BUSINESS AFFAIRS

Producing for Public Television (Part 2)

by Lionel S. Sobel

PBS's MacNeil/Lehrer News Hour is in jeopardy. It is not threatened with cancellation. But its hour length may have to be trimmed in half, over its producers' objections. This is a matter of significant concern not only to the program's own personnel, but also to others who take pride in the innovations that PBS has introduced to television. In 1983, when the three commercial networks were just talking about expanding their prime-time newscasts to an hour, PBS did it. Indeed, PBS remains the only network to offer an hourlong newscast today.

Unfortunately, MacNeil/Lehrer's onehour format does not enjoy unanimous support among the 302 stations that make up the PBS network.

The views of station managers are of importance to programmers at ABC, CBS and NBC. Commercial network affiliates are not legally required to broadcast all network programs, and thus ABC, CBS and NBC cannot force-feed their affiliates programs the affiliates choose not to carry. Nevertheless, because ABC, CBS and NBC pay their affiliates to broadcast network programs, rather than the other way around, most network offerings are cleared with relative ease, despite the occasional misgivings of affiliated station managers.

Though the views of station managers have only an indirect impact on the programming decisions of the commercial networks, the views of public television station managers could be absolutely controlling so far as PBS is concerned, as a practical matter. This is because public television stations directly contribute their own funds towards the production costs of nearly half the PBS schedule. If they choose not to contribute - or not to contribute all that is requested - it could affect a program's format and even whether a program gets produced at all. In the case of the MacNeil/Lehrer News Hour, the show's annual budget is $20 million. Ten million dollars comes from the American Telephone & Telegraph Company and $4.5 million comes from the Corporation for Public Broadcasting. The $5.5 million balance has been coming from public television stations themselves. If those stations - or even any significant number of them - choose not to contribute enough to make up that $5.5 million balance, the show's producers will not have the money to make an hour-long program, and their only alternatives will be to cut back to the show's original half-hour format or not to produce it at all.

Public television stations are now in the process of deciding whether to continue contributing to the funding of an hour-long version of MacNeil/Lehrer. The process is a highly refined and democratic one and is carried on through PBS's "Station Program Cooperative," referred to as the "SPC" for short.

The SPC is a procedure that has been used by public stations since 1974 to select and finance television programs on a cooperative basis. The SPC cycle is an annual one. It begins in August when producers submit written proposals to PBS. These proposals are prepared on standardized printed forms, and they include detailed budgets. The budget section of the proposal must indicate what portion of the total budget will be funded from other sources and thus how much financial support is being sought from the stations themselves.

PBS compiles all of the proposals into a catalogue which is duplicated and distributed to public television stations. In September, the stations vote for the programs of their choice. As a result of that vote, the original catalogue is trimmed to 50 to 60 proposals, and a new catalogue is issued. In October, station programmers attend PBS's annual Program Fair to discuss the remaining proposals. Producers whose programs survive the initial cut are invited to attend the Fair to screen pilots or segments of their shows and to meet and talk with station representatives. This year, the Program Fair was held in Seattle, and it was there that the fate of the MacNeil/Lehrer NewsHour - as well as other proposed programs - was debated.

SPC Selection Process

No binding votes are actually taken at the Program Fair. Instead, following the Fair, the selection process goes through two stages. First, a Program Advisory

Committee (made up of station representatives) meets with PBS's programming staff, and together they decide on a highly selective list of programs that are recommended to stations for funding. When necessary, the list is revised until it receives the near unanimous support of all public stations. Most stations do in fact participate in the funding of the entire package of recommended programs (though they are not required to do so and may instead purchase broadcast rights to individual programs).

Programs that are not selected in the first stage are considered individually in a second stage. In this stage, stations cast a series of votes for individual shows they wish to purchase. Programs that receive few votes would be prohibitively expensive on a per station basis, and such shows are dropped from the voting on the next round. Programs that receive votes from many stations are relatively less expensive per station and thus may receive enough support in successive rounds of voting to be funded.

This two-stage selection process occurs during January and February, so that funding decisions are made by March for programs that are to be scheduled for broadcast between July of that year and September of the next. Each station's financial contribution towards the cost of those programs selected in the SPC is calculated in accordance with a formula based on each station's non-federal financial support. As a result, each station pays a proportionate share of the cost, rather than an equal share. For the last few years, the total amount paid by all public stations for programs funded through the SPC came to about $30 million which is approximately 25 % of the total cost of producing all of the programs distributed by PBS. In addition to the MacNeil/Lehrer NewsHour, other programs which receive funding through the SPC include Sesame Street, Nova, Great

Performances, Wall Street Week, Nature, Firing Line and American Playhouse.

Sources of Public Station Income

Clearly, the number of programs funded through the SPC, and the amount of financial support given to each, depend on the amount of money public television stations have to spend. Public stations obtain money for the acquisition of programming from several sources. Advertising, however, is not one of them, at least not at the present time. Current federal law prohibits public stations from selling advertising time. Whether federal law should prohibit the sale of advertising time is now a topic of some debate among public television station executives. During 1982 and 1983, nine public stations participated in a Congressionally sanctioned (but now concluded) "Advertising Demonstration Program."

When the 99th Congress convenes, it is likely that the advertising debate will continue on Capitol Hill. But unless and until the law is changed, stations will have to obtain their money from viewer donations and auctions from corporate and foundation contributions, from state and local governments, and from the Corporation for Public Broadcasting and other federal agencies.

None of these sources of money is problem-free or or likely to increase significantly from current levels. Viewer donations must be spurred by repeated "pledge breaks" which, along with auctions, disrupt regular programming in a manner that some viewers find more objectionable than commercials. Corporate and foundation contributions are difficult to obtain and sometimes difficult to acknowledge, because some program underwriters prohibit stations from giving on-air credit to other contributors in time-slots adjacent to the underwriter's show.

State and local government support is subject to political and financial vagaries. Earlier this year, for example, California Governor George Deukmejian vetoed all but $180,000 of $4 million the legislature had appropriated for the support of public radio and television stations in California. Thereafter, Governor Deukmejian also vetoed a bill that would have created a temporary state endowment of $25 million, to be repaid over three years, the interest from which would have been distributed to public broadcast stations in the state. Television station KOCE, which is owned by the Coast Community College District in Orange County, California, has seen its financial support from the College District fall from $3.2 million in 1977 to $1.5 million this year. And last August, the College District Board voted to relinquish ownership of the station to a nonprofit foundation in 1987 - and to terminate its financial support entirely at that time. Even the amount of support that is likely to be available in the future from the Corporation for Public Broadcasting is uncertain in this era of federal budget deficits.

For all of these reasons, PBS does not expect stations to spend more in this year's Station Program Cooperative than the $30 million they have spent in the past, and PBS has cautioned producers that the amount "could even decrease." Nevertheless, a producer's failure to receive funding through the SPC does not mean the program has been rejected by PBS. Indeed, more than half of the programs on the PBS schedule receive no financial support through the SPC. Among these shows are some of PBS's most popular, including the National Geographic Specials, Masterpiece Theatre, Live from the Met, Washington Week in Review, Smithsonian World, and Tony Brown's Journal.

Corporation for Public Broadcasting

Another major source of production funding is the Corporation for Public Broadcasting. The CPB is a non-profit corporation created by Congress in 1967 as a vehicle for providing federal financial assistance to public radio and television. The CPB was designed as a "heat shield" to insulate public broadcasters from the sorts of political pressures that are often felt by other recipients of Congressionally appropriated tax dollars. In theory, public broadcasting is shielded from such pressure because Congress authorizes funding for the CPB approximately five years in advance, and appropriates its funding two to three years in advance, of the year in which those funds are to be used. Furthermore, it is the CPB - rather than Congress which actually distributes the appropriated funds to broadcasters and producers. In this fashion, Congress's influence on programming decisions is minimized if not eliminated altogether.

What cannot be minimized is the effect federal budget deficits are likely to have on appropriations to the CPB. Last summer, Congress passed a bill authorizing $761 million in funding for the CPB during the 1987 through 1989 fiscal years ($238 million for 1987, $253 million for 1988, and $27O million for 1989). In August, President Reagan vetoed the bill, saying that "When all the demands on the federal budget are taken into account, increases in spending on public broadcasting of the magnitude contemplated by this legislation cannot be justified."

On the face of the bill, it did appear that CPB would be receiving an enormous increase in federal funding, because appropriations for fiscal 1984 have been closer to $130 million. On the other hand, Congress has a practice of authorizing far more than it actually appropriates. For 1982, for example, Congress authorized $220 million but only appropriated $172 million (an amount which nevertheless is the most that CPB ever has received from the federal government). Following the President's veto, Congress passed a new bill authorizing a total of $675 million for 1987 through 1989. Though the new bill cut $86 million off the amount specified in the earlier bill, in October the President vetoed the new bill as well, saying that "Under present fiscal conditions, unrestrained increases of this magnitude - no matter how worthy the programs - are unacceptable."

CPB funding will be taken up again when the 99th Congress convenes in January. But in light of deficit-reducing proposals that were suggested by the Administration in December, it seems quite unlikely that CPB's federal funding will be increased at any time in the foreseeable future. This is a bad omen for public TV program producers, because of the important role that CPB plays in the funding of such programs.

CPB Role in Production Funding

The Corporation for Public Broadcasting plays a two-part role in funding the production of public television programs. First, the CPB makes annual grants to public stations to help support their general day-to-day operations. Known as "Community Service Grants," these CPB funds are among those used by public stations to pay for the acquisition of national programming through membership in PBS and participation in the Station Program Cooperative. In addition, the Corporation for Public Broadcasting makes separate grants directly to program producers to finance the production of particular television programs.

A substantial portion of CPB's Program Fund is earmarked for established programs of unique merit. The MacNeil/Lehrer NewsHour is one example; it received $4.5 million this year directly from the CPB (in addition to the $5.5 million the program received through the SPC). American Playhouse is another example; it received $3 million from the CPB (in addition to almost $4 million through the SPC). The documentary series Frontline also receives major funding from the CPB; it will receive $3 million for 1985 (down from $5 million in 1982).

CPB Open Solicitation Process

The CPB also funds additional programs through an "Open Solicitation" process. In this process, independent producers (and public television stations acting as producers) are invited to submit proposals for the development and production of programs in three areas: news and public affairs; cultural and children's; and drama and arts. Open Solicitation proposals must contain four elements: a preprinted Basic Information Sheet, a three to five page description (five to ten pages for a series proposal), a detailed budget (including the sources and amounts of support other than that requested from CPB), and a list of key personnel. Drama projects must include a copy of the proposed script as well.

The most promising proposals are selected by CPB staff for review by an advisory panel of experts three times each year: in August, December and April. Proposals are judged on comparative merit, measured against priorities set by the CPB Board of Directors, the needs of the public television system, the relevance of the subject to a national audience (rather than merely a local or regional one), the adaptability of the subject to television, and the credentials of the production team.

CPB distributes some $6 million per year through its Open Solicitation, but the process is highly competitive. Last year, 462 proposals were submitted. Only 12 were funded.

Annenberg/CPB Project

Purely instructional films will not be funded by the CPB Program Fund. However, the Corporation for Public Broadcasting does administer a separate $150 million fund provided by The Annenberg School of Communications for the development, over a 15-year period, of college-level educational materials, including television programs. Known as "The Annenberg/CPB Project," this fund is primarily interested in programs that could be the basis for credit-bearing courses. Nevertheless, some programs that have received funding from The Annenberg/CPB Project have had wide enough appeal to be carried by PBS in prime time. These include this season's eight-part series The Brain, produced by WNET in New York City, and the 13-part series The Constitution: That Delicate Balance, produced by The Media and Society Seminars of the Columbia University

Graduate School of Journalism. WNET also is developing a nine-part prime-time series on the history of Western art pursuant to a $2.5 million grant from the Annenberg/CPB Project (a grant which requires WNET to raise an equal amount from other sources by November 1985).

Although the Corporation for Public Broadcasting provides the lion's share of all federal money that finds its way into public broadcasting, other federal agencies are the source of some funding for the production of public television programming. American Playhouse, Great Performances, and Live from Lincoln Center all receive grants from the National Endowment for the Arts. Heritage: Civilization and the Jews received a grant from the National Endowment for the Humanities. And The Brain received funding from the National Science Foundation, the National Institutes of Health and the National Institute of Mental Health. In 1983, the National Endowment for the Humanities contributed $4.4 million just for the production of documentaries.

Occasionally, agencies will decide to fund a particular type of project even before being asked to do so. In those cases, agencies issue a "call for proposals," literally inviting producers to submit grant applications. The National Endowment for the Arts did so, for example, last June, when it decided to provide $300,000 to help "launch" a new dance television series which NEA hopes "will become an important showcase for some of the best and most exciting work of the new generation of choreographers and companies." The $300,000 offered by NEA must be matched, at least dollar for dollar, by funds raised from other sources. And the series is to consist of at least five half-hour programs. Applications from interested producers were due in September, and the grant will be awarded and announced this month.

In October, the National Endowment for the Arts (along with the J. Paul Getty Trust) invited proposals for the production of a half-hour weekly television series for children devoted to the arts.

Private Foundations

Privately endowed foundations are yet another source of funding for public television program production. The Brain, Firing Line, Live from Lincoln Center, Live from the Met, Heritage: Civilization and the Jews, and Smithsonian World all received significant financial support from private foundations. Indeed, foundation support for the production of public television programs amounted to $4.5 million in 1983. And while that was only 3.6% of the total cost of producing PBS's national program service last year, foundation support was so critical in some cases, that PBS routinely advises new producers to learn the intricacies of the procedures involved in researching and applying for foundation grants. The place to begin, producers are told, is at The Foundation Center which publishes grant directories, indexes and data books, and which maintains (or is affiliated with) reference libraries containing these publications in every state in the nation. Researching and applying for foundation grants is an art and science in itself, and the proper techniques for doing so are taught by organizations such as The Grantmanship Center in Los Angeles. Producers who learn the techniques are apt to make more programs for public television than those who do not. Indeed, although public television is nonprofit, entrepreneurship is a characteristic shared by most if not all of its successful producers.

"Citizen"

At least one team of producers went beyond ordinary "grantmanship" to raise the funds necessary to get their program made. They formed their own foundation, and through it, produced Citizen: The Political Life of Allard K. Lowenstein, an hour-long documentary that was broadcast by PBS stations last summer. The story of the making of Citizen is a lesson in itself about the trials and tribulations of producing for public television. It also illustrates however that there is great potential for success, especially when producers are committed to their projects - and are motivated by goals other than financial reward.

Citizen is a film chronicle of the career of political activist Allard K. Lowenstein. Through archival footage and interviews with friends, family and political associates, the documentary traces Lowenstein's career from his involvement in human rights issues in South Africa in the 1950s; to his work in voter registration drives in the South in the early 1960s; to his opposition to the Vietnam War in the mid-60s; to his organization of Eugene McCarthy's Presidential campaign and his own election to Congress in 1968; and finally to his untimely shooting death in 1980 by a former campaign worker who was subsequently declared insane.

The film was conceived by actor Mike Farrell - best known for his role as B.J. Hunnicutt on the television series MASH - who served as Executive Producer of Citizen. Mr. Farrell met Lowenstein as a result of their common interest in liberal political causes, and the two had worked together in an effort to develop a movie-of-the-week for CBS based on a book Lowenstein wrote in the early '60s about a trip he had taken to Southwest Africa. When Lowenstein was killed, Mr. Farrell felt a great sense of loss and did not want to let Lowenstein's memory fade.

As a result, Mr. Farrell approached filmmaker Julie Thompson, whom he knew as a result of her work on the film The Willmar 8 and because of her interest in political causes, and asked her to do a film on Lowenstein's life. The Allard K. Lowenstein Foundation for Media was formed as the project's production entity, and Ms. Thompson signed on as producer-director. Filmmaker Brogan de Paor agreed to serve as co-producer/editor. Funding of course was the next order of business. Early on, the Foundation sought a grant from the Corporation for Public Broadcasting by making an application in CPB's Open Solicitation process. The application, however, was rejected. Undaunted, the producers pursued other, less traditional, funding methods.

Ms. Thompson realized that because Lowenstein had been a U.S. Congressman, the names of those who had contributed to his political campaigns would be on file with the Federal Election Commission. The hope was that people who were interested enough in Lowenstein to contribute to his campaigns also would be interested enough in his memory to contribute to the production of a film about his career. Thus the next step was the preparation of a proposal, attractively printed in booklet form, asking for financial contributions. The booklet was mailed to some 5,000 people, and with it, the producers raised $8,000. They then held two fundraising parties, one in New York and the other in Los Angeles, at the homes of two of Lowenstein's former political supporters. Those two parties raised another $100,000, much to Ms. Thompson's pleasant surprise.

Soliciting Lowenstein's former supporters was an inspired idea, but not one that many producers can emulate. The formation of their own foundation is a tactic of more general applicability, however. The Allard K. Lowenstein Foundation for the Media is a nonprofit, educational corporation, exempt from taxation under section 501(c)(3) of the Internal Revenue Code. The most significant thing about its tax status is that contributions to the Foundation are deductible by their donors. Tax deductibility was, no doubt, a significant attraction for the more than 400 people who contributed the initial $108,000 the Foundation raised to produce Citizen.

Encouraged by the relative ease with which they raised $108,000, Ms. Thompson and Mr. de Paor commenced production. They had enough money to film the interviews and to do research into the availability or archival film footage. But they did not have enough to license the use of archival footage or to produce a final print. In all, Citizen cost about $190,000, and raising the additional money "was just like pulling teeth," Ms. Thompson later said. They did raise another $20,000 or so. And then they borrowed the rest of the money they needed to finish the film.

PBS Deal

As soon as Citizen was finished, a screening was arranged in Washington, D.C. The purpose of the screening was to raise more money - money that the producers needed to repay loans and pay off still outstanding debts. The screening received some publicity in the Washington press. And as a result of that publicity, PBS contacted Ms. Thompson and Mr. de Paor and asked to see the film. Once PBS saw it, PBS expressed interest in broadcasting it, and negotiations were begun. Ms. Thompson and Mr. de Paor first had to establish that the Lowenstein Foundation would not let PBS have the film free. (Many programs are in fact provided to PBS "free." One of PBS's most popular series - The National Geographic Specials - is made available to PBS without charge by its producer, public station WQED in Pittsburgh. WQED is able to do so, because the series' production costs are fully underwritten by Gulf Oil whose headquarters are in Pittsburgh.) Once Ms. Thompson and Mr. de Paor made clear that Citizen would not be free to PBS, negotiations progressed and eventually a deal was made.

On paper, the deal was a licensing agreement between the Lowenstein Foundation and PBS. But the fee itself actually was paid by the Corporation for Public Broadcasting. In a way then, the Lowenstein Foundation came full circle with CPB. Having been turned down for financial support at the outset, the Foundation made Citizen without any government money. Then, when the film was done, the Foundation was paid by CPB, without the Foundation having to go through a competitive funding process at all. The amount that the Foundation was paid as a licensing fee was not enough to pay off all the Foundation's debts. But the fee did make a "good dent," Ms. Thompson has said.

The balance of the amount still owed will come, the producers hope, from distribution of prints and videocassettes of Citizen by The Cinema Guild, a New York City based non-theatrical distribution company. Ms. Thompson and Mr. de Paor estimate that it will take a year or more to pay off all the debts owed to people other than themselves. Payment of their own salaries - deferred at least in part as a matter of necessity - will take longer than that.

Corporate Funding

As noted above, in years past, Inside Story was funded by grants from the General Electric Corporation, and the MacNeil/Lehrer NewsHour receives half its funding from American Telephone & Telegraph Company. GE and AT&T are not the only corporations that have supported the production of public television programs.

Gulf Oil pays for the National Geographic Specials. Mobil underwrites Firing Line, Mystery, and Masterpiece Theater. Exxon funds Great Performances and Live from Lincoln Center. Chevron financed A Walk Through the 20th Century with Bill Moyers. Atlantic Richfield underwrote the Cousteau Odysseys. (Indeed, oil companies fund so many PBS programs, there are those who cynically say that "PBS" really stands for the "Petroleum Broadcasting System.") Ford underwrites Washington Week in Review. Sperry, Hilton Hotels and Prudential-Bache pay for Wall Street Week. Johnson & Johnson and Allied fund Nova.

The list could go on and on. In fact, in 1983, corporations provided $38.3 million in support for the production of programs broadcast by PBS. That represented almost 31 % of the total amount spent producing those programs. And it was more money than came from any other type of source, including public stations themselves (which spent $36.5 million on program acquisition, mostly through the Station Program Cooperative) and the Corporation for Public Broadcasting (which funded $16.5 million worth of program production).

Corporations underwrite the production of PBS programs for a variety of reasons. Many do so as a community service and out of a sense of civic responsibility. Most do so because of the public relations benefits that follow from their association with quality, highbrow programming. Some do it as a form of relatively inexpensive television advertising. And some companies do it because they support a program's point of view or even its particular message.

Underwriting Credits

The extent to which corporate underwriting may be used for advertising purposes is limited by federal law. Not only are public stations prohibited from selling advertising time, federal law and PBS policies also control the content of the underwriter credits that are broadcast at the beginning and end of every PBS program. At one time, FCC rules strictly prohibited the broadcast of credits that in any way promoted the goods or services of the underwriting corporation or even informed viewers what those goods and services were. As a result, credits could do no more than state that "Funding for this program has been provided by the XYZ Corporation," or equally bland words to the same effect. Underwriters - whose products and services already were well known - may have received some advertising-related benefits from this sort of credit, but such benefits certainly were minimal.

The FCC has since concluded that its former rules were more strict than necessary to assure that public television retains its "noncommercial" character. Congress came to the same conclusion. As a result, Congress amended the Federal Communications Act, and the FCC relaxed its rules, to permit underwriting credits to include brand names, logos and slogans which identify but do not promote, product and service listings, and company locations. In the Matter of Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations, Docket No. 21136, 55 RR2d 1190 (1984).

PBS has advised its members that the following sort of underwriter credit now is acceptable: "In Performance at the White House is made possible by grants from J.C. Penney, serving American consumers from coast to coast, and GTE, advancing technology in telecommunications and electric products." Also acceptable would be

"Evening at the Pops is made possible by Digital Equipment Corporation, the world's second largest computer company, providing computer solutions for professionals." While still not "commercials," it is hoped that credits such as these will have sufficient advertising value that producers will be able to attract more corporate underwriting.

The outer limits of the advertising benefits that may be obtained from underwriting PBS programs will be tested this coming spring. WNET in New York has entered into an unusual arrangement with General Foods Corporation which may raise as much as $1 million for the production of a new, ten-part, half-hour series entitled The Sporting Life. Eight of General Foods' products will participate in a proof-of-purchase campaign that will result in General Foods contributing 25 cents to WNET for each proof-ofpurchase coupon sent in by consumers between April 28th and July 30th. While some are concerned about the effects this sort of arrangement will have on PBS's image, the possibility of raising $1 million has led others to say "it's worth the try."

Underwriting Standards

The extent to which corporations may underwrite programs because they support its point of view or particular message also is limited by PBS policy. Corporate underwriters may not exercise editorial control over program content. Nor may it appear to the public that editorial control might have been exercised by underwriters. Moreover, in order to avoid commercialism, a program may not promote a corporate underwriter's business interests. Thus according to PBS's National Program Funding and Practices guide, a photo equipment manufacturer could not fund a program that prominently featured the company's own products, though it would be permitted to underwrite a general "how-to" series on photography. Earlier this year, PBS did in fact broadcast a documentary on the AIDS epidemic funded in part by the pharmaceutical company Hoffman-LaRouche.

Co-Productions

Proof-of-purchase coupon returns are unlikely to be the wave of the future for public TV production funding. That honor appears to belong to "co-productions": co-productions with theatrical and home-video distributors, pay and cable-TV companies, foreign production companies, and perhaps even commercial television. That is the view of David Crippens, Vice President for National Productions of KCET, Los Angeles' public television station and an active production company in its own right. Crippens explains that because there is no longer as much money available from the federal government to produce programs as there once was, public stations are doing coproduction deals with one another and with cable, home video and other companies - companies which are finding co-production deals attractive because they too do not have all the money they need to make all of the programs they would like to produce.

Mr. Crippens cites as an example the production of Cat on a Hot Tin Roof which aired last summer on Showtime and will be broadcast by PBS in June 1985 as part of the American Playhouse series. Showtime put up 50% of the production costs; American Playhouse put up 30%; and KCET put up 20%. In exchange for its share, Showtime received pay-TV broadcast rights and half the ancillary income from home-video and foreign distribution. KCET and American Playhouse received public-TV rights and will share the other half of the ancillary income.

American Playhouse needed the financial assistance of Showtime and KCET - even though American Playhouse received funding through the PBS Station Program Cooperative, from the Corporation for Public Broadcasting, and from the National Endowment for the Arts - because the cost of producing the 22 new dramas that will be aired on the series this year was substantially greater.

Co-production financing of American Playhouse projects was begun last year with Testament, a film about a family's efforts to endure the aftermath of a nuclear attack. Directed and co-produced by Lynne Littman, Testament was conceived as a made-for-television movie and was produced for American Playhouse on a budget of $778,000. The movie was so good, however, that Paramount expressed a willingness to distribute it theatrically, and did in fact do so with modest box-office success. Jane Alexander, the film's star, was nominated for an Academy Award. El Norte is another American Playhouse co-production that has received theatrical distribution prior to its upcoming broadcast on PBS. And next month, filming is expected to begin on a screen version of Richard Wright's classic American novel Native Son. it too will be an American Playhouse coproduction, with theatrical distribution preceeding its airing on PBS.

Independent Productions

An independent producer with an idea suitable for public television must decide at some point whether to proceed with production independently - as Mike Farrell, Julie Thompson and Brogan de Paor did with Citizen - or whether to associate with a public television station that has production experience. As is true in the world of theatrical production, there are advantages and disadvantages of both routes.

KCET's David Crippens explains that affiliation with an established public station can provide the independent producer with television production expertise, production facilities, fundraising experience and connections, legal assistance, experience in dealing with PBS's technical requirements, a nonprofit producer-of-record, and credibility. In return, public stations will want an on-air production credit and a share of any ancillary income the program may later earn. While such an affiliation is not required, it has become almost customary, for experienced as well as inexperienced producers. For example, A Walk Through the 20th Century with Bill Moyers was produced by The Corporation for Entertainment & Learning, Inc., a publiclyheld corporation in New York City that has been producing for public, cable and commercial television for years. Though underwritten by Chevron, and produced by CEL's own personnel with its own equipment in its own offices, A

Walk Through the 20th Century was "co-presented" by WNET and KQED.

Production Prospects

The prospects for new public TV projects arc as uncertain and as chancy as those for new commercial TV programs and theatrical motion pictures. In some cases, producers have been able to raise money from a single source with relative ease. WQED's success with the National Geographic Specials is an example; Gulf Oil has funded the series completely for years. Independent producers Ann and Bob Shanks enjoyed similar success with the funding of their hour-long special A Day in the Country. Featuring Kirk Douglas as its host, A Day in the Country was about an exhibit of French impressionist art at the Los Angeles County Museum of Art and was broadcast on PBS last summer. The Shanks produced the program in association with KCET, and the entire $300,000 production budget was funded with a grant from the Atlantic Richfield Corporation.

Fundraising is not always, or even usually, easy however. KCET acquired the rights to produce three programs about the Olympic Arts Festival but was able to raise money to make only one. Inside Story's financial problems are not unique. The producers of Reading Rainbow just recently announced that Kellogg's, the cereal company that had contributed more than $1 million towards the series' production costs, has decided not to renew its grant. Twila Liggett, the program's project director, has sought alternate funding sources, thus far without success.

Even as experienced a producer as WNET had enormous difficulty in funding the production of Heritage: Civilization and the Jews. Originally budgeted at $6.9 million, WNET commenced production of the nine-part series with only a single $1 million grant from the Charles H. Revson Foundation, confident that the balance would be easily raised as the project progressed. In fact, the balance did not come as quickly as WNET anticipated. The National Endowment for the Humanities was asked for $2 million but gave only $750,000. The Corporation for Public Broadcasting, asked for a like amount, gave only $300,000 or $400,000. Other contributors spread their payments out over a three-year period, rather than giving all at once. Delays in funding resulted in delays in production which in turn caused expenses to escalate to $11 million - more than $4 million over the original budget. Most, but not all, of WNET's costs were covered by the time the series went on the air in October. But doing so took more than 75 different contributors. The most WNET had ever before needed for a single project was four. Though the station is still willing to produce big series, its problems with Heritage led to its adoption of a new policy. "The rule now is we don't give a go-ahead for a production unless the funding is clearly identified or reliably targeted," WNET president John Jay Iselin has said.

The Future

Indeed, WNET's experience with Heritage, coupled with the current federal budget deficit crisis, raises questions about the future of PBS programming. With federal financial support in doubt, there will be greater pressure than ever before to modify rules that prohibit advertising and limit underwriting credits. The "noncommercial" nature of public television may have to give way in light of financial realities.

Perhaps it will be sufficient if public television becomes merely "nonprofit." The concern of many, however, is that advertising and promotional underwriting credits will inevitably alter the nature of public television's programming - making it more like commercial TV programming. On the other hand, budget realities are doing that already; co-productions, after all, are possible only when the program is suitable for both markets. Would it be better to accept this reality sooner rather than later? This is the question that the public television system, as well as members of Congress, must consider in the months ahead.

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RECENT CASES

Federal District Court denies motion to dismiss in copyright infringement suit involving Beatle classics "Hey Jude" and "Let It Be" because defendant had actual notice of transfer of copyright despite allegedly defective recordation

The "Long and Winding Road" has led yet another Beatle copyright infringement suit to the steps of the courthouse. A Federal District Court has denied Distinguished Productions' motion to dismiss a claim that it had infringed Northern Songs' copyright to "Hey Jude" and "Let It Be." The court found that Distinguished had actual notice that Northern Songs had transferred the copyrights in these songs to Maclen Music and that Distinguished had made no attempt to license the rights in these songs from anyone. Distinguished argued that

Northern Songs' recordation of the transfers was defective and consequently Distinguished's failure to receive constructive notice of recordation should have barred Northern's copyright infringement suit.

Northern Songs brought this action against Distinguished Productions, Splotched Animal Music, Sesame Street, Christopher Cerf and Norman Stiles. It argued that these parties (writers, publishers, producers and/or distributors) violated its copyrights by "the composition, recording, manufacture, sale and performance of 'Hey Food' and 'Letter B' contained in the record album, 'Born To Add.'" Northern's complaint alleged that "Hey Food" and "Utter B" were both copies and derivative works of the Lennon/McCartney songs "Hey Jude" and "Let It Be" Furthermore, Northern argued that the defendants' songs violated section 43(a) of the Lanham Act "because they mislead the public into believing that they are the actual Nothern compositions or arrangements or derivations thereof."

Distinguished Productions sought dismissal of this action on the grounds that Northern Songs failed to comply with the recordation requirements of section 205 of the Copyright Act. In addition, Distinguished requested an opportunity to conduct pre-answer discovery, aimed at the issues of ownership and transfer of the relevant copyrights. These requests were denied.

The relevant facts are as follows. On January 1, 1973 Northern Songs assigned the copyrights in 300 songs to Comet Music. Northern also assigned to Maclen Music eleven songs of which "Hey Jude" and "Let It Be" were to be included. Both of these transfers were recorded with the Copyright Office on August 30, 1978.

Subsequently, however, a document revealed that these two assignments had been reversed because the schedules which were attached to these assignments had been inadvertently switched. As a result, Northern Songs drafted a memorandum to this effect and recorded it with the Copyright Office on June 20, 1979. It stated that the copyrights in "Hey Jude" and "Let It Be" were intended to be assigned to Maclen and not to Comet.

Two documents, both entitled "Withdrawal of Claim to Copyright," were also recorded on June 20, 1979. One was executed by Northern and Comet and the other to Northern and Maclen. Both of these documents, in effect, were intended to return the "Hey Jude" and "Let It Be" copyrights to Northern Songs.

Distinguished Productions argued that the memorandum that Northern recorded with the Copyright Office, in which it recorded the errors in the assignments to these two Beatle songs, did not qualify as an "instrument of transfer" under section 205 of the Copyright Act. Furthermore, it argued, that even if it were a valid instrument of transfer, it did not meet the specific requirements of section 205(c) because the memorandum did not "clearly transfer the specific copyright by the name of the work or registration number." As a result, this failure to comply with the Copyright Act was an "impediment to its discovery during a 'reasonable search' of the Copyright Office Filings."

The court found that though these contentions were "theoretically appealing" they did not apply to this case because the questions raised by Distinguished Productions were unrelated to the question of notice. Furthermore, Distinguished never stated that it was unaware of the transfer of the copyrights in question or of Northern Songs' memorandum.

The court agreed with Northern Songs that "the requirements of section 205(c)(1) are intended to protect licensees, assignees and/or bona fide purchasers for consideration by providing them the true identity of the copyright owner, to enable such persons seeking permission to use a copyrighted work to contact the proper party." Thus, since Distinguished Productions had actual notice of the transfer and because it had made no attempt to license the rights in these songs from anyone, the court held "their alleged failure to receive constructive notice under section 205(c)(1) cannot constitute a bar to the infringement suit before this court."

In addition, the court stated that even though recordation of an exclusive copyright transfer is jurisdictionally required in order for a person to bring a copyright infringement action, other courts have consistently permitted parties to correct a defective memorandum. "Therefore, even were the court to find recordation of the memorandum defective, other factors, prejudice to defendants for example, would have to be demonstrated before dismissal on this ground would be warranted."

Northern Songs, Ltd. v. Distinguished Productions, Inc., 581 F.Supp. 638 (S.D.N.Y. 1984) [ELR 6:7:10]

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Warner Bros. obtains judgment against restaurant owner who allowed performance of unlicensed copyrighted music because he had ability to supervise, and had direct financial interest in, infringing activity

A restaurant owner got his "goose cooked" when a Federal District Court pierced the corporate veil and found the owner personally liable for $2,500 in statutory damages. The court granted Warner Bros.' motion for summary judgment because it concluded that J. Ross Haffey, Jr., the president and sole shareholder of the Lobster Pot restaurant, offered no evidence to rebut allegations that he allowed copyrighted musical compositions to be performed at his restaurant without first obtaining the required license from ASCAP.

Haffey owned and operated his restaurant in South Euclid, Ohio. On April 30, 1981 musicians entertaining at the Lobster Pot performed ten songs, the copyrights to which belonged to Warner Bros. The Lobster Pot had not obtained a blanket license from either ASCAP or BMI nor had it obtained an individual license from Warner Bros.

Warner Bros., a member of ASCAP, brought this action against the Lobster Pot and J. Ross Haffey, Jr., seeking an injunction, statutory damages, costs and attorneys' fees.

In response, Haffey filed a motion for summary judgment on the grounds that Ohio's corporation law protected him from personal liability. Warner Bros. opposed this motion and filed a summary judgment motion of its own.

In his answer Haffey admitted that neither he nor anyone at the Lobster Pot had any record of the musical composiLO tions performed at his restaurant on April 30, 1981. Furthermore, he admitted that no one at the Lobster Pot received permission from Warner Bros. to perform the musical compositions alleged to have been infringed.

In his defense Haffey argued that the compositions in question had not been performed at his restaurant on the date alleged. Furthermore, even if they had been, they "were performed by musicians and performers over whose activity the Lobster Pot, Inc., and J. Ross Haffey, Jr., had no right and ability to supervise and control. . ." The Court dismissed these arguments as being "Completely without merit." Quoting prior case law, Judge White stated, "The cases are legion which hold the dance hall proprietor liable for the infringement of copyright resulting from the performance of a musical composition by a band or orchestra whose activities provide the proprietor with a source of customers and enhanced income. . . ."

To further support this conclusion, Judge White stated that Congress had considered and rejected a proposed amendment to the Copyright Act which would have exempted the owners of establishments such as the Lobster Pot from liability. "The committee has decided that no justification exists for changing existing law, and causing a significant erosion of the public performance right," said a Congressional committee report.

Thus, the court found that because Haffey knew and participated in the decision to play music at the Lobster Pot he could not escape liability by arguing that the musicians were independent contractors.

The court was equally unpersuaded by Haffey's claim that Ohio law shielded him from personal liability. According to Judge White, Haffey "misapplied the applicable law." The test for finding a corporation liable is "whether the officer has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities."

As to the first question, Judge White concluded that Haffey did have the "necessary substantial right and ability to supervise or control the infringing activities:' because as the president and sole director of the Lobster Pot he has the final say over the restaurant's day to day operations. Furthermore, the fact that Haffey had told the manager not to play copyrighted music was indicative of his control over the illicit activity. Finally, Judge White noted that the Lobster Pot had been contacted by ASCAP at least 38 times prior to the infringing conduct. "Therefore, even though not a required aspect of the test for personal liability, Defendant Haffey, an attorney, knew or should have known of the infringing activities and of his obligation to individual ASCAP members."

The second question, whether Haffey had a direct financial interest in the infringing activity, was also answered in the affirmative because the Court found that Haffey, the sole shareholder in the Lobster Pot, Inc. (the company which owns the Lobster Pot), "is the only person who receives dividends from the company and he does so regularly." Moreover, other evidence was presented that Haffey owned the building in which the Lobster Pot was located, had " regularly loaned money to Lobster Pot, personally guaranteed the company's obligations, and signed mortgages on the company's property and equipment " The Court found that this evidence was "substantial" proof that Haffey had a direct financial interest in the Lobster Pot.

Finally, the court addressed the question of relief and damages. Having concluded that Haffey and the Lobster Pot were liable for infringing Warner Bros.' copyright, Judge White issued an injunction permanently restraining anyone connected with the Lobster Pot from the public performance of the songs in question. In addition, Judge White awarded $2,500 in statutory damages and costs and attorneys fees in the amount of $6,393.75.

Warner Bros., Inc. v. Lobster Pot, Inc., 582 F.Supp. 478 (N.D.Ohio 1984) [ELR 6:7:11]

Federal District Court dismisses defamation and infliction of emotional distress claims brought by former president of Wichita Aeros arising from comments made by general manager of Denver Bears at winter baseball meetings

"This is not just a case about damages; this case is about baseball!" And so began a legal opinion which may one day be cited for its entertaining reflections of baseball memories, if for nothing else. Aside from its recollections of "America's national pastime," a Federal District Court in Colorado has ruled that Jim Burris' behavior in making insulting remarks to Dick King and allegedly assaulting him with a soft drink bottle at the winter baseball meetings was insufficient to support King's claims for either negligent or intentional infliction of emotional distress. The court also ruled that although King did state a cause of action for defamation, that claim was subject to dismissal without prejudice because King failed to properly notify Burris of King's intent to sue.

This case "stems from one of the less memorable events in the history of the game (of baseball) - an argument at the 1981 winter baseball meetings of the American Association of Professional Baseball Clubs." Dick King, then President of the Wichita Aeros, was one of those who attended the meetings. Also in attendance was Jim Burris, General Manager of the Denver Bears.

King and Burris disagreed with one another on several issues raised at the meetings, "including league expansion and scheduling for the upcoming season." At one point in the meetings, "Burris lost his temper and hurled a barrage of verbal beanballs at King," including such remarks as "'damn fat fag,' 'liar,' 'I ought to hit you in the mouth,' and 'why don't you do the game of baseball a favor and resign.'" King alleged that Burris then "swore at him and threatened him with a Sprite bottle."

King brought suit against Burris and the Denver Bears for defamation and negligent and intentional infliction of emotional distress. King alleged that "as a direct result of Burris' actions, (King) resigned from his position and was forced to seek medical consultation and counseling." King further alleged that he gave up a salary of $40,000 a year plus 25% of the Aeros' profits. King sought $2 million compensatory damages and $5 million punitive damages.

In what amusingly appeared to be a citation to the court's authority to drift from the issues when baseball is involved, Federal District Court Judge Kane began by pointing out that "even the Supreme Court of the United States cannot restrain itself when confronted with mankind's noblest achievements on 'Hoboken's Elysian Fields.'" As Judge Kane continued, "I think it too much to expect a mere tyro on the district bench to cleave to the issues in the face of that august example." Perhaps the most amusing part of the opinion was when Judge Kane reflected that "the game has survived the Black Sox scandal of 1919, striking umpires, striking players, drug and alcohol problems, and even perhaps George Steinbrenner."

The court did eventually proceed to discuss the merits of King's arguments, footnoting at every opportunity additional baseball commentary. Judge Kane first addressed King's claims for negligent and intentional infliction of severe emotional distress. Finding that Florida law governed the case, the court first noted that "the Florida Supreme Court has yet to award damages for emotional or mental injuries standing alone." However, as Judge Kane pointed out, that court has recognized that such a cause of action may exist where there has been a "physical impact" or when the injuries are "produced as a result of a deliberate and calculated act performed with the intention of producing such an injury. . . ."

In rejecting King's claim of negligent infliction of emotional distress, Judge Kane simply stated that King had failed to allege any direct physical impact. The District Court then turned to King's claim of intentional infliction of emotional distress. Judge Kane noted that "the Florida courts have been slow to allow recovery for emotional distress" allowing recovery "only in extraordinary circumstances."

The issue then became whether Burris' conduct could be shown to be "extreme enough to state a claim beyond the defamation charges and any charges that (King) could bring for assault." After reviewing the applicable Florida case law, Judge Kane found that King had not alleged enough to maintain a cause of action for intentional infliction of emotional distress. Judge Kane stated that Burris' behavior "was not 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" The court concluded that King's claim was simply "a restatement of his defamation claims bolstered by the charge that Burris assaulted him with a Sprite bottle."

For the foregoing reasons, Judge Kane granted summary judgment for Burris in regards to King's negligent and intentional infliction of severe emotional distress claims.

The court next addressed King's defamation claim. The parties stipulated that Burris did make the alleged defamatory comments to King. Judge Kane first stated that "Burris' comments, while hardly reminiscent of Cyrano de Bergerac's nose speech among baseball's contributions to the ancient art of insult (footnoting several illustrative examples), do state a cause of action for defamation."

Judge Kane observed that "the pleadings raise many interesting issues such as whether the term 'fag' constitutes defamation per se or per quod, whether King is a public figure, and whether the Denver Bears or its General Partners ratified Burris' statements." Nonetheless, Judge Kane concluded that there was no need to "decide any of these issues because King never notified Burris of his (King's) intent to sue" which is a prerequisite to the instigation of any civil suit for defamation under Florida statutory law. In dismissing King's defamation action, the court left the door open for King to reassert his defamation claim in a later action since it was dismissed "without prejudice."

King v. Burris, 588 F.Supp. 1152 (D.Col. 1984) [ELR 6:7:11]

Houston Astros owner denied judgment on the pleadings in defamation action brought by former general manager because alleged slanderous statements were reasonably capable of defamatory interpretation

Houston Astros owner John McMullen has fouled out in his attempts to end a legal exhibition before it went to trial. A Federal District Court has ruled that alleged slanderous remarks made by McMullen about Astros former general manager Tal Smith "are reasonably capable of defamatory interpretation," and "whether the comments were in fact slanderous" is a question for the jury.

Smith brought an action against McMullen alleging that he had made "certain defamatory statements to a reporter for the Houston Chronicle" which were subsequently published by the Chronicle. Specifically, Smith claimed that McMullen's remarks that Smith "is a despicable human being" and that it was "unfair and wrong for people to keep giving him credit" for the team's success "were defamatory and have injured him in his profession or business and impute unfitness for his employment in professional baseball."

McMullen allegedly "made these statements about (Smith) despite the fact that during (Smith's) tenure as general manager of the Astros, the team improved from last place in their division in 1975 to first place in 1980." McMullen had made these statements in 1983, however, when the Astros were in last place in their division.

McMullen denied that his comments were slanderous and maintained that "his remarks were at most only words of vituperation or rhetoric hyperbole and that, in addition, they were statements of opinion protected by the First Amendment."

In denying McMullen's motion, Federal District Court Judge McDonald first addressed McMullen's contention that the alleged comments were, at most, words of vituperation or rhetoric hyperbole. Specifically, McMullen argued that his description of Smith as a "despicable human being' is no more than a vigorous epithet which is protected by the First Amendment." McMullen based his argument on two Supreme Court decisions which held that certain statements that a plaintiff was "blackmailing" a city, and statements identifying a plaintiff as a "scab," were protectable as rhetoric hyperbole.

Judge McDonald stated that if he "were to focus solely on the language referring to (Smith) as a 'despicable human being,' then the holdings in (those two cases) would be controlling." However, as Judge McDonald observed, "the words cannot be examined in isolation, but instead must be viewed in the context of the statement as a whole." Judge McDonald found that McMullen engaged in "far more than name-calling; the totality of his statements, when viewed as a whole, are reasonably capable of a defamatory intent." The court concluded that McMullen's remarks cannot be protected as hyperbole.

McMullen next contended that his statements about King were statements of opinion protected by the First Amendment. Judge McDonald recognized that statements of "pure opinion" are Constitutionally protected, but found that McMullen's statements "were hybrid in nature and not pure opinion" since they were "laden with factual content." The court further found that McMullen "failed to set forth any facts in support of his assertion that (Smith) had nothing to do with the apparent success of the Astros during his tenure as general manager." Judge McDonald concluded that "inasmuch as (McMullen's) statements were no more than conclusory statements of unsupported fact, they are not privileged as opinion."

Smith v. McMullen, 589 F.Supp. 642 (S.D.Texas 1984) [ELR 6:7:12]

Federal District Court adopts neutral reportage privilege in libel action brought by former university basketball coach on account of articles in Sports Illustrated; coach's failure to plead actual malice with

specificity also was ground for court order granting summary judgment to Time, Inc.

A Federal District Court in Northern California has recognized a constitutional privilege of neutral reportage in dismissing a libel action against Time, Inc. The court also relied on basketball coach Pete Barry's failure to plead actual malice with the requisite specificity.

Barry, a former head basketball coach at the University of San Francisco, based his claim on the publication by Sports Illustrated of two articles concerning illegal recruiting methods at the school. In its July 28, 1982 and August 9, 1982 issues, Sports Illustrated contained articles focusing on the university's investigation of charges that Quintin Dailey, a star player on USF's basketball team and subsequently a professional basketball player for the Chicago Bulls, had received improper payments, in violation of National Collegiate Athletic Association rules, from a company owned by a USF supporter. The articles contained a statement by Dailey that Barry had personally transmitted improper payments to Dailey. The articles also presented Barry's denial of any involvement with illegal or questionable payments to Dailey or to any other player while he was coach. The controversy over recruitment methods eventually resulted in a decision by USF's president to cancel the men's basketball program.

The court first found that Barry was at least a limited public figure with regard to comments concerning his position as head basketball coach at USF. After reviewing the everincreasing libel case checklist, the court reached the key question in this first portion of the case - did the articles concern a public controversy in which Barry participated? The definition of "public controversy" upon which the court relied was the definition set forth in Waldbaum v. Fairchild Publications, Inc., 627

F.2d 1287 (D.C. Cir. 1980), cert. denied 449 U.S. 898 (1980), as follows: "A public controversy is not simply a matter of interest to the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way ... (The court) should ask whether a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution. If the issue was being debated publicly and if it had foreseeable and substantial ramifications for nonparticipants, it was a public controversy."

The Barry court emphasized that under Waldbaum, attracting the public's interest in a controversy is a "relevant but not dispositive factor." Only a controversy which attracts the public's interest because it affects individuals other than the direct participants is a public controversy for purposes of determining public figure status in a libel action. The public controversy in this case involved the alleged recruiting violations at USF. Prior to Barry's employment as head basketball coach in 1980-1981, USF had twice been investigated by the NCAA and had conducted at least one in-house investigation into alleged recruiting violations. The outcome of the recruiting violation controversy was likely to affect members of the USF community. And there did exist a dispute as to the action USF might take in the face of these allegations. Furthermore, stated the court, the difficulties at USF reflected the nationwide debate over the proper role of school athletic programs. Thus, the public controversy requirement of Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) was met.

The court then examined the nature and extent of Barry's participation in the controversy and concluded that limited public figure status was appropriate. Barry voluntarily accepted the position of head basketball coach at USF and by so doing, "thrust" himself into the forefront of an already existing public controversy regarding alleged recruiting violations at USF. It was noted that two previous head coaches at the school had lost their positions due to the investigation of possible recruiting infractions. Again, citing Waldbaum, the court pointed out that "the responsibilities of a position may include decision making that affects significantly one or more public controversies, in which case the occupant becomes a limited public figure for those controversies." A long line of cases have found professional and collegiate athletes and coaches to be public figures. Barry inevitably became "the focal point" of media attention with regard to his team and as such was required to establish that Sports Illustrated published the articles in question with actual malice.

Barry's claim of reckless publication was grounded upon the magazine's alleged failure to investigate. The responsibility to investigate was higher in this case, according to Barry, because the articles were based on statements from Dailey who recently had pled guilty to charges of aggravated assault against a female USF student. But the fact that the publisher knew of Dailey's purported "disreputable character" was not necessarily sufficient to put the publisher on notice of probable falsity, declared the court. The Sports Illustrated articles presented to the readers of the magazine the factors which might affect Dailey's credibility, including the fact that he failed a lie detector test concerning his participation in the assault. In all, stated the court, "Time acted responsibly in printing Dailey's comments and was plainly not in derogation of its duty to investigate." The publication of Barry's denial of the charges was found to be responsible journalism in that the magazine attempted to present a "balanced, neutral picture" of the controversy.

The second half scoring revolved around the court's consideration and affirmance of a constitutional privilege of neutral reportage, a privilege apparently set forth for the first time by the Second Circuit in Edwards v. National Audubon Society, Inc., 556 F.2d 113 (2d Cir.), cert. denied sub nom. Edwards v. New York Times Co., 434 U.S. 1002 (1977). Under the privilege, an issue of first/impression in the Ninth Circuit, "a republisher who accurately and disinterestedly reports certain defamatory statements made against public figures is shielded from liability, regardless of the republisher's subjective awareness of the truth or falsity of the accusation." The court agreed with the Edwards court that the privilege would serve the public interest in being fully informed of serious charges against a public figure, "For if a republisher may be held liable for passing on newsworthy but defamatory information to the public, it is likely that he will decline to publish this information...." The possibility of a lengthy and costly inquiry into a publisher's state of mind might cause a "chilling effect" on publication.

In order to apply the neutral reportage privilege, a court must assess whether the defamer is a party to the controversy and whether the report is accurate and neutral. Barry argued that the privilege would not apply in this case because of Dailey's allegedly poor credibility. But the court declined to restrict the privilege to "trustworthy" individuals or organizations making the allegedly defamatory statement. The public interest rationale of Edwards would be not be met if this differentiation were introduced, stated the court. Thus, concluded the court, the neutral reportage privilege should be applied "to all republications of serious charges made by one participant in an existing public controversy against another participant in that controversy, regardless of the trustworthiness of the original defamer." The privilege is available so long as the publisher does not "espouse or concur" in, or "deliberately distort" the charges.

The court pointed out that the privilege does not extend to the republication of defamatory statements about private parties not already involved in a public controversy.

In this case, the requirements of the privilege were met and served as an independent ground, apart from Barry's failure to plead actual malice with sufficient specificity, for the court's order granting summary judgment in favor of Time.

Barry v. Time, 584 F.Supp. (N.D.Cal. 1984) [ELR 6:7:13]

Federal District Court dismisses law professor's libel action against Newsweek Magazine; statements describing professor's undergraduate level class as

"the easiest five credits a Stanford student can earn" were protected opinions

versity class as "the easiest five credits a Stanford student can earn" while arguably objectionable and unpleasant, did not constitute actionable libel, a Federal District Court has ruled.

The case arose from Newsweek's publication, on October 17, 1983, of an article entitled "A Giggle of Guts." The article appeared both in Newsweek and in Newsweek on Campus, a special supplement circulated on college campuses. The Stanford University class which was nominated by students as a "mick" course was the undergraduate course in criminal law taught by Stanford Law School Professor John Kaplan.

Professor Kaplan sued Newsweek for libel and for intentional infliction of emotional distress. Federal District

Court Judge Aguilar expressed sympathy for Professor Kaplan's "dismay and anger" at Newsweek's devastating portrayal of the course. But the court found that the statements published in the article were not reasonably susceptible of a defamatory interpretation. The article essentially consisted of student opinion as to course offerings, and statements of opinion generally are not actionable. Newsweek did not "impugn [Kaplan's] ability, intellectual standards or performance as a professor, viewed from the perspective of the average reader." Judge Aguilar therefore granted Newsweek's motion for dismissal with prejudice as to the libel cause of action.

Kaplan's cause of action for intentional infliction of emotional distress, based upon Newsweek's alleged failure to discharge its "duty to retract," also was not viable, stated the court. Kaplan did have the opportunity to respond to the article in a letter which was published by Newsweek.

The court concluded by rejecting Kaplan's attempt to turn his libel claim into two separate causes of action, for under California's Uniform Single Publication Act, only one cause of action for damages may be brought based on any single publication.

Kaplan v. Newsweek, 10 Med.L.Rptr. 2142 (N.D.Cal. 1984) [ELR 6:7:14]

Attorney is disqualified from representing performer in musical group in action brought by individual seeking management commission, because attorney's testimony would be required as to alleged contract between the group and the manager

Several years ago, Denis Pregnolato d/b/a Anonymous Management, filed an action for breach of contract and quantum meruit against the band Starbuck. Pregnolato sought a commission payment of $15,230 for management services he allegedly performed for the group, pursuant to an oral contract, from June 1977 to about December 31, 1977. The corporation Starbuck, Inc., and the individuals comprising the band Starbuck denied that an enforceable contract had been entered into with Pregnolato.

During the course of the proceeding, Pregnolato moved to disqualify the law firm representing one of the members of the group, citing Disciplinary Rule 5-102 of the Code of Professional Responsibility. The rule generally requires that attorneys withdraw from conducting a trial when it is obvious that they (or a member of their firm) ought to be called as a witness on behalf of the client, with certain narrow exceptions.

Judge Robert H. Hall, of the Federal District Court in Georgia, found that the lawyer-witness conflict would likely arise in this case and therefore granted Pregnolato's motion. It was noted that since a default judgment was entered against Starbuck, Inc., Pregnolato probably would attempt to establish the liability of members of the band as individuals. There was some evidence, including an unexecuted contract with Pregnolato drafted by the attorney, and correspondence between the attorney and Pregnolato, indicating that the group's members intended to bind themselves as individuals in connection with their obligation to Pregnolato.

Pregnolato also might argue, observed the court, that certain circumstances required that the band member-stockholders be held responsible for the debts of the corporation, even if the corporation were proven to be the contracting party. In all, Judge Hall stated, "the crucial issues seem to be whether a contract was made at all, and if so, by whom." The resolution of these issues would require the attorney's testimony at trial, since, in addition to the factors mentioned above, the attorney apparently was the band's representative in "virtually all" of its dealings with Pregnolato; wrote letters on behalf of Starbuck which would support an inference that Pregnolato was serving as the band's manager; and wrote to Pregnolato stating that his client had asked for a breakdown of the "commission charges" prior to signing any promissory note. This conduct indicated the attorney's "intimate knowledge" of the relationship between Pregnolato and Starbuck, and necessitated his testimony.

The exceptions to the disqualification rule were found not applicable. Disqualification also was found appropriate under Disciplinary Rule 5-102(B) which requires lawyers to withdraw from conducting a trial if they (or a member of their firm) may be called as a witness by opposing counsel and the testimony may be prejudicial to the client. The attorney's "significant involvement" with Pregnolato should have alerted him to the necessity for his testimony, its potential importance, and its potential prejudice to his partner's client, Judge Hall said.

it should be pointed out that Judge Hall's ruling has not been published and only recently, after the settlement of the case prior to trial, was brought to the attention of the Entertainment Law Reporter

Pregnolato v. Wagner, Case No. C80-1429A (N.D.Ga. 1982) [ELR 6:7:15]

Copyright and trademark infringement action brought by creator of "Care Bear" stuffed toy against "Message Bear" toy is rejected by Federal District Court in New York

December 1983 was a brisk and bountiful season indeed for elves and toy litigants (see cases reported at

ELR 6:4:10 to 6:4:13). And now, entering court annals and joining the worthy company of He-Man, the Cabbage Patch Kids and the General Lee car, we present the endearing Care Bears. The Care Bears are pastel-colored plush stuffed toys; each bear carries a different "pictorial representation," i.e., a rainbow, heart, etc., on its chest. In 1983, the sales of Bedtime Bear, Birthday Bear, Cheer Bear, Friend Bear, Grumpy Bear and Tenderheart Bear were expected to exceed $250 million. American Greetings Corporation and CPG Products were the co-venturers in the creation and marketing of the plush stuffed version of the Care Bears. They also licensed products such as greeting cards and plastic toys which carried on the Care Bear concept.

Easter Unlimited, Inc., d/b/a Fun World was an importer and distributor of the "Message Bear" stuffed toy. The Message Bears, which carry chestly greetings such as "Have a Happy Day," appeared in four colors, several of which were close to the colors sported by the Care Bears.

American Greetings claimed that the Message Bears infringed the Care Bears copyright and violated section 43(a) of the Lanham Act and New York state unfair competition law. A Federal District Court in New York denied American Greeting's application for a preliminary injunction, holding that the company failed to establish a likelihood of success on the merits and that the balance of hardships was in favor of Fun World. After an expedited bench trial, the court ruled that American Greetings did not demonstrate a violation of federal copyright or trademark law, or of New York state law, and entered judgment for Fun World.

Federal District Court Judge Sand conducted an extensive review of the nurturing, development and promotion of the Care Bears, and a detailed examination of their physical qualities. Fun World contended that its

Message Bears were created independently of the Care Bears. But Judge Sand concluded that while Fun World did have a bear toy project underway prior to the October 1982 introductory Care Bear trade ad, the Care Bear project "accelerated" the production of the Message Bears and influenced Fun World's marketing strategy.

Judge Sand also found that the Care Bears were copyrightable works of art, because the "total creation" embodying the unique chest symbols, body shape, color, "toushee tag," and heart shaped nose were of sufficient originality to bestow copyrightability on the introductory brochure and on the three dimensional toys derived from the cartoons in the brochure. Furthermore, the inference of copying by Fun World based upon the company's access to the Care Bear design and the similarity of its Message Bear product was not sufficiently rebutted by the evidence of independent creation.

But, were the bears substantially similar? No, answered the court. The similarities in the bears were those of color and size and these were not "striking" similarities, according to Judge Sand, who stated that "the average lay observer most likely would perceive not appropriation, but striking differences notwithstanding those similarities inherent in most plush stuffed toy bears." The Message Bears did not capture the "total concept and feel" of the Care Bear - a bear designed to convey a distinctive personality via its chest symbol and corresponding facial expression. Other differences in the toys included the following: the Message Bear slogans have "a wholly different impact on the observer" than the Care Bears chest symbols; the facial expressions of all Message Bears are identical; and the Message Bears are not known by individual names and have no discernible personalities(!)

Another central difference between the Care Bears and the Message Bears was their respective trade dress. The Care Bear resides in a cardboard box carrying the bear's name; Message Bears are "bulk" items, sans packaging or brochures, displayed in bins rather than on shelves. And the Message Bears retail for a price of five to seven dollars in contrast to a retail price of between sixteen and twenty-one dollars for the Care Bears. Numerous other differences in the bears were cited by the court, "the cumulative [effect] of which clearly undercuts substantial similarity." The Message Bears, at most, may "stir one's memory" of the Care Bears, but this was found insufficient to constitute copyright infringement.

American Greeting's Lanham Act claim also "quickly dissolved" given the finding of an absence of substantial similarity, since little basis remained for the assertion of a likelihood of consumer confusion claim. Weak evidence had been presented as to actual confusion as to source or sponsorship. The testimony of a toy store owner indicated that the Care Bears and Message Bears were not considered competitive items. To further minimize the risk of confusion, the Message Bears wear a prominent tag reading "Fun World."

Fun World may have capitalized on an increased demand for stuffed bears, generated to some extent by the Care Bears promotion, but the company did not do so by confusing customers, ruled the court, in rejecting American Greeting's claims for trademark infringement and unfair competition under state law.

American Greetings Corporation v. Easter Unlimited, Inc., 579 F.Supp. 607 (S.D.N.Y. 1983) [ELR 6:7:15]

New York trial court orders 62/38 split of multimillion dollar modern art collection assembled, pre-divorce, by Robert and Ethel Scull

Call it neo-realism or post-pop, but we know a Solomonic legal opinion when we see one. So stand back and peruse the intriguing composition of New York State Supreme Court Judge Richard W. Wallach's decorous apportionment of the multimillion dollar modern art collection of former husband and wife Robert and Ethel Scull.

A New York trial court originally had ruled that the collection belonged exclusively to Robert Scull because he had purchased the works with his own money. But an appellate panel rejected this finding, imposed a constructive trust on the couple's assets, and ordered the trial court to assess each party's participation in, and contribution to, the collection.

In order to determine the extent of each party's interest in the collection, Judge Wallach designed a five category formula based on: (1) the source of the funds used to make acquisitions; (2) the physical drive, effort and energy involved in acquiring the collection and its subsequent business management including storage, insurance, and safekeeping during transit for exhibition; (3) the critical judgment required to discern the new trends in art and which artists were the emerging masters with the potential for great appreciation in value; (4) the cultivation and inspiration afforded to individual artists; and (5) the ability to capture the public eye and imagination as a collector of art and to enhance the value of acquired works by publicizing both the collection and personality of the collector. On the basis of a scale of ten, the court found the relative participation and contribution of the parties to be: (1) source of funds: Robert 6, Ethel 4; (2) collection effort and business management:

Robert 7, Ethel 3; (3) critical judgment in acquisition: Robert 8, Ethel 2; (4) cultivation of artists: Robert 5, Ethel 5; (5) promotion and publicity: Robert 5, Ethel 5 - for a total of: Robert 31, Ethel 19.

Judge Wallach accordingly fixed Ethel's interest in the art collection at 38% and Robert's at 62% and then reviewed the evidence that resulted in this finding.

Among the factors of particular importance were: Robert Scull's possession of "the critical eye of a Berenson mixed with Duveen - the sure sense of where the trends in modern art were moving and where the great potential for appreciation of value was." He was one of the first collectors of an astonishing roll call of those who would become major figures in today's art scene. He became one of the early purchasers of the works of Jasper Johns, Andy Warhol, Willem de Kooning, James Rosenquist, Frank Stella, and others. Ethel Scull unfortunately but significantly was disabled and confined to her home from October 1961 to October 1962 - a time of "great acquisition activity" by Robert. Robert also acquired certain works on solo trips to Europe. In all, Robert had the ability, far more than Ethel, "to discover what would endure in the frontier of artistic endeavor as opposed to transitory fads."

Ethel's argument that Robert's color-blind condition made him heavily dependent upon her artistic judgment as to color and values was discounted by the court. Robert had been a commercial artist in his youth, notwithstanding this minor impairment. Ethel was not his "artistic seeing eye dog," as it were, stated the court.

In turning to the "cultivation of artists" criterion, the court acknowledged that the creation of certain works of art by, among others, Jasper Johns and Willem de Kooning, resulted from Ethel's encouragement. But in most instances, Ethel and Robert were involved equally with the artists in their lives. The couple also participated as a team and with "dazzling brilliance" in skillfully promoting the collection - and themselves as collectors - thus enhancing the ultimate value of the collection itself.

Judge Wallach concluded by imposing the same respective shares as were set with respect to the art collection to real property owned in Connecticut by the couple.

Scull v. Scull, New York Law Journal, p. 7, col. 2 (N.Y.Sup.Ct., Sept. 14, 1984) [ELR 6:7:16]

Summary judgment denied to parties seeking to impose liability on limited partner in art gallery for general partner's conversion of funds obtained from sale of client's Matisse painting

A New York State Supreme Court justice has responded with notable dispassion to the provocative and tragic circumstances surrounding the sale of a painting by Henri Matisse to the Museum of Fine Arts in Houston.

In 1977, Rebecca G. Reis, the owner of the Matisse painting "Portrait of Olga Merson," employed Richard Lerner and Ernest Heller as her agents to sell the painting. Lerner and Heller were art dealers in New York City, doing business under the name of Lerner-Heller Gallery. The Matisse was sold to the museum for $500,000. The museum made full payment for the art work over a period of three years (through 1981). The gallery, although entitled to a five per cent commission, paid Reis only $225,000 and refused to pay her the balance.

In 1982, Lerner admitted his liability for the conversion of the balance of the museum's payment; summary judgment subsequently was entered on behalf of Reis in her action against Lerner and Lerner d/b/a Lerner-Heller Gallery and damages of $225,827.15 were awarded Reis. Lerner made payments to Reis which totalled $10,000. Then in Sep tember 1982, Lerner committed suicide.

Reis' motion for summary judgment against Heller on the conversion cause of action has been denied. Justice Peter J. McQuillan reviewed the history of the Lerner-Heller venture and pointed out several significant features of Heller's involvement with the gallery. When the gallery commenced business in 1970, Heller, who was Lerner's uncle, was a general partner and a limited investor; in 1972, Heller transferred his general partnership interest to a family corporation (Electro Spark); after 1975, Heller was almost completely inactive in the business. In 1976, a certificate of limited partnership was prepared. The certificate, which never was filed or published, listed Lerner and ElectroSpark as general partners and Heller as one of many limited partners. In 1981, Heller sold Electro Spark's general partnership interest in the gallery to Lerner. When Lerner died, the gallery ceased doing business; it had no assets and several outstanding claims against it. Heller lost his full investment in the gallery; he never received a salary or benefit from the gallery although he filed tax returns, as a limited partner, reporting income realized and losses suffered per his interest in the business.

Justice McQuillan also reviewed the history of Lerner's dealings with Mrs. Reis, who began to sell art works via the gallery in 1976. Reis dealt only with Lerner and came to rely on him for assistance when she and her husband became ill. Lerner purportedly became "almost a part of the family," at least until 1981 when he stopped making payments to Reis from the Matisse proceeds.

In turning to the applicable law, Justice McQuillan stated the principle that every general partner of the gallery would be liable, jointly and severally, for a conversion of funds by the gallery or Urner.

Reis argued that Heller was a general partner because the gallery never was established as a limited partnership under the New York Partnership Law and that Heller therefore was liable, as a general partner, to creditors. But the court emphasized that under the state's Uniform Limited Partnership Act, "a partnership's failure to comply with statutory requirements for its formation, including filing and publication requirements, does not per se lead to the imposition of unlimited liability on limited partners. . . . Thus, a person who believed himself to be a limited partner is not generally held liable for the partnership's failure to comply with statutory requirements for its formation." Heller, it was observed, did believe himself to be a limited partner and acted accordingly. And there was no evidence that Reis "relied to her detriment or was injured, prejudiced or misled by the partnership's failure to comply with the statutory requirements for its formation." The court therefore refused to impose a general partner's liability upon Heller.

Reis also argued that Heller was, as a matter of a law, a general partner, because he forfeited his right to limited liability when he permitted the use of his surname in the gallery's title. The court agreed that a factual determination was required as to whether Reis extended credit to the gallery "without actual knowledge" that Heller was not a general partner. Justice McQuillan noted that Reis may have had actual knowledge that Heller was only an investor in the gallery, given her close relationship with Lerner and the fact that initially she chose to attempt to collect the funds due from Lerner and not from Heller.

Thus, the court denied Reis, Heller and the museum's various motions for summary judgment and sent to trial the question of the extent, if any, of Heller's liability.

Reis v. Lerner, New York Daily Journal, p. 6, col. 3 (N.Y.Cnty., Sept. 26, 1984) [ELR 6:7:17]

NCAA did not violate antitrust laws by sponsoring women's intercollegiate athletics, Federal Court of Appeals affirms in suit brought by AIAW

The past several years have witnessed a dramatic increase in the popularity of women's sports. In fact, in 1981 the National Collegiate Athletic Association decided that the time had come to expand its formerly all-male collegiate athletic association into the market for women's athletics, a market that the NCAA had not entered throughout its first 77 years of existence. However, the NCAA's decision was accompanied by an antitrust suit brought by the Association for Intercollegiate Athletics for Women. In affirming a District Court ruling that the NCAA did not violate antitrust laws by entering the women's intercollegiate athletic market, a Federal Court of Appeals has held that the "AIAW failed to prove (the) NCAA's dues policy, proceeds distribution formula, or sale of television rights violated the Sherman Act."

From 1906 to 1980, the NCAA sponsored programs only for men's intercollegiate athletics. In 1967, the AIAW was organized "to provide a governing body for women's athletics." By 1980, the AIAW had become the major governing body in women's intercollegiate sports with a membership of 961 colleges and universities. However, the NCAA's expansion into the women's athletic market in 1981 brought the AIAW's reign to an end.

Beginning with the 1981-82 sports season, the AIAW began to suffer "a significant drop in membership and participation in its events." This loss of membership resulted in a substantial loss of revenue and prestige. AIAW lost membership dues income; it lost television revenues it otherwise would have received from NBC and ESPN; it lost commercial cosponsorship with the Broderick Company and Eastman Kodak; and it lost the ability to license the commercial use of its logo. As a result of these and other less tangible losses, the AIAW suspended operation in June of 1982.

Prior to going out of business, the AIAW filed suit against the NCAA in the Federal District Court for the District of Columbia. The AIAW alleged that the NCAA had violated sections 1 and 2 of the Sherman Act by using "its monopoly power in men's college sports to facilitate its entry into women's college sports and to force AIAW out of existence." "Specifically, the AIAW asserted that (the) NCAA's unlawful conduct consisted of predatory pricing, the use of financial incentives to 'link' the sale of competitive services with the sale of monopoly services, and an illegal tying arrangement." The District Court held that the AIAW did not prove facts sufficient to constitute a section 1 or 2 violation, and judgment was entered in favor of the NCAA (ELR 5:3:10).

On appeal, the AIAW contested portions of the District Court's fact findings and legal analysis. Although the Court of Appeals disagreed with one part of "the district court's statement of how antitrust laws apply to NCAA practices," it nevertheless concluded that the District Court's "disposition ultimately and properly turns on fact findings that are not clearly erroneous."

First, the Court of Appeals addressed the District Court's statement that AIAW "must demonstrate anti-competitive intent as well as effect to establish NCAA antitrust liability under section 1 or 2 of the Sherman Act." In rejecting this statement of the law, the appellate court stated that "a party's intent is relevant only insofar as it helps predict the probable competitive impact of a disputed practice." The Court of Appeals added that the "emphasis on competitive effect, as opposed to intent, comports with recent Supreme Court precedent dealing with regulatory or nonprofit organizations." Nonetheless, the appellate court found that " although the district court's review of the law unduly emphasized intent, its disposition of AIAW's claims rested on fact findings as to the de minimis competitive impact and noncoerciveness of NCAA's disputed practices," and thus "its error was rendered harmless." Therefore, to resolve the appeal, the Court of Appeals turned to "the precise grounds upon which the district court rejected AIAW's claims."

AIAW first asserted that the NCAA had "used its dues policy as a predatory pricing scheme and its proceeds distribution formula to create 'irresistible inducements' to facilitate its entry into women's sports." AIAW claimed that such conduct constituted either "an unlawful monopolization, an attempt to monopolize, or at least an unlawful use of monopoly power in one market to damage competition in another market."

The Court of Appeals stated that "to establish a monopolization claim, the plaintiff must demonstrate that the defendant in fact acquired monopoly power as a result of unlawful conduct." After reviewing the record, the appellate court found that the District Court was not "Clearly erroneous" in its conclusion that the NCAA had not acquired a monopoly in women's sports by June

1982, and thus affirmed the dismissal of AIAW's monopolization claim.

The appellate court next addressed AIAW's "attempted monopolization" claim. The District Court had found that "although AIAW proved that NCAA's eventual monopolization of women's sports was 'a likelihood,'" the NCAA lacked "the requisite specific intent." After reviewing the considerable evidence cited by the District Court that the "NCAA viewed the continued existence of AIAW as a healthy alternative to the NCAA . . ., and that (the) NCAA's objective was not 'to take over women's athletics,'" the appellate court concluded that the District Court had properly applied the law in relation to the "attempted monopolization" claim and the District Court's decision was fully supported by the record.

The AIAW's third section 2 claim alleged that the NCAA "unlawfully distorted competition in women's sports ... by using its monopoly power as a 'lever' to facilitate its entry into women's sports." The appellate court stated that even "assuming arguendo that leverage is a distinct section 2 offense," the AIAW was required to prove the alleged use of monopoly power "in fact caused economic injury and that such use was unlawful." The District Court found that the "AIAW failed to establish the causal relationship between NCAA's disputed practices and AIAW's economic injury." The appellate court concluded that its "review of the record does not reveal that the district court's conclusion was clearly erroneous." "That the NCAA's disruptive practices were not exclusionary, did not spring from a predatory intent, and regulated essentially noncommercial conduct further suggests that these practices would have a de minimis competitive impact."

Accordingly, the Court of Appeals affirmed the District Court's ruling that the "AIAW failed to establish that it suffered antitrust injury as a result of NCAA's dues policy or proceeds distribution formula."

Finally, the appellate court addressed the AIAW's claim regarding the NCAA's sale of television rights. The AIAW contended that the NCAA "tied the purchase of television rights for its women's basketball championship game to the purchase of its men's counterpart," amounting to a per se violation under s tion 1 of the Sherman Act. Since the District Court concluded that the NCAA "in fact did not use this power to impose a tied sale on the television networks," the appellate court stated that the AIAW had the "heavy burden of demonstrating that the district court's factual conclusion was clearly erroneous."

The AIAW asserted three points in attacking the District Court's finding of no coercive tie. First, conditions imposed in submitting bids for the men's championship television rights included a condition that "requested the networks to assign a separate fee to NCAA's women's basketball championship game." Second, both CBS and NBC "felt obligated to submit such a bid." Finally, that the NCAA awarded CBS the women's event even though NBC's bid was substantially higher.

The appellate court rejected all three of these points. First, the appellate court found that "nothing in the NCAA's submission to the networks indicated the men's event would be sold only to the network that purchased the women's event." By adding the request for a separate fee bid for the women's event, the NCAA was simply asking "the networks for their view" of the worth of the women's event, the appellate court stated. Second, the appellate court found "no evidence demonstrating that had the networks assigned a value of zero to the women's event, the possibility of purchasing the men's event would have been foreclosed and thus no coercion existed. Finally, the appellate court stated that given "the potential efficiencies of awarding the men's and women's championships to the same network, we cannot presume a coercive tie between two products from the sole fact that both products were sold to the same bidder."

Association For Intercollegiate Athletics For Women v. National Collegiate Athletic Association, 735 F.2d 577 (D.C.Cir. 1984) [ELR 6:7:18]

Briefly Noted:

Copyright.

The New York Court of Appeals has reversed an order granting a defendant's motion to vacate a preliminary injunction because the court below lacked subject matter jurisdiction in an action alleging unfair competition, interference with contractual relations, and violation of the state antidilution statute, because in reality the action was for copyright infringement which should have been heard by a federal district court having exclusive jurisdiction over such matters. The plaintiffs, Editorial Photocolor Archives, Inc. (EPA) and Scala Institute Fotografico Editoriale (Scala) and the defendant, The Granger Collection, are competitors in the business of leasing and licensing transparencies and photographs for reproduction from their archives. EPA and Scala had an agreement whereby Scala gave EPA the exclusive right in North America to sell, lease or license reproduction rights to all Scala photographs and transparencies. EPA then saw several pictures in two publications, apparently taken from Scala transparencies, which were credited to The Granger Collection instead of EPA. EPA then brought suit, asserting violations of state law. The court found that the rights the plaintiffs had asserted were the equivalent of rights protected by the Federal Copyright Act. The Copyright Act of 1976 provides that state courts do not have jurisdiction to consider claims to enforce those rights under the Copyright Act, and that such cases must be heard in federal district court. The court ruled that an order issued without subject matter jurisdiction is void, and that the defect could be raised at any time and was not waived.

Editorial Photocolor Archives, Inc. v. Granger Collection, 463 N.E.2d 365 (N.Y. 1984) [ELR 6:7:19]

Copyright.

A New York Small Claims Court has recognized the exclusive jurisdiction of the federal courts to hear a copyright infringement action, and it has dismissed an action brought by a photographer against the New York Post, alleging breach of contract when the newspaper failed to pay the sums agreed for her photograph. Marilyn Schrut, a freelance photographer, shot a photograph of President Reagan's son, Ron, as he stood in line at the New York State Unemployment Office, presumably waiting to receive his benefits. Ms. Schrut sold the photograph to the New York Post which agreed in writing to pay her $250 as a holding fee with a further sum of $550 upon publication of the photograph. The Post further agreed that the picture was for one-time use only but reserved the right to flash back to the picture in subsequent editions. Though the photograph appeared in three separate editions, Ms. Schrut was paid only $550. The New York Post argued that the complaint should be dismissed since her claim was based upon an alleged violation of the Federal Copyright Act. Ms. Schrut

countered that it was a simple contract action, requiring the court to interpret the "flash back" provision of the contract. The court held that such an action comes within the federal copyright statute and thus claims seeking relief under the common law or state statutes are expressly preempted. The court dismissed the complaint with leave to replead
in Federal Court.

Schrut v. News America Publishing, Inc., 474 N.Y.S.2d 903 (N.Y. City Civ. Ct. 1984) [ELR 6:7:20]

Video Games.

A video amusement center in Massachusetts has been unsuccessful in challenging the constitutionality of a city ordinance which was the basis for the denial of its license to operate 50 video machines. The City of Malden has an ordinance restricting licenses for 5 or more video games where they were accessory or incidental to only recreational business use, with a maximum limit of 25 games for each license. Based on this ordinance, the City Council rejected the Malden Amusement Company's application for a license. The Amusement Company challenged the ordinance on several grounds: that video game playing is protected speech; that the ordinance violates freedom of association; that it is void for vagueness; and that it violates due process and equal protection because it treats recreational businesses differently from businesses operating video games for profit. A Federal District Court has nonetheless upheld the constitutionality of the ordinance. The court echoed the ruling of another federal court holding that video games are not protected speech. In addition, there was no violation of freedom to associate since a person has no constitutional right to play video games in an arcade that is not an "accessory to or incidental to only recreational business use." The statute was held not to be vague since reasonable persons were put on notice regarding the meaning of the quoted phrase. Furthermore, an economic classification that treats one business differently from the other is valid if it is rationally related to a legitimate state interest, such as maintaining order, preventing crowding or diminishing the prospects of outsiders from congregating in the city. Finally, the ordinance was not found to be arbitrary or capricious, thus withstanding the due process challenge.

Malden Amusement Co., Inc. v. City of Malden, 582 F.Supp. 297 (D.Mass. 1983) [ELR 6:7:20]

IN THE NEWS

Federal District Court in New York awards $1,450,000 in damages to seven record companies in copyright infringement action

Federal District Court Judge Charles S. Haight has awarded $1,450,000 to seven record companies in a copyright infringement action alleging that Joseph Peri, the owner of Creative Disc, Inc., a pressing and duplicating plant, and Dynasty Graphics, Inc., a graphics plant, engaged in the unauthorized duplication of sound recordings and the packaging for those recordings. Judge Haight also ordered the Mount Vernon, New York-based companies to pay all attorneys fees, and ordered the destruction of all infringing materials and the sale of non-infringing materials, with the proceeds to be applied towards the total damages assessed against the infringing parties. [Dec. 1984] [ELR 6:7:20]

Avco Embassy Pictures is ordered to pay $195,300 in damages for omission of executive producer credit

A Federal District Court in California has awarded Patrick Wachsberger $195,300 in his action against Avco Embassy Pictures, James W Glickenhaus and Glickenhaus Soldier Films for the companies' failure to grant him an allegedly agreed-upon screen and advertising credit as executive producer of the film "The Soldier." The award included the balance of Wachsberger's compensation, $125,000 in compensatory damages and $300 for the violation of section 3344 of the California Civil Code. [Dec. 1984] [ELR 6:7:20]

Federal Court of Appeals refuses to allow live television coverage of Westmoreland-CBS libel trial

A Federal Court of Appeals in New York has denied Cable News Network's latest request to provide live television coverage of General William C. Westmoreland's libel action against CBS (see ELR 6:6:21). The court stated that the public has a right to attend a trial, but not to view it on television, rejecting CNN's argument that federal court rules banning cameras in the courtroom violate the network's First Amendment right to have access to the trial. [Dec. 1984] [ELR 6:7:21]

Warner Communications and Polygram abandon proposed merger

Warner Communications, Inc., and the parent companies of Polygram, Inc., have announced the abandonment of plans to merge their record operations in the United States. The decision was based upon the Federal Trade Commission's continued opposition to the proposed merger as anticompetitive. It is likely that another significant factor in the companies' decision was the recent Federal Court of Appeals decision granting the Commission's request for a preliminary injunction pending further administrative hearings (ELR 6:6:10). [Dec. 1984] [ELR 6:7:21]

NBC receives $3 million damage award against presidential candidate Lyndon H. LaRouche, Jr.

A Federal District Court jury in Virginia has awarded NBC $3,002,000 in damages in the network's countersuit against right-wing writer and presidential candidate Lyndon H. LaRouche, Jr.

The court action arose when LaRouche filed a $150 million libel suit against NBC. LaRouche alleged that the NBC programs "Nightly News" and "First Camera" (which is no longer on the air) reported in January and March 1984 that LaRouche was the head of a right-wing, extremist "political cult" with an anti-Semetic bias. LaRouche also alleged that the broadcasts wrongly depicted his followers as a "hate group, a psychologically unstable cult of followers ... who have and will perform crimes which [LaRouchel orders" and who may have engaged in "smear tactics" to intimidate reporters and to subvert the political campaign of presidential candidate Walter Mondale.

The jury rejected LaRouche's claims and awarded NBC $2,000 in compensatory damages and $3,000,000 in punitive damages on the basis of the network's counterclaim of business interference. The counterclaim charged that LaRouche and his followers had interfered with NBC's attempt to obtain further information about their activities via an interview with Senator Daniel Patrick Moynihan.

LaRouche has announced his intention to appeal the jury's decision. [Dec. 1984] [ELR 6:7:21]

Utah and California voters reject proposals to regulate content of cable television programming

A proposal to ban "indecent material" on cable television was rejected by voters in Utah last month. Approximately two-thirds of the state's voters were against an initiative which would have regulated the content of pay services carried by cable systems in the state.

In the community of Vista, California (in northern San Diego county), voters rejected an "indecent material" proposition aimed at the Playboy Channel. The Vista voters also defeated a separate proposition which would have authorized $300,000 in litigation expenses to defend against an anticipated challenge to a Playboy Channel ban, if enacted. [Dec. 1984] [ELR 6:7:21]

Vanessa Redgrave recovers $100,000 in damages in breach of contract action against the Boston Symphony Orchestra

A Federal District Court jury has awarded actress Vanessa Redgrave $100,000 in her $1.2 million breach of contract action against the Boston Symphony Orchestra.

In April 1982, the orchestra canceled a performance by Redgrave as the narrator of Stravinsky's "Oedipus Rex." This action was taken primarily in response to threats of violence directed against the orchestra because of Redgrave's pro-Palestinian views. But the jury determined that the risk of a violent public reaction did not warrant the cancellation of Redgrave's performance, and awarded the actress her $27,500 concert fee and a sum to compensate for lost earnings.

However, the jury also found that the orchestra's action did not constitute a blacklist for political reasons in violation of Redgrave's civil rights. [Dec. 1984] [ELR 6:7:21]

Public hearings are reopened on proposed California administrative regulations governing the employment of minors in the entertainment industry

Public hearings are being reopened on proposed changes in California's child labor regulations for the entertainment industry. The Child Labor Regulations Panel (a unit of the California Department of Industrial Relations) issued proposed revised rules governing the employment of minors (as reported in ELR 6:3:19). The rules have not yet been adopted, and now will be open to further public comment at a hearing scheduled for January 30, 1985.

The proposed regulations have been the target of considerable critical comment from the studio teachers union, while being endorsed by many industry management and labor representatives, including the Alliance of Motion Picture and Television Producers, the Screen Actors Guild and the American Federation of Television & Radio Artists. [Dec. 1984] [ELR 6:7:21]

WASHINGTON MONITOR

Congress enacts legislation authorizing "backyard" reception of unscrambled satellite-transmitted television signals

The right of owners of backyard satellite earth stations to receive unscrambled television signals from satellites has been affirmed by a provision of the recently-adopted Cable Communications Policy Act of 1984.

Cable program suppliers utilizing satellite transmission may choose whether to scramble their signal to protect their transmission or whether to leave their signal unscrambled and enter into negotiated agreements with representatives of the backyard dish industry to receive compensation for signal use.

The new policy amends section 605 of the Communications Act (now redesignated as section 705).

Remaining unaltered are the severe penalties for the unauthorized use of scrambled or unscrambled signals and, in particular, for the use of "blackboxes" to receive scrambled programming for commercial use or private gain.

The provision also grants copyright holders the right to bring civil actions seeking injunctive relief to restrain the violation of the statute. Any damages awarded in such an action may be increased by up to $50,000 upon a finding of willfulness. [Dec. 1984] [ELR 6:7:22]

Federal Communications Commission will review competing applications for RKO's broadcast licenses

The Federal Communications Commission has commenced proceedings to determine the future licensees for RKO General, Inc.'s radio and television stations if

RKO is found unqualified to renew its various broadcast licenses. The Commission has designated for hearings 149 competing applications for RKO's twelve radio stations and for WHBQ-TV, Memphis. Further action on the applications most likely will await a ruling by FCC Administrative Law Judge Edward J. Kuhlmann in a pending proceeding to determine whether RKO is fit to retain its license for KHJ-TV, Los Angeles.

News reports indicate that the FCC's action was prompted by the RKO Radio Network's admission that it may have overcharged advertisers by as much as $7.9 million since 1980. The overcharging apparently resulted from advertising rates which were based on a larger number of radio listeners than actually were reached by RKO stations. [Dec. 1984] [ELR 6:7:22]

DEPARTMENTS

In the Law Reviews:

A Judicial Circumscription of Rights under the "Derivative Works Exception," Section 304(c)(6)(a) of the Copyright Act of 1976: Who's Sorry Now? - Harry Fox Agency, Inc. v. Mills Music, Inc. by Lisa Aimee Strenger, 6 Whittier Law Review 923 (1984)

Communications and the Law, Volume 6, Number 5 has been published by Meckler Publishing, 11 Ferry Lane West, Westport, CT 06880, and contains the following articles:

A Primer on the Interface of Trade Secrets and Copyright on Software Protection by Alan J. Hartnick, 6 Communications and the Law 3 (1984)

Copyright in Collections of Facts: A Reply by William Patry, 6 Communications and the Law 11 (1984)

First Amendment Rights and the Cable Television Industry: Introduction by Michael Botein, 6 Communications and the Law 45 (1984) (Professor Botein coordinated a First Amendment and Cable Television conference in October. The following three articles are from the proceedings.)

Cable Television and the First Amendment by Glen 0. Robinson, 6 Communications and the Law 47 (1984)

Content Regulation of Cable Programming by Thomas G. Krattenmaker, 6 Communications and the Law 63 (1984)

Rights of Excess: Cable and the First Amendment by Douglas H. Ginsburg, 6 Communications and the Law 71 (1984)

"Cablespeech": The Case for First Amendment Protection: A Book Review by Stephen R. Bachmann, 6 Communications and the Law 81 (1984)

Collegiate Athletic Participation: A Property or Liberty Interest? by Keith Randall Solar, 15 Pacific Law Journal 1203 (1984)

Regulating the Professional Sports Agent: Is California in the Right Ballpark? by Dana Alden Fox, 15 Pacific Law Journal 1231 (1984)

Of Mice, Men and Supermen: The Copyrightability of Graphic and Literary Characters by Stephen Clark, 28 Saint Louis University Law Journal 959 (1984)

Appellate Review of Lanham Act Violations: Is Likelihood of Confusion a Question of Law or Fact? by Brett Thomas Reynolds, 38 Southwestern Law Journal 743 (1984)

Descendibility of the Right of Publicity, Volume 1983 Southern Illinois University Law Journal 547 (1983)

General Public Figures Since Gertz v. Robert Welch, Inc., 58 St. John's Law Review 355 (1984)

Toward a Definition of an Alien's Residency for United States Income Tax Purposes, 19 Texas International

Law Journal 481 (1984) (Published by the University of Texas at Austin Law Publications)

Signal-Penetration or Station-Location: The Scope of the National Football League's Television Blackout Antitrust Exemption WTWV v. National Football League, 6 Western New England Law Review 877 (1984)

TeleViolence: Should Broadcasters Be Liable? - DeFilippo V. National Broadcasting Co., 6 Western New England Law Review 897 (1984)

A Review of Federal, State and Local Regulation of Cable Television in the United States by Adrian E. Herbst, Gary R. Matz and John F. Gibbs, 10 William Mitchell Law Review 377 (1984)

Minnesota's Approach to the Regulation of Cable Television by W.D. Donaldson, 10 William Mitchell Law Review 413 (1984)

Implications for Economic Regulation of Cable Television by Neil Hamilton, 10 William Mitchell Law Review 433 (1984)

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