary services as part of basic service, whether this be 12-, 20-, 36-, or 54-channel service, or more, the rate for the entire basic tier remains subject to local regulation."

Thus, for Judge Wicker, the Community Cable cases did not serve to preempt local government rate regulation or to prevent a local authority from holding a cable operator to its contractual obligation to provide all of the promised channels on the basic tier. Cox's action in reducing the number of channels in its basic service while retaining the $7.95 fee meant that Cox in effect increased the rate for its basic service. The city therefore was entitled to prevent Cox's "retiering scheme" in order to enforce its authority to regulate rates.

The Capital Cities decision also did not provide Cox with the right to retier its basic service. Capital Cities was a true signal-carriage case, noted the court. Cox's case did not involve altering the substance of broadcast signals, setting the channels for Cox's transmissions, or requiring Cox to carry signals which are not permitted by FCC rules. And, most emphatically, the dispute did not concern pay cable programming.

In all, the city was entitled to regulate Cox's basic service package pursuant to "the right of local agencies to regulate retiering as an element of rate regulation; their authority to choose the cable franchisee; and their general grant of responsibility over basic subscriber services." This authority has not been preempted by federal regulation, the FCC, or the Supreme Court, Judge Wicker held.

Cox's motion for summary judgment in its declaratory relief action therefore was denied and the court remanded the city's breach of contract action to state court.

"It is important to note that this case was decided prior to the recent passage of the Cable Communications Policy Act of 1984. As a result of that Act, local regulation of basic cable rates will terminate in two years. (See the Washington Monitor section of this issue.)

Cox Cable New Orleans, Inc. v. City of New Orleans, Case No. 84-3743 (E.D.La., Oct. 4, 1984) [ELR 6:6:17]

Federal Communications Commission rules that Nevada Public Services Commission may not regulate rates for tiered cable television services

The Federal Communications Commission's rulings in Community Cable TV Inc., which Cox Cable New Orleans relied upon to little avail (see ELR 6:6:17), were issued by the Commission in November 1983 and in July 1984.

The Commission's November 1983 decision was in response to a petition brought by Community Cable, the operator of a cable television system in Las Vegas, Nevada, seeking a ruling that federal preemption of cable television rate regulation extends not only to pay or subscription cable services (i.e., programming for which a per-channel or perprogram charge is made) but also to special or auxiliary cable services - primarily satellite-delivered programming - of the kind provided in tiers of services. These "tiers" are offered to cable system subscribers at a single package rate distinct from the rate charged for basic program service.

Community Cable sought the ruling in response to a Nevada Public Services Commission proposal to regulate rates for all "subscriber services" - a term defined in the proposed order as "all cable television service provided other than pay channel services." The Public Services Commission declared that the scope of federal preemption was limited to programming for which per-program or perchannel charges are made.

In its petition, Community Cable noted that its "expanded tier" included satellite delivered services such as WTBS, ESPN and the Cable News Network; and it pointed out that if the company attempted to offer these services on a separate per-channel charge basis to avoid Nevada state rate regulation, other cable services such as MTV and Nickolodeon no longer would be made available to the company.

In contrast to Cox Cable, Community Cable did not question local rate regulation of basis subscriber services even though Community's basic tier did include some satellitedelivered programming as well as the mandatory carriage signals. Community Cable's petition emphasized that local rate regulation was preempted for non-basic subscriber services in order to encourage the development of innovative and diverse programming services, and the FCC agreed.

The Commission first adverted to its policy of "deliberately-structured dualism" in which regulatory responsibility is divided between the Commission and nonfederal authorities. Preemptive jurisdiction was maintained over nonbroadcast programming services in order to facilitate experimentation and growth of cable television. Local authorities retained the power to regulate basic service rates, which the FCC defined as "charges imposed for receipt of broadcast signals required to be carried by our rules . . . It does not apply to auxiliary services such as pay cable advertising, leased channels, etc. We continue to believe that it is premature for any rate regulation to be imposed on these other services. We have preempted such regulation with the express intent of allowing the marketplace to function freely."

Preemptive jurisdiction applied to the tiering of nonbasic subscriber services, in the Commission's view, in order for system operators and nonbroadcast programming entrepreneurs to have the maximum flexibility in the marketplace, in the public interest, to experiment with program offerings and payment methods for such programming. Thus, Nevada's proposal was found contrary to the Commission's preemption policy and of no effect.

A company known as Cablevision of New Jersey filed a petition with the FCC seeking reconsideration of the Commission's order in Community Cable. A New Jersey administrative law judge had ruled that the FCC's preemptive jurisdiction over discretionary services on non-basic tiers applied only to new services offered, and that existing services remained subject to municipal regulation.

But in its July 1984 ruling (ELR 6:3:21), the Commission observed that "it is evident that petitioners have fundamentally misconstrued the thrust of our prior decision." The decision in Community Cable broke no new ground, stated the FCC, quoting a Federal Court of Appeals as follows: "The policy to preempt has been shouted from the rooftops...." The fact that local franchising authorities may have believed that their regulatory authority over non-basic services had not been preempted and that they may have acted upon that belief did not mean that the belief was correct, cautioned the Commission.

In the strongest terms at its command, the FCC reiterated its resistance to the potential "regulatory constraints of the more than 15,000 government cable franchising entities as a distortion of market forces which would create barriers to growth and diversity in cable service."

The Commission did state that Cablevision was free to add, delete or realign its service "so long as the basic service contains all the signals mandated by the Commission's rules."

Two years of local authority over basic service rates apparently remain under the recently-enacted, as yet unsigned Cable Communications Policy Act of 1984. (See ELR 6:6:22) Given the decision in Cox Cable and footnote 6 in the Community 11 ruling, it remains to be seen if, during these two years, cable systems which include signals beyond those mandated by the FCC in their basic service package will abide by the rate and programming service terms of locally granted franchises.

In re Community Cable TV Inc., 54 RR2d 1351 (Nov. 8, 1983), 56 RR2d 735 (July 12, 1984) [ELR 6:6:19]

Briefly Noted:

New York Civil Rights Law.

Television personality Johnny Carson has obtained a preliminary injunction barring the unconsented-to use of his name, portrait or picture for advertising purposes in connection with the production of a movie entitled "The Eileen Ford Story." The injunction also prevents parties associated with the movie from issuing public statements concerning Carson's purported interest in the project. Carson's action apparently was prompted by newspaper articles displaying his photograph and indicating that Carson would make his movie debut in the film. Carson denied any such involvement.

Carson v. King, New York Daily Journal, p. 6, col. 3 (N.Y.Cnty., Oct. 16, 1984) [ELR 6:6:19]

Libel.

A Federal District Court in the District of Columbia has granted a summary judgment in a libel action brought by an air traffic controller against a magazine which claimed he was partially to blame for an air crash. Washingtonian Magazine featured an article about airplane crashes and air safety in general, noting that controller errors were partially to blame for only a few accidents. The magazine cited the TWA crash into Mount Weather in Virginia as an example. The controller, who was the sole controller on duty during that crash, sued the magazine alleging that the statement was false and defamatory. The magazine had based its statement on an official National Transportation Safety Board report. The traffic controller admitted that a publication has immunity as a result of the "fair comment" or "record" privilege when there is a fair and substantially correct statement of the record. Here, however, the controller asserted, the magazine failed to identify the source of the statement and that a federal court in Virginia had held that he was not negligent in his duties in connection with the crash. The court held that the name of the governmental body and the precise designation of the proceeding in which the finding was made were irrelevant to the privilege. Additionally, the earlier court ruling regarding the controller's non-negligence was rendered in an unrelated wrongful death action brought by relatives of some of the airliner's crew. The magazine's conditional privilege, the court held, was not defeated by this collateral litigation whose finding was at odds with the Safety Board. The publishing of the Board's findings about the causes of transportation disasters fosters understanding of safety issues, noted the court, and discussion and comment regarding those findings are in the public interest.

Dameron v. Washington Magazine, Inc., 575 F.Supp. 1575 (D.D.C. 1983) [ELR 6:6:20]

Copyright.

The maker and distributor of coin-operated miniature hockey games has been granted a preliminary injunction against the maker and distributor of a similar game in a copyright infringement action decided by a Federal District Court in New York. The plaintiff, Innovative Concepts in Entertainment, Inc., sought to enjoin defendants, Noma Enterprises (manufacturer) and Entertainment Enterprises (distributor) from manufacturing, selling or offering for sale any hockey game infringing its copyrighted game entitled "Chexx." Innovative held registered copyrights covering the game's hockey player figures, its game board, sound effects and computer control program. All the corresponding elements were substantially the same in defendants' game, entitled "Face-Off." The defendants, however, disputed the validity of the plaintiff s copyrights, alleging that the copyrights were invalidated by plaintiff's initial omission of notices affixed to the games when introduced, that the notices on the hockey player figures as "sculptural works" were insufficient because each lacked notice and finally that the notice of copyright in the sound effects did not comply with the Copyright Act. The court disagreed with defendants' latter two allegations, finding that the copyright of the figures was sufficient and the defective notice in the game's sound effects could be cured. As to the original omission of notice which was rectified four months after the game's introduction, the court found that the omission was a result of a mistake of law. The plaintiffs president and apparently his counsel were unaware that copyright protection might be available for the game, but this did not invalidate the copyrights. Accordingly, the court found that the plaintiff had met its burden for preliminary injunctive relief.

Innovative Concepts In Entertainment, Inc. v. Entertainment Enterprises Ltd., 576 F.Supp. 457 (E.D.N.Y. 1983) [ELR 6:6:20]

Copyright.

A Federal District Court in the District of Columbia has granted a radio station an impoundment order against a potentially competing station which copied its material in the preparation of an FCC application for permission to construct new broadcasting facilities. AM radio station WHAZ had applied to the FCC for permission to change its license to another city and to develop a new transmitting antenna at the new site. Accordingly, the station filed an application and engineering report with the FCC. These documents, as with all such documents, were routinely made available to the public for inspection. Five months later, MRLJ Enterprises filed a competing application with an identical engineering report. If MRLJ's application were granted, it would exclude operation of WHAZ's proposed facilities. WHAZ brought suit for copyright infringement, unfair competition, and fraudulent and corrupt practices. The Court found that section 503(a) of the Copyright Act lacks an explicit statutory standard to be applied upon a request for impoundment and that impoundment is discretionary with the court. The court then determined that while such an order is not technically an injunction, the plaintiff must meet the requirements for the grant of preliminary injunctive relief. WHAZ met these requirements by showing that it was likely to prevail on the merits at trial; that there was irreparable injury since there was no other adequate remedy at law; that the threatened harm to WHAZ outweighed the threatened harm of the injunction on the defendant; and that the grant of a preliminary injunction would not disserve the public interest. Thus all MRLJ's materials which infringed WHAZ's engineering report and antenna design were ordered impounded.

WPOW Inc. v. MRLJ Enterprises, 584 F.Supp. 132 (D.D.C. 1984) [ELR 6:6:20]

Defamation.

The Associated Press has won a motion for summary judgment, granted by a Federal District Court in the District of Columbia, against Theo Bell of the Tampa Bay Buccaneers, who brought suit against the wire service for publication of an allegedly libelous news story. In March 1982, a man posing as Theo Bell was arrested for alleged lewdness at an Atlantic City casino hotel, having convinced hotel and police officials of his false identity. An official arrest report and subsequent summons and bench warrant were issued when Theo Bell failed to appear in court. A reporter for AP picked up the story and after making substantial attempts to verify the story, sent it out on the news wire. Several newspapers then published the story. Bell contended that the story was not a report of an official action or proceeding which would have brought it within the privilege of a good faith publication of fair and accurate reports of official actions. He reasoned that the arrest report resulted in the imposter's arrest, not his. The court held his contention meritless, noting that the story must be compared to the official reports, not what actually happened. To rule otherwise, noted the court, would impose an excessive burden on the press to verify that the police had the right suspect in each case which would cause the cessation of reporting about criminal proceedings. Additionally, the court found that Bell, as a public figure, willingly assumed the public spotlight. To recover, he would have to show proof that the falsehood was made with knowledge or reckless disregard of the truth. Here the AP story was an inadvertent error with no malice or reckless conduct by AP.

Bell v. The Associated Press, 584 F.Supp. 128 (D.D.C. 1984) [ELR 6:6:20]

Previously Reported:

The United States Supreme Court, without comment, has declined to review the Federal Court of Appeals' decision in Fine v. Barry & Enright Productions (see ELR 6:4:6; 5:2:9), which upheld television game show contestant participation restrictions. Martin Allen Fine, who won more than $11,000 on three different game shows, had alleged that the three major networks and several game show producers violated federal antitrust laws by limiting non-celebrity contestant appearances. But the

Court of Appeals concluded that Fine did not establish that the restrictions had any anticompetitive effect. [Nov. 1984] [ELR 6:6:21]

IN THE NEWS

Federal District Court denies CBS motion for summary judgment in General Westmoreland's libel action; Cable News Network's petition to present tive coverage of trial also is denied

Federal District Court Judge Pierre N. Leval has denied CBS's motion for summary judgment in the $120 million libel action filed against the company by retired Army General William C. Westmoreland.

Westmoreland has alleged that he was libeled by statements made during the January 23, 1982 broadcast of the "CBS Reports" documentary entitled "The Uncounted Enemy: A Vietnam Deception." The program contended that there was a "conspiracy" during Westmoreland's 1964 to 1968 command of United States forces in Vietnam to deliberately underestimate the number of enemy troops. Judge Leval, citing four alleged errors in the program, determined that CBS did not demonstrate the absence of genuine issues of material fact conceming the issue of constitutional malice. Judge Laval noted, among other things, Westmoreland's contention that CBS acted with dishonesty and willful falsity in the editing and presentation of evidence, and that the network's conduct arguably may have involved "deliberate misstatements of the evidence supporting the premise of the program." He therefore ordered the case to trial.

The trial will not be televised live, because in a separate ruling, Judge Leval denied Cable News Network's petition to cover the proceedings. While expressing the view that television coverage is warranted because of the "broad social, legal and historical issues" the trial will invoke, Judge Leval declared that, notwithstanding the parties' consent to live television coverage, he did not have the discretion to waive the rules of both the Code of Judicial Conduct for the United States Courts and the Code of Conduct of the Southern District Court. The codes prohibit televised coverage of trials in federal courts.

Just prior to Judge Leval's ruling on Cable News Network's petition, the Judicial Conference of the United States, headed by Chief Justice Warren E. Burger, decided to retain the rules that ban radio and television equipment in federal courts. The Conference rejected a petition by twenty-eight media groups, including Cable News Network, which sought revision of the rules, stating that the "alleged public benefits of broadcast coverage" would be "outweighed by the risks to the administration of justice."

Most recently, the United States Court of Appeals for the Second Circuit denied Cable News Network's petition for a writ of mandamus seeking to allow the televising of the libel trial. The court stated that the writ may not be used "in lieu of an appeal." The court did agree to an expedited appeal however, and late last month it heard oral argument on the matter. A decision is being awaited as this issue went to press. [Nov. 1984] [ELR 6:6:21]

California governor signs anti-runaway production legislation, but vetoes other entertainment industry bills

California Governor George Deukmejian has signed a bill providing for the establishment of a California Film Office (a development and permitting agency) within the state's Department of Commerce. The bill also provides funding for that Office, for the state's Motion Picture Council (which will continue as a policy and advisory body), and for a pilot one-stop permit program to be administered by the Southern California Association of Governments. This bill, along with other recently signed measures, was designed to counter "runaway" film production.

The governor vetoed legislation that would have required the Motion Picture Council, along with the state's Department of Fair Employment and Housing, to study the hiring practices of the film industry.

Two other bills also were vetoed. One bill would have provided tax relief for independent postproduction sound and music editors by restricting the income earned by the editors which is subject to sales tax to ten percent, rather than 100 percent, of the invoice amount for work performed on tape and film for movies.

The other bill would have established an endowment fund with a $25 million loan from the state to help finance, via investment-generated interest, public broadcasting stations in the state.

A bill which would have restricted the use of the TVQ rating book in performer casting decisions was defeated in August 1984 in the State Assembly's Labor and Employ ment Committee. The TVQ, an annual rating of celebrities based upon a sampling of the public's perception of their recognizability and popularity, has been a long-time bane of the Screen Actors Guild. [Nov. 1984] [ELR 6:6:22]

Los Angeles court dismisses female pianist's suit alleging that Los Angeles Olympic Organizing Committee violated state Civil Rights Act by refusing to audition her for Opening Ceremonies

A female pianist's claim that the Los Angeles Olympic Organizing Committee violated the state's Unruh Civil Rights Act has been dismissed by a Los Angeles Superior Court Commissioner. Linda Fay had been refused an audition to play George Gershwin's "Rhapsody in Blue" at the July 28th opening ceremonies of the Olympic Games. The piece was played by 84 men dressed in tuxedos. The court ruled that artistic activities are not covered by the Unruh Act. [Nov. 1984] [ELR 6:6:22]

Texas institutes sales tax on motion picture theater admissions

Texas motion picture theaters, which previously were exempt from the state's sales tax, henceforth will be subject to a 4.125% state tax charge on theater admission fees under newly enacted legislation. [Nov. 1984] [ELR 6:6:22]

WASHINGTON MONITOR

Congress passes cable television deregulation bill

The Cable Communications Policy Act of 1984 has been passed by Congress at the proverbial 11th hour. The Act establishes a national policy for cable television but affirms the authority of municipalities to award exclusive franchises to cable operators, and to require operators to provide educational, public and government access channels. However, the statute limits the franchise fee that a municipality may obtain to five percent of a cable operator's gross annual revenues and ends local regulation of basic cable rates in two years. The procedures for renewing cable franchises when they expire also are set forth.

Several controversial issues raised during the gestation of the Act were resolved as follows: the numerical equal employment opportunity guidelines for the hiring of women and minorities were eliminated, but the Act directs the Federal Communications Commission to conduct periodic reviews of hiring practices in the industry; the final version of the bill eliminated a ban on newspaper ownership of cable companies; and special language was included to allow California's cable deregulation statute to remain in effect (the 1983 statute contains criteria for the deregulation of cable service rates).

The Act reflects a lengthy effort by the National Cable Television Association, the National League of Cities and the United States Conference of Mayors to arrive at acceptable legislation. (See ELR 6:2:21) [Nov. 1984] [ELR 6:6:22]

DEPARTMENTS

In the Law Reviews:

Hastings College of the Law, San Francisco, has published Volume 6, Number 2 of Comm/Ent, Hastings Journal of Communications and Entertainment Law. It is available from Hastings College of the Law, 200 McAllister Street, San Francisco, CA 94102-4978 and studies the following:

What Does "Negligence" Mean in Defamation Cases? by Marc A. Franklin, 6/2 Comm/Ent 259 (1984)

Cable-Copyright: The Corruption of Consensus by Leslie A. Swackhamer, 6/2 Comm/Ent 283 (1984)

The Athlete as Public Figure in Light of Genz v. Robert Welch,Inc., or Torts in Sports: The Role of the Courts by Richard M. Wise, 6/2 Comm/Ent 325 (1984)

Spotlight on the Jury: Trial Publicity and Juror Privacy by Susan L. Greenberg, 6/2 Comm/Ent 369 (1984)

The Copyrightability of Jokes: "Take My Registration Deposit ... Please!" by Gayle Herman, 6/2 Comm/Ent 391 (1984)

The Selig Case and Amortization of Player Contracts: Baseball Continues its Winning Ways by S. Barksdale Penick, 6/2 Comm/Ent 423 (1984)

Constitutional Limitations on Libel Actions: A Bibliography of New York Times v. Sullivan and its Progeny, 1964-1984 by Frank G. Houdek, 6/2 Comm/Ent 447 (1984)

William and Mary Law Review has published a special issue on Defamation and the First Amendment: New Perspectives which includes the following articles:

Introduction by Professor William B. Spong, Jr., 25 William and Mary Law Review 743 (1984)

Reputation, Compensation and Proof by David A. Anderson, 25 William and Mary Law Review 747 (1984)

Defamation and the First Amendment: The End of the Affair by Paul A. LeBel, 25 William and Mary Law Review 779 (1984)

First Amendment Limitations on Recovery from the Press - An Extended Comment on "The Anderson Solution" by William W. Van Alstyne, 25 William and Mary Law Review 793 (1984)

The Plaintiffs Burden in Defamation: Awareness and Falsity by Marc A. Franklin and Daniel J. Bussel, 25 William and Mary Law Review 825 (1984)

Hard Defamation Cases by Cass R. Sunstein, 25 William and Mary Law Review 891 (1984)

Public Figures by Frederick Schauer, 25 William and Mary Law Review 905 (1984)

Of Public Figures and Public Interest - The Libel Law Conundrum by Gerald G. Ashdown, 25 William and Mary Law Review 937 (1984)

Public Figures Revisited by Diana M. Daniels, 25 William and Mary Law Review 957 (1984)

The Unauthorized Interception of Subscription Television, 17/4 Creighton Law Review 1267 (1984)

The Federal Communications Law Journal has published Volume 36, Number 1 with the following articles. It may be obtained from UCLA School of Law, 405 Hilgard Avenue, Los Angeles, CA 90024.

The Constitutional Rights of Puffery: Commercial Speech and the Cigarette Broadcast Advertising Ban by Gregory T. Wuliger, 36 Federal Communications Law Journal 1 (1984)

A "Better" Marketplace Approach to Broadcast Regulation by Todd Bonder, 36 Federal Communications Law Journal 27 (1984)

Radio Marti and the U.S.-Cuban Radio War by P. Kimberly Howland, 36 Federal Communications Law Journal 69 (1984)

Income Averaging and the Professional Athlete: A Re-Examination by Henry I. Thomas, 19 New England Law Review 335 (1984)

Anticipating an Instant Replay: City of Oakland v. Oakland Raiders by Eric Alan Mitnick, 17 U.C. Davis Law Review 963 (1984)

The First Amendment Right of Access to Civil Trials After Globe Newspaper Co. v. Superior Court, 51 University of Chicago Law Review 286 (1984)

The Taxation of Defamation Recoveries: Toward Establishing Its Reputation by David D. Willoughby, 37 Vanderbilt Law Review 621 (1984)

The Freelancer's Trap: Work for Hire under the Copyright Act of 1976 by Johanna Fisher Stewart,' 86 West Virginia Law Review 1305 (1984)

The British Telecommunications Decision: Toward a New Telecommunications Policy in the Common

Market by Silda A. Wall, 25 Harvard International Law Journal 299 (1984)

The Parody Defense to Copyright Infringement: Productive Fair Use after Betamax, 97 Harvard Law Review 1395 (1984)

The Triumph of the Press: New Jersey Departs from Federal Trends in Libel Law, 36 Rutgers Law Review 91 (1984)

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