NEW LEGISLATION AND REGULATIONS

California enacts statute establishing descendible right of publicity

California has extended its protection of the right of publicity via the enactment of Section 990, and the amendment of Section 3344, of the Civil Code.

Section 990 provides that the use, without authorization, of a "deceased personality's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling ... products . . ." will result in liability for an amount equal to the greater of $750 or actual damages. Other remedies provided for in the statute include profits from the unauthorized use, punitive damages, and attorneys' fees and costs, along with any other remedy provided for by law. The Section 990 rights are "property rights, freely transferable in whole or in part, by contract or by means of trust or testamentary documents." A transfer may occur, prior to death, by the personality or his or her transferees, or after the death of the personality by certain appointed parties. The statute specifies the parties who may execute the rights granted in the section; establishes administrative procedures for registering a claim with the Secretary of State to the rights of the deceased personality in order to recover damages for an unauthorized use; and sets a 50-year term from the death of the deceased personality.

A deceased personality is defined as "any natural person whose name, voice, signature, photograph or likeness has commercial value at the time of his or her death, whether or not during the lifetime of that natural person the person used his or her name ... on or in products, merchandise or goods, or for purposes of advertising or selling...." A deceased personality includes any such natural person who has died within 50 years prior to January 1, 1985.

Another significant definition is that of the word "photograph," which for purposes of the statute means any photograph, still or moving, or any videotape or live television transmission such that the deceased personality is "readily identifiable," i.e., "when one who views the photograph with the naked eye can reasonably determine who the person depicted in the photograph is."

A fair use caveat exempts from the consent provision of the statute the use of a name, voice, signature, photograph or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign. Furthermore, the section does not apply to the use of a deceased personality's name, et. al., in a play, book, magazine, newspaper, musical composition, film, radio or television program (other than an advertisement or commercial announcement which is not otherwise exempt); material that is of political or newsworthy value; single and original works of fine art; and/or an advertisement or commercial announcement for one of these cited uses.

The use of a name, et. al., in a commercial medium does not constitute a use for which consent is required solely because the material containing such use is commercially sponsored or contains paid advertising.

Section 3344 of the Civil Code was amended to conform with the provisions of Section 990 as follows: liability may result under this section from the unauthorized use of the voice or signature of an individual without his or her consent as well as from the use, without consent, of another's name, photograph or likeness for advertising purposes or purposes of solicitation of purchases; the section now will extend to the use in any products, merchandise or goods and to a use for purposes of selling such goods; minimum damages will be $750 rather than $300; and unauthorized use, as in section 990, may result in punitive damages and attorneys' fees.

The section also considers: photographs that include more than one individual, such as those of members of a crowd at a sporting event, or of a basketball team or the audience at a theatrical production; the incidental use of an employee's photograph or likeness; fair use; and a requirement that a party charged with liability have knowledge of the unconsented-to use.

California Civil Code, Sections 990 and 3344 (Senate Bill 613, adopted 1984) [ELR 6:8:3]

Tennessee adopts statute establishing descendible right of publicity; Tennessee appellate court upholds trial court's earlier rejection of right of publicity and trademark infringement claims brought by estate of entertainer Lester Flatt against Coors Beer

On June 5, 1984, Tennessee Govenor Lamar Alexander signed the "Personal Rights Protection Act of 1984." The Act prohibits "the unauthorized use of another's name, photograph, personality or likeness for advertising, solicitation or commercial purposes...." The Act should counter the decision in Memphis Development Foundation v. Factors Etc., Inc., 616 F.2d 956 (6th Cir. 1980) (ELR 1:22:1), by providing that "Every individual has a property right in the use of his name, photograph or likeness in any medium in any manner" that is freely assignable and licensable and that does not terminate upon his or her death.The right of publicity survives "whether or not such rights were commercially exploited by the individual during [his or her] lifetime." The right is exclusive to the individual during lifetime, and it is exclusive to the individual's estate for at least ten years after the individual's death. The right may terminate if the executor or heir fails to use the name, likeness or image of the deceased party for a period of two years after the initial ten-year term of exclusivity.

The Act provides for the issuance of injunctive relief and the recovery of actual damages and any profits from unauthorized use, among other remedies.

With respect to fair use, the Act states that the use of a name, photograph or likeness in connection with any news, public affairs or sports broadcast or account is deemed a fair use, and not a violation of an individual's rights. And it will remain a question of fact as to whether or not the use of an individual's name, photograph or likeness in a commercial medium "was so directly connected with the commercial sponsorship or with paid advertising [contained in the commercial medium] as to constitute a use for purposes of advertising or solicitation."

The Act was signed just prior to a Tennessee appellate court decision emphatically affirming the dismissal of a right of publicity claim brought by the estate of entertainer Lester Flatt against the Adolph Coors Company. The Flatt estate trustees had sued Coors for wrongfully including the performer's likeness in a poster advertising its beer. Most of the estate's claims were summarily rejected, but a Chancery Court jury did award $8,000 to the Flatt estate (ELR 4:12:2). Notwithstanding the jury award, the estate chose to appeal the dismissal of its various causes against Coors, including a claim alleging that the company cast Flatt "in a false light in the public eye."

Judge Henry F. Todd of the Court of Appeals of Tennessee first noted that the false light claim constituted an accusation of defamation and, citing Memphis Development, held that any claim for injury sustained by Flatt ceased upon his death. The trial judge's determination that the evidence of Coors' conduct was insufficient to support a verdict for punitive damages also was upheld.

Judge Todd then considered the estate's claim for trademark or service mark infringement. Flatt had acquired a trademark and/or service mark during his life with respect to his entertainment services, recordings and the mementos of his career, noted the court. The service mark, however, ceased to be viable at Flatt's death, according to Judge Todd, because he no longer could render services. The trademark rights did pass to Flatt's estate but only as to the class of goods to which the trademark was attached or to goods of the same general class. Judge Todd declared: "By no stretch of the imagination could it be conceived that the deceased attached his name or picture to an alcoholic beverage," and therefore ruled that Coors' use of Flatt's likeness was not an infringement of the trademark rights of Flatt or his estate.

Judge Todd proceeded to express his view that the right of publicity is not a devisable right even where an individual has exploited the right by contract during life, a view apparently not shared by the Tennessee legislature. As strictly delineated by the court, "The only actionable wrong in connection with the name or likeness of the deceased is the interference with the use of the name or likeness to identify the products to which it has become attached m the public mind." It was pointed out that the trial court had recognized the right of the estate to recover actual financial losses resulting from Coors' wrongful use of Flatt's likeness; i.e. , the estate might have had reduced sales of merchandise it was distributing "in continuation of a practice of the deceased." But the $8,000 damage award more likely was based upon the market value of Coors' use of Flatt's likeness, rather than upon the very narrow ledge carved out by the court.

However, given Coors' failure to appeal from the award, the appellate court could only conclude by reiterating its opinion that the trial court had not erred in refusing to instruct the jury regarding any injury to the noninheritable right in the "reputation of the name or likeness" of the deceased, or in refusing an instruction as to recovery for the noninheritable value of the deceased's name or image or any loss of opportunity to sell to others the right to use Flatt's name or image.

Tennessee Senate Bill No. 1566 (June 5, 1984); Commerce Union Bank v. Coors of the Cumberland, Inc., Case No. 83-327-II (Tenn.App., June 20, 1984) [ELR 6:8:3]

RECENT CASES

Federal Court of Appeals affirms royalty award of over $280,000 to widow of songwriter Jim Croce against music publisher and recording company

A Federal Court of Appeals has upheld an award of damages of $283,744 to Ingrid Croce, the heir of performer and songwriter Jim Croce (who died in 1973), in claims against Blendingwell Music, Inc., and Cashwest Productions, Inc., and their officers, Philip Kumit, Thomas R. Picardo, Jr. aka Tommy West, and Dennis Minogue aka Terry Cashman.

In 1968, Blendingwell entered into contracts with Croce pursuant to which Blendingwell became the exclusive publisher of Croce's compositions and his personal manager. Croce also entered into a contract with a corporate predecessor of Cashwest for the recording of his works. The Croce-Blendingwell "Standard Songwriters Contract" provided that: ". . . the COMPANY agrees to pay, during the term of the copyright owned by it, to the WRITER ... A. 03 cents per copy for each and every complete pianoforte copy of the composition sold by the COMPANY, and paid for in the United States of America and Canada ... E. 50% of the net sums actually received by the COMPANY from mechanical, transcription and synchronization licenses ... G. 50% of the net sums actually received from any other sources or rights now known or which may hereafter come into existence not [now] specifically provided for herein.... "

In 1969, Blendingwell entered into a contract with Robbins Music Corp. granting Robbins a license to sell Croce's compositions in sheet music form. Blendingwell, until 1976, paid Croce 50% of the amounts received from Robbins under this contract. In 1976, Blendingwell began paying Croce three cents per copy of sheet music sold by Robbins; Blendingwell also claimed that the prior payments to Croce in excess of three cents per copy were overpayments and proceeded to deduct $70,992 from Croce's then current royalties in order to recoup the alleged overpayment.

Moving on down the highway - in 1972, Cashwest and Blendingwell entered into agreements with ABC Records, Inc., and ABC's affiliate Wingate Music Corp., whereby ABC obtained the right to manufacture, distribute and sell Croce's recordings in return for the payment of royalties by ABC to Cashwest and Blendingwell. In addition, Blendingwell assigned to Wingate 50% of

Blendingwell's share in publishing income generated by Croce's compositions under Blendingwell's songwriter contract with Croce. Thus, if Blendingwell received royalties for a Croce work from a record company other than ABC, Blendingwell would pay 50% to Croce, keep 25% and pay 25% to Wingate, per the court's explanation. However, Blendingwell agreed that ABC could pay 25% of the gross amount due to the company from ABC directly to Wingate and pay Blendingwell the remaining 75%.

Blendingwell's practice until 1980, was to pay Croce songwriter royalties of 50% of the gross amount ABC was required to pay to Blendingwell. But in 1980, Blendingwell began paying Croce only 50% of the payment ABC was forwarding to Blendingwell, i.e., the amounts paid by ABC to Wingate for Blendingwell's account no longer were being taken into consideration in determining the payment to Croce.

These arrangements became further complicated by a dispute between ABC and Cashwest and Blendingwell resulting as an audit of ABC's royalty payments through December 31, 1975. The auditors' report stated that ABC owed Cashwest $4,500,000 and owed Blendingwell about $223,000. The audit also revealed that Blendingwell owed Wingate's corporate successor about $326,000. In 1979, Cashwest, Blendingwell, ABC and Wingate entered into a settlement agreement whereby ABC paid Cashwest approximately $1,920,000 for past royalties; ABC's stated debt to Blendingwell was extinguished as was Blendingwell's stated debt to Wingate.

In the midst of it all, Ingrid Croce filed her lawsuit claiming that Blendingwell, Cashwest and the individuals comprising these companies had breached their recording, publishing and managerial contracts with Croce and had acted unconscionably in carrying out their fiduciary duties to Croce. At issue was a claim against

Blendingwell for 50% of the gross amounts payable to Blendingwell by ABC since 1979; a claim against Cashwest on the ground that when Blendingwell's debt to Wingate was extinguished in 1979, this occasioned a reduction in ABC's royalty payment to Cashwest and that, under the Croce-Cashwest recording contract, Croce was entitled to 5/9 of the amount of the reduction; and a claim against Blendingwell for 50% of the net amounts received by Blendingwell for sales of sheet music by Robbins (less the three cents per copy already paid).

Blendingwell counterclaimed for $334,024 in alleged overpayments to Croce between 1972 and 1980 under its agreements with ABC.

The contract claims were heard by a jury. But after the close of the evidence, the District Court directed a verdict in favor of Croce for $31,591 on the ABC royalty claim and for $70,992 on the sheet music claim. Blendingwell's counterclaim was dismissed. The ABC-settlement claim was submitted to the jury on special interrogatories, and the jury found that ABC had reduced its payment to Cashwest when the Blendingwell debt to Wingate was extinguished. The court then found that the amount of the reduction was $326,000 and that Croce was entitled to recover $181,161 (representing 5/9 of the amount of the reduction).

On appeal, Judge Amalya Kearse upheld the jury finding and the court's damage award. Judge Kearse first stated that the District Court was not required to submit to the jury the question of the amount of the reduction in ABC's royalty payments resulting from the settlement agreement.

With respect to the royalty payment dispute, Blendingwell argued on appeal that since it physically received only 75% of the gross amount payable by ABC, Blendingwell was required to pay Croce only 37 1/2% of that amount. The District Court had ruled that the contractual term "net sums actually received by Blendingwell" included sums that Blendingwell "realized" and had constructively received. The evidence in support of this ruling was "overwhelming," stated Judge Kearse. First, from 1972 until 1980, Blendingwell had paid Croce 50% of the total amount owing to it by ABC - both of the sums received from ABC in cash and of the sums constructively received through ABC's payments to Wingate on its behalf. The parties' practical construction of the contract prior to the commencement of litigation was found "compelling." Further, there was "clear and unequivocal" evidence that Blendingwell's actions in paying Croce 50% of the net sums realized from 1972 to 1980 was not a bookkeeping error, but rather reflected its interpretation of its contractual obligation to Croce. In 1975, Kumit, in a tape recorded conference with Ingrid Croce, informed Croce that Blendingwell had given up one-half of its own share of the royalties and had not asked Croce to accept a 50-50 division with Blendingwell of the remaining 75%. And ABC's payments to Wingate were not expenses to be deducted before Croce's share of the net was computed - the agreement in question expressly defined Blendingwell's net income as an amount remaining after Croce's royalties were deducted. The directed verdict in favor of Croce on the ABC royalty claims therefore was declared proper, because no rational juror could have concluded that the parties intended that Blendingwell would pay Croce only 37 1/2% of the royalties realized by Blendingwell from the mechanical license to ABC.

The directed verdict in connection with the sheet music claim also was upheld. Blendingwell did not sell the sheet music for which it withheld royalties. The songwriter contract plainly stated that sheet music sales by Blendingwell would result in a three cent royalty and that sums received from other sources not specifically provided for in the contract would result in a 50% royalty. Blendingwell unsuccessfully cited industry custom in support of its claim that the three cent royalty would apply to sheet music sales by licensees. But the court pointed to expert testimony that when a contract contained a provision for royalties on sheet music sold by the publishing company, the industry practice indeed was to include a provision that sheet music sold by persons other than the company would incur a 50% royalty. And again, for many years, Blendingwell actually paid Croce a royalty of 50% of the sums it received from Robbins, noted the court in affirming the judgment of the District Court.

Croce v. Kurnit, 737 F.2d 229 (2d Cir. 1984) [ELR 6:8:4]

Producers' breach of contract action against Motown Records, alleging failure to provide Diana Ross's services for a record album project, is dismissed

In 1979, the Chic Organization entered into an agreement with Motown Record Corporation whereby Chic was to provide the services of its principals, Nile Rodgers and Bernard Edwards, in the production of a record album by Diana Ross. The agreement contained an option provision which stated, in part, that "If sales of the LP hereunder exceed one million units sold (i.e., shipped and not returned) ... producer shall have the option to produce one of the Artist's next two (2) albums. . . . "

Ross's album "Diana" was released in May 1980. In October 1980, Chic advised Motown that it was exercising its option under the agreement. Unfortunately, after the recording of "Diana," Ross refused to record another album for Motown. Ross's exclusive personal services contract with Motown was to expire on December 23, 1980. And while Motown encouraged Ross to commence new recordings and to agree to a new contract, these efforts were unsuccessful. In May 1981, Ross entered into a recording contract with RCA.

Chic sued Motown, alleging that Motown breached an "implied, unconditional promise to deliver Ross for two albums," Motown was found subject to personal jurisdiction in New York in a ruling issued by Federal District Court Judge Conner in 1983 (ELR 4:22:6). But Judge Conner has ruled that under the applicable provisions of California law, the Chic/Motown agreement was not subject to the interpretation advanced by Chic.

The agreement contained an integration clause expressly limiting any warranties of the parties to those set forth in the agreement. The court therefore declined to imply an obligation on the part of Motown - namely, to provide Ross's services - that was not so set forth.

Other provisions of the Chic/Motown agreement also demonstrated that Chic's interpretation was "unacceptable." For instance, Motown did not expressly undertake an affirmative obligation to furnish Ross's services even though Chic had expressly warranted that Rodgers and Edwards had contracts with Chic that would enable them to carry out their contractual obligations and that those contracts would remain in effect for the term of the Chic/Motown agreement. Rodgers and Edwards also personally signed the Chic/Motown agreement, assuming the obligation "to perform in accordance with and to be bound by the Agreement insofar as the Agreement related to each of them." There was no similar provision whereby Motown warranted that it would keep Ross under contract for the term of the Chic agreement or that Motown would be able to compel Ross to perform.

While it could have been anticipated that Motown would make good faith efforts to provide Ross's services (which the company apparently did undertake), Motown was not the guarantor of Ross's continued availability for performance. Furthermore, Ross did not sign the Chic/Motown agreement. Chic never requested Ross's signature during the entire course of a lengthy negotiating process. The court concluded that "if the parties had intended that Motown have an unconditional obligation to ensure Ross's availability, they would have stated so explicitly."

Chic's reliance on Ross's loyalty to the Motown organization was hardly well-founded, noted Judge Conner, given the fact that the California Labor Code limits the duration of personal service contracts to seven years. The court therefore concluded that Motown did not breach the option provision of the Chic/Motown agreement and dismissed Chic's complaint accordingly.

Chic Organization, Ltd. v. Motown Record Corporation, 582 F.Supp. 812 (S.D.N.Y. 1984) [ELR 6:8:6]

Court of Appeals affirms preliminary injunction granted to T-Shirt manufacturer against alleged "bootlegger" but also rules that "bootlegger" stated cause of action for violation of antitrust laws

A Federal Court of Appeals has denied Edwin Trela's request to terminate a preliminary injunction which bars him from printing t-shirts bearing the names and likenesses of individual performers and musical groups with whom Winterland Concessions has exclusive licensing agreements. The appellate court did however reverse the District Court in part, by holding that Trela did state a cause Of action against Winterland under the antitrust laws.

In 1981, Winterland filed an action against various "bootleggers" (people who sell, outside of the concert facilities, shirts bearing performers' likenesses without authorization) alleging violations of the Illinois Deceptive Practices Act, the Act and the common law right of publicity. Two months later, Trela was added as a defendant and a few days after that a preliminary injunction was issued barring Trela from "manufacturing or selling any upper-body garments bearing the names, likenesses, or logos of Winterland licensors."

Trela filed an answer and counterclaim in which he alleged that Winterland, through its agents and attorneys, had violated the antitrust and civil rights laws. Winterland moved to dismiss these counterclaim because it alleged that Trela failed to state a cause of action.

Trela then filed a motion to vacate, or modify the preliminary injunction. Four months later, the District Court entered an order dismissing Trela's counterclaims and denying Trela's motion to vacate the injunction.

Trela's first counterclaim, in which he alleged that Winterland violated his civil rights, was premised on the argument that Winterland's participation in a conspiracy consilting of "filing and dismissing lawsuits, and obtaining ex parte seizure and restraining orders" was done in a manner which was designed to deprive Trela of his right to due process. Trela also argued that Winterland used improper seizure orders to conduct "illegal" searches of Trela's house and business "and to harass Trela in unspecified ways."

The court concluded that the dismissal of this cause of action was proper because the counterclaim merely alleged a conspiracy between state and federal officers in conclusory terms. "It does not present any facts demonstrating a colorable claim that Trela was deprived of constitutional rights by reason of actions attributable to either Chicago police officers or U.S. Marshals. Conclusory pleadings of a conspiracy must be dismissed."

Last, but for Trela's sake not least, the court discussed and decided that the District Court's dismissal of Trela's antitrust cause of action was improper.

It, like Trela's civil rights claim, was premised on Winterland's use of the courts. But this time the court found that a possibility existed that Winterland's use of the courts was a mere "sham," and therefore was an exception to the NoerrPennington doctrine (a doctrine which gives immunity from antitrust liability where the courts are used for the purpose of protecting property rights).

Trela's main contention is that Winterland "through a variety of tactics, deliberately denied Trela access to the courts in order to avoid a judicial determination of the nature and extent of its alleged property rights."

The court stated that although litigation may be used "for improper purposes even where there is probable cause for the litigation ... if the improper purpose is to use litigation as a tool for suppressing competition in the antitrust sense ... it becomes a matter for antitrust concern."

The appellate court expressed no opinion as to whether Winterland in fact violated antitrust laws, but it concluded that Trela's allegations were sufficiently supported to survive a motion to dismiss for failing to state a cause of action.

Winterland Concessions Co. v. Trela, 735 F.2d 257 (7th Cir. 1984) [ELR 6:8:6]

Judgment in favor of author of "Scrabble" strategy handbook is reversed by Federal Court of Appeals in copyright infringement action alleging that games manufacturer produced a substantially similar

handbook; author's breach of contract claim is remanded for further proceedings as to existence of implied-in-fact contract between the parties

"Scrabble" strategist Mark Landsberg's hopes of running up a high score against Selchow and Righter, the owner of the Scrabble trademark (and producer of various Scrabble brand crossword games), has been blocked by a Federal Court of Appeals.

In the early 1970s, Landsberg prepared a manuscript entitled "Championship Scrabble Strategy." When Landsberg requested permission from Selchow and Righter to use the word "Scrabble" in connection with his manuscript, the company suggested that Landsberg send a copy of the work to them; and Landsberg did so.

Selchow and Righter then sent a copy of the manuscript to another expert Scrabble player, Michael Senkiewicz, for an evaluation. Senldewicz thought the work was excellent and indeed, utilized the Landsberg manuscript in preparing a piece on Scrabble strategy for inclusion in a Selchow and Righter Scrabble Players Handbook. In fact, the contract between Senkiewicz and Selchow and Righter included an outline that Senkiewicz was found to have copied from Landsberg's manuscript.

While Senkiewicz was engaged in writing his piece, Selchow and Righter purported to enter into negotiations with Landsberg to obtain the rights to his manuscript. Landsberg finally demanded that Selchow and Righter return or destroy all copies of his manuscript in the company's possession.

Ultimately, Landsberg sued Selchow and Righter in a California state court on several causes of action, including "piracy of literary property" (infringement of common law copyright) and breach of contract. Selchow and Righter had the case removed to a federal district court where, after a "blizzard of motions" by Selchow and Righter, "many found obstructionist and frivolous by the district court" judgment was entered for Landsberg on his common law copyright claim. The District Court found that Selchow and Righter's negotiations with Landsberg were a "bad faith tactic" to provide time for the preparation of the company's own handbook based on Landsberg's work; that Selchow and Righter "surreptitiously" kept copies of Landsberg's work; that Senkiewicz used his copy of the manuscript as the basis for his section of the Scrabble Players Handbook' and that Selchow and Righter engaged in the "wholesale copying" of both Landsberg's ideas and the form of expression that he used in his manuscript. The court granted Landsberg actual and exemplary damages and attorneys fees and costs.

According to the Court of Appeals, Selchow and Righter ignored the judgment and continued to print and sell its handbook. Landsberg sued again for copyright infringement, under the 1976 Copyright Act, rather than California law. The District Court granted Landsberg summary judgment and damages (though further exemplary damages were not awarded because there is no provision for such damages under the 1976 Copyright Act).

The Court of Appeals has reversed the District Court order granting summary judgment to Landsberg. The factual nature of the material at issue meant that only a limited number of ways were available to express certain concepts. Therefore, stated the court, citing Nimmer on Copyright, "similarity of expression may have to amount to verbatim reproduction or very close paraphrasing before a factual work will be deemed infringed." In support of its ruling, the court also cited the case of Hoehling v. Universal City Studios, Inc. (ELR 1:24:4) in which Universal Studios was found not to have infringed a factual account of the destruction of the dirigible Hindenburg, and the doctrine of scenes a faire as "another illustration of how the substantial similarity that constitutes infringement varies according to the idea expressed." The doctrine precludes a finding of infringement when a form of expression flows necessarily from common unprotectible ideas.

The court then reviewed the two works at issue and concluded that the similarities between the works were those that would "unavoidably" be produced in restating the ideas contained in Landsberg's work. A finding of infringement, in the court's view, would mean that Landsberg would "in effect have obtained a copyright on the ideas contained in his work " The District Court in this case applied the test of substantial similarity too broadly by expanding it to cover Landsberg's ideas and stock expressions. It was pointed out that the Selchow and Righter work did not duplicate the selection, coordination and arrangement of the ideas in Landsberg's work.

The court did suggest that Landsberg might pursue a remedy in California contract law. Landsberg had alleged that Selchow and Righter breached a contract to pay him for the use of his manuscript. California law will enforce a contract, whether express or implied-in-fact, to pay for the disclosure of an uncopyrightable idea.

But such an implied-in-fact contract will be enforced only if the circumstances indicating the existence of a contract precede or accompany the disclosure of the idea. If Landsberg's initial disclosure of the manuscript to Selchow and Righter was made in confidence and with the expectation of payment upon use, then Selchow and Righter's use of the disclosed ideas would have been wrongful. The breach of contract claim therefore was remanded to the District Court for further proceedings.

The court concluded by pointing out that while an award of attorneys fees could not be justified on the basis of the copyright statute, such an award might be justified if Landsberg prevails on his contract cause of action in view of Selchow and Righter's "vexatious, oppressive, obdurate, and bad faith conduct of this litigation."

Landsberg v. Scrabble Crossword Game Players, Inc., 736 F.2d 485 (9th Cir. 1984) [ELR 6:8:7]

Publisher's claim that poetry collection was a "work created for hire" is rejected, and thus subsequent publisher of poems was not liable for copyright infringement

The fertile fields of Wisconsin have yielded a wellcultivated copyright infringement action involving the publication of the works of poet Richard L. Tierney.

In October 1975, R. Alain Everts, the owner of The Strange Company in Madison, Wisconsin, printed a book entitled Dreams and Damnations, containing 23 poems by Tierney. Everts had approached Tierney in 1973 or 1974 about the possibility of publishing Tierney's work, and the two purportedly reached an oral agreement concerning the project. Everts paid Tierney a total of $80, which was designated as "advance royalties" for Tierney's fifty percent interest in the proceeds from the proposed sale of 150 copies of the work. The book, when published, contained a copyright notice which read, "Copyright 1975 by Richard L. Tierney. " Approximately 30 copies of the book were distributed to acquaintances of Tierney and Everts.

Everts subsequently attempted to register his own copyright in the 1975 edition of Dreams and Damnations; claiming that the book was created as a work for hire for The Strange Company by Tierney. in 1981, Everts published a second edition of Dreams and Damnations; the edition corrected some errors in the 1975 text. The 1981 edition bore the copyright notice, "Copyright 1975, 1981 by The Strange Company." This copyright was registered by Everts in September 1981.

In November 1981, a company known as Arkham House published a book of Tierney's poetry entitled Collected Poems - Nightmares and Visions. Collection Poems contained the poems that had been published previously in both editions of Dreams and Damnations. As a result, Everts sued Arkham House for copyright infringement and common law theft. Federal District Court Judge Shabaz has granted Arkham House's motion for summary judgment on the copyright infringement claim on the ground that the evidence did not establish that Everts and Tierney had "the sort of purchaser-artist relationship that would support a finding that Dreams and Damnations was a work created for hire."

Judge Shabaz noted that Everts had not commissioned Tierney for a set fee to write poems to Everts' specifications for inclusion in a book; he and Tierney had agreed to enter into a publishing venture and split the revenue from the planned sale of the work. The court relied on the law developed under the Copyright Act of 1909 with respect to works created for hire because Dreams and Damnations appeared prior to the effective date of the Copyright Act of 1976. The court stated that the criteria for determining whether a work was created for hire would apply in claims involving artists who were characterized as independent contractors as well as artists who were deemed employees. But the course of dealings between Everts and Tierney established, for the court, a "garden variety publisher-author relationship . . ." Thus the copyrights in the poems included in Dreams and Damnations belonged to Tierney, who had granted to Everts, at most, a non-exclusive license to publish the poems. Everts therefore was not entitled to prevent distribution of the Arkham House work.

In his opinion, Judge Shabaz also briefly considered Arkham House's argument that Dreams and Damnations entered the public domain in 1975 for lack of proper notice and registration. Judge Shabaz stated that the work certainly was copyrighted as of January 1978. The 1975 edition did contain a copyright notice. Even if Everts alleged that The Strange Company was the correct claimant, the notice was sufficient under the 1909 Act to create a copyright in the work as a whole, and in the individual poems published for the first time in the collection. As Judge Shabaz pointed out, "Registration is irrelevant to the existence of a copyright under either the 1909 or 1976 statute." However, if the printing and distribution of the 1975 edition was not intended to be a general publication, Dreams and Damnations remained protected under common law copyright until December 31, 1977, "after which time it was copyrighted under the federal scheme by force of the Copyright Act of 1976 as a work created, but not published, before 1978."

The common law theft claim was dismissed without prejudice.

Everts v. Arkham House Publishers, Inc., 579 F.Supp 145 (W.D.Wis. 1984) [ELR 6:8:8]

New York court asserts jurisdiction over British corporation's copyright infringement claim against New

York corporation engaged in allegedly unauthorized South American licensing agreements

A British corporation's action against a New York corporation alleging copyright infringement in South America has been ruled amenable to jurisdiction in New York.

London Film Productions, Ltd., claimed that Intercontinental Communications, Inc., without authorization, had granted distribution and exhibition rights for certain London films to a buying agent for Chilean television stations. Intercontinental also purportedly marketed London films in Peru, Venezuela, Ecuador, Costa Rica and Panama. The films were protected by copyright in Great Britain and in Chile under the terms of the Berne Convention. The United States has not become a party to the Berne Convention.

Intercontinental questioned the court's jurisdiction on the ground that London had not alleged any "acts of wrongdoing" by Intercontinental in violation of United States law.

Federal District Court Judge Robert L. Carter pointed out that London stated a valid cause of action under foreign copyright laws and that the court had personal jurisdiction over Intercontinental. Support for the court's assertion of jurisdiction in the matter also was found in Nimmer on Copyright. Professor Nimmer advances the theory that copyright infringement constitutes a transitory cause of action which may be adjudicated in the courts of a nation other than the one in which the cause of action arose.

In this case, stated the court, it did indeed have an interest, albeit indirect, in adjudicating a case involving the conduct of an American citizen in a foreign country, even though United States law may not have been violated. This interest was the "reciprocal" of the court's concern with securing compliance with United States law by foreign citizens within the court's jurisdiction. Furthermore, it was not necessary for the court to determine any crucial or complex issues involving the existence or validity of a copyright under foreign law. London's films had received copyright protection in Great Britain by virtue of publication there, and Chile's participation in the Berne Convention automatically conferred copyright protection on the films in Chile.

The court also determined that the need to apply foreign law did not in itself require the dismissal or transfer of the case. Furthermore, there was no alternative foreign forum in which Intercontinental would be subject to personal jurisdiction. Considerations of hardship and inconvenience, and of the enforceability of a possible judgment against Intercontinental, also prompted the court to exercise jurisdiction in the matter and deny Intercontinental's motion to dismiss.

London Film Productions Limited v. Intercontinental Communications, Inc., 580 F.Supp. 47 (S.D.N.Y. 1984) [ELR 6:8:9]

Federal Court of Appeals upholds default judgment and damages award entered in copyright infringement action involving musical works of composer Alex Bradford; but portion of District Court order requiring "recreation" of certain works by alleged infringer is vacated

In 1981, a dispute arose concerning the ownership of copyrighted musical works composed by Alex E. Bradford whose compositions included the plays "Your

Arm's Too Short to Box with God" and "Don't Cry Mary, or What's a Friend For." A Federal District Court resolved a copyright infringement claim brought by Blue Pearl Music Corporation, the assignee of Bradford's copyrights, by entering a default judgment against Alberta Bradford, the executrix of the estate of her late husband. The court enjoined Mrs. Bradford from the further infringement of Blue Pearl's copyrights and directed her to turn over to Blue Pearl all lead sheets and other copyrightable materials in her possession. After a damages hearing, a magistrate recommended an award of damages in the amount of $105,000, and the District Court adopted this recommendation and entered judgment in favor of Blue Pearl.

When Mrs. Bradford sought to vacate the default judgment and the judgment of damages, the District Court denied her motion and granted Blue Pearl's cross-motion to hold Mrs. Bradford in contempt of court for breaching the provisions of the default judgment.

A Federal Court of Appeals has upheld the District Court ruling denying Mrs. Bradford's motion to vacate the default judgment. But the appeals court vacated a portion of the contempt order which would have required Mrs. Bradford to "recreate" all copyrightable materials "which were previously but are no longer in her possession. . . ." It was noted that no case law authority was cited for ordering such relief and the record did not support the "extreme remedy" of re-creation. The court also adverted to the availability, from sources other than Mrs. Bradford, of copies of the musical plays mentioned above. And if other unnamed works of Alex Bradford were lost, the re-creation order was too vague to extend to such works. An order to re-create arguably might be permissible if Mrs. Bradford had stolen the only copies of the musical works from Blue Pearl and destroyed them; and if she had committed the works to memory and was technically competent to fe-create them; and if she were the only person who could re-create the lost material. The record did not approach this "hypothetical scenario' stated the appeals court. The re-creation order was thus quite distinct from the valid portion of the District Court order which required Mrs. Bradford to transfer to Blue Pearl the leadsheets and other documents embodying Alex Bradford's literary and artistic works.

Blue Pearl Music Corporation v. Bradford, 728 F.2d 603 (3d Cir. 1984) [ELR 6:8:9]

Federal District Court ruling in "Coma" copyright infringement action bars appeal in state court proceeding for alleged misappropriation of screenplay

The effect of a Federal District Court ruling dismissing Ted Berkic's claim for copyright infringement against the parties involved in the production of the book and film entitled "Coma" was to bar Berkic's various state law claims arising from the alleged misappropriation of his unpublished screenplay, a California appellate court has ruled.

In his state complaint, Berkic had alleged that he brought his original unpublished screenplay entitled "Reincarnation, Inc to agent Marvin Moss who then, without authorization, provided access to the work to Michael Crichton and MGM/UA Entertainment Company, the author and producer of the book and film "Coma." Berkic's complaint included causes of action for plagiarism, unfair competition, breach of implied contract and fraud. The trial court sustained demurrers in favor of the Coma parties and Berkic appealed.

While Berkic's appeal of the trial court ruling was pending, a Federal District Court granted summary judgment to the Coma parties in a copyright infringement action Berkic had filed in that court. (The court previously had dismissed Berkic's Lanham Act claim for failure to state a cause of action.)

In assessing the effect of the District Court ruling, California appellate court Justice Compton pointed out that "the whole of the damage complained of' by Berkic derived from the alleged misappropriation of his property and the attendant damage to the marketability of his screenplay. But the District Court had determined that there was no substantial similarity of ideas between Berkic's screenplay and the Coma works and that no reasonable jury could conclude that Coma captured the "total concept and feel" of Reincarnation, Inc. The District Court ruling therefore precluded any finding that the Coma parties had invaded Brick's interest in his personal property or had impaired the marketability of his screenplay, and served to bar fur- ther action in the state court appeal.

Berkic v. Moss, 205 Cal.Rptr. 674 (Cal.App. 1984) [ELR 6:8:10]

Hustler Magazine found liable for copyright in- fringement due to unauthorized publication of nude photographs of Elizabeth Ray

Hustler Magazine infringed photographer Barry M. Blackman's copyrights in photographs of Elizabeth Ray, a Federal District Court has ruled, rejecting the maga- zine's claim that it had entered into a contract to publish the photographs which appeared in its September 1976 issue (nine photographs); in Best of Hustler #2 (republication of the nine photographs) and in the July 1979 issue (republication of one photograph).

Blackman took nude photographs of Ray in September 1972 and obtained a model release giving him all rights to use, publish and copyright the nineteen color and thirty-five black and white photographs. In June 1976, Ray was the object of widespread publicity due to her relationship with a United States Congressman. Blackman subsequently complied with the technical requirements for publishing the 54 photographs of Ray with notice of his copyright, and filed copies of the photographs with the United States Register of Copyrights. Blackman also requested William L. Tucker, a stock picture broker, to assist him in dealing with potential purchasers of the rights to publish the Ray photographs. Blackman and Tucker agreed that while the "essential negotiations" as to any sale of rights would be conducted by Tucker, Blackman retained the rights to give final approval to any publication agreement.

On June 15, 1976, Tucker embarked on a close encounter with Larry Flynt that was to end eight years later in a federal courtroom. It was on June 15th that Flynt had Tucker flown from Washington, D.C., to Las Vegas. Tucker was asked to bring along samples of the Ray photographs and a copy of the model release. In Las Vegas, Tucker faced a barrage of sophisticated negotiating techniques and in short order signed a letter agreement purporting to grant Flynt publication rights in the Ray pictures. However, notwithstanding the unusual circumstances Tucker encountered in Flynt's Us Vegas environment, he did manage to repeatedly advise Flynt that Blackman had the sole right to approve the sale of the photographs. Tucker departed Las Vegas on June 16th, leaving Flynt with ten black and white prints, eight duplicate transparencies and eight Xerox color copies of the Ray photographs. Flynt signed a receipt for the copies which noted: "All copyrighted by photographer Barry M. Blackman." These materials generally would not be used for purposes of magazine reproduction. However, Tucker also provided Flynt with four original transparencies.

Predictably, on June 17th, Blackman sent a telegram to Hustler confirming Tucker's statements that Blackman would have to approve the sale of publication rights in the Ray photographs.

On June 24th, Blackman and Tucker proceeded to enter into an exclusive publication agreement with Cheri Magazine for the Elizabeth Ray photographs. Blackman then advised Hustler of his rejection of its publication offer, retumed a $1,000 check from the magazine, and demanded the return of the Ray material.

Hustler attempted to wire $15,000 to Blackman's bank account on June 25th; Blackman refused to deposit this sum. Charging right along, Hustler published the photographs in its September 1976 issue.

Federal District Court Judge Joyce Hens Green promptly rejected Hustler's claim that a valid transfer of rights took place between Blackman and the magazine. Tucker possessed neither actual nor apparent authority to enter into an agreement on behalf of Blackman, declared the court. In particular, Tucker, with the exception of four originals, carried only duplicates of Blackman's works; this did not suffice to establish that Tucker was entitled to act as an agent with the authority to enter a binding publication rights agreement. Flynt was put on notice of the need to exercise due diligence in determining the extent of Tucker's authority and failed to do so.

Hustler's unauthorized publication was found to have reduced the license value of the photographs. Furthermore, Hustler misappropriated the photographs for its own commercial advantage, thereby engaging in unfair competition, with attendant damages recoverable by Blackman.

Judge Green ordered the matter to a magistrate for further proceedings to determine the amount of damages. It was pointed out that since Hustler's actions were "deliberate, intentional, malicious and wanton," an award of punitive damages might be justified.

Blackman v. Hustler Magazine, Civil Action No. 76-2103 (D.D.C., July 11, 1984) [ELR 6:8:10]

Damage award of $150,000 assessed against Hustler Magazine in false light invasion of privacy claim case; magazine was negligent in efforts to verify forged consent form accompanying nude photograph

A damage award of $150,000 to LaJuan Wood in her invasion of privacy case against Hustler Magazine has been upheld by a Federal Court of Appeals. But the court reversed a $25,000 award to Billy Wood, an award attributable in part to the invasion of his wife's privacy.

Mrs. Wood's claim arose from Hustler's publication of a nude photograph of her, along with a rather ribald caption, in its February 1980 issue. The photograph, which had been taken by Wood's husband, was removed from the Wood home by a neighbor. The neighbor then submitted the photograph to the magazine along with a forged consent form. When Hustler attempted to verify the consent form in a brief telephone conversation, it was the neighbor's wife who responded to the magazine's queries.

Mrs. Wood sued Hustler for defamation and for invasion of privacy. The suit was filed one year and two weeks after the February 1980 issue of the magazine was published. The District Court, applying Texas law, ruled that the defamation cause of action was time-barred by a one-year statute of limitations. The privacy cause of action, however, was found to be governed by a two-year limitations period, and damages were awarded on the basis of the court's holding that Hustler had invaded the Woods' privacy both by publicly disclosing private facts in an offensive manner and by placing the Woods in an offensive false light.

On appeal, Hustler contended that California substantive law should apply in the case. Hustler then construed California's one-year limitations period on invasion of privacy actions as substantive law which a Texas court would be required to apply if California were found to have the most significant relationship to the parties and the dispute.

The Court of Appeals first determined that the District Court properly applied Texas law since the contacts of the matter with Texas were predominant. The only contacts with California were that the state is Hustler's place of business and the place where the conduct causing injury occurred.

The court then rejected Hustler's argument that the oneyear limitations period for actions "for injuries done to the character or reputation of another by libel or slander" would apply to invasion of privacy actions. Rather, the two-year statute of limitations governing actions "for injury done to the person of another" was correctly applied by the District Court. Although a false light invasion of privacy claim is similar to a defamation claim, the false light tort is "broader" than defamation, stated the court. Texas courts most likely would apply the two-year statute of limitations to false light privacy actions as well as to an invasion of privacy claim based on the public disclosure of private facts, because both torts involve injury to the person. Also, Mrs. Wood purportedly suffered mental distress from the unauthorized publication - an injury found to fall within the statutory requirement.

Hustler next argued that the First Amendment requires that a publisher not be held liable for false light invasion of privacy unless there is a showing that the challenged material was published with reckless disregard of its falsity or offensiveness.

The Court of Appeals noted that the District Court "assumed" that publishing with reckless disregard was a required element of a false light claim. The District Court found that Hustler indeed had acted in reckless disregard in that the magazine falsely represented that Mrs. Wood consented to the publication of a nude photograph in a "coarse and sex-centered" magazine; and falsely attributed a lewd fantasy to her. Hustler apparently also was found liable by the District Court under the public disclosure of private facts theory because of the unconsented-to publicity given to Mrs. Wood's appearance sans clothing.

The Court of Appeals "inferred" that Mrs. Wood most likely was awarded damages primarily on the false light theory, since some of the damages probably were based on the publication of the imaginative and offensive fantasy accompanying the photograph - a fantasy that did not truthfully reflect Mrs. Wood's private life. No Texas court has set forth the standard of care applicable to publishers who invade the privacy of public or private persons by placing them in a false light. Nevertheless, the Court of Appeals was "convinced" that Texas courts would apply the same standard of care to a false light claim as would be applied to a defamation action. Citing its own interpretation of Texas law in Braun v. Flynt (ELR 6:4:15), the court held that the standards announced in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), would apply equally in Texas to false light and to defamation cases. Accordingly, liability for actual damages may be imposed on publishers who negligently place private figures in an offensive false light.

The application of the negligence standard revealed that Hustler "carelessly administered a slipshod procedure" that resulted in Mrs. Wood's unfortunate appearance in the magazine. The nature of the material appearing in the magazine demanded great care in verifying a model's consent. But in verifying the forged consent form accompanying Mrs. Wood's photograph, Hustler did not even follow its own "questionable" operating procedure. Magazine employees suspected that the name LaJuan Wood was a pseudonym. And the $50 photo submission payment was sent to a person other than Mrs. Wood. But these facts did not trigger an inquiry. The magazine did not require the submission of a social security number, drivers license number or the notarization of the consent form.

In affirming the judgment for Mrs. Wood on the false light theory, the court did not review the magazine's liability for public disclosure of a private fact. The court concluded by reversing the damage award to Billy Wood, because Texas does not permit a person to recover for injury caused by the invasion of another's privacy; and by finding that the District Court was not prejudiced in its award of damages, did not award punitive damages in the guise of actual damages, and did not award damages beyond the maximum possible award supported by the evidence.

Wood v. Hustler Magazine, Inc., 736 F.2d 1084 (5th Cir. 1984) [ELR 6:8:11]

New trial is ordered in attorney's defamation action against Penthouse magazine unless attorney accepts reduction in punitive damages award from $537,500 to $200,000, but compensatory damages award of $30,000 is upheld

In November 1978, Penthouse magazine published an article entitled "The Stoning of America." The article discussed the distribution and sale of marijuana in American markets, and revealed that drug "businessmen" often may be attorneys, presumably because federal judges are unlikely to sentence "attorney criminals" to prison. Frank J. Marcone was listed as an example of an attorney criminal who "contributed down payments of up to $25,000 on grass transactions." The article stated that "charges against him were dismissed because he cooperated with further investigations."

Mr. Marcone brought a defamation action against the magazine. Marcone testified that he did not provide any money for use in the purchase of drugs, and did not cooperate with federal authorities. The attorney had been indicted in a federal court in Detroit for allegedly making a $25,000 drug payment, but the indictment was voluntarily dismissed. And the United States Attorney in Philadelphia testified that there was not sufficient evidence to seek reindictment of Marcone in the Philadelphia district, and that he was unaware of cooperation by Marcone with federal authorities.

A Federal District Court jury in Pennsylvania awarded compensatory damages of $30,000 and punitive damages of $537,500 to Marcone. Federal District Court Judge Raymond J. Broderick has upheld the compensatory damage award, but has granted Penthouse's motion for a new trial unless Marcone agrees to accept a reduced punitive damages award of $200,000.

Judge Broderick first discussed Penthouse's "troublesome contention" that the court erred in instructing the jury, with respect to the award of punitive damages, that Marcone was required to establish by "a preponderance of the evidence" that the allegedly defamatory portions of the article were published either with knowledge of their falsity or with reckless disregard as to whether they were true or false. Penthouse stated that such a finding must be made utilizing a clear and convincing evidence standard to support an award of punitive damages, even if Marcone was not a public figure.

After lengthy consideration, and despite avowing his belief that the Pennsylvania Supreme Court would support his position that the preponderance of the evidence standard for private figure plaintiffs was correct, Judge Broderick declared that the question did not have to be decided in the case before him. Rather, the court found that Marcone had proved by clear and convincing evidence that Penthouse acted with reckless disregard of the truth or falsity of the statements it published. Thus, even if the standard in the court's instruction were incorrect, the error did not require a new trial since the court, under Pennsylvania law and Supreme Court holdings, was entitled to determine that the constitutional standard indeed was satisfied by Marcone, and that a proper basis existed for the jury's award of punitive damages. As summarized by the court, its holding was that "neither Pennsylvania law nor the Constitution requires a new trial in circumstances such as those of the present case in which the jury has found actual malice by a preponderance of the evidence and the Court has found the evidence sufficient to meet the Constitutional standards."

The court then found that Marcone's evidence proved actual malice on the part of the magazine. The article's route to publication was marked by the inability of editorial personnel to verify the allegedly defamatory statements about Marcone, and the inexplicable appearance in the article of the erroneous statement (which did not appear in drafts of the story) that charges against Marcone were dismissed because of his cooperation with authorities. Judge Broderick pointed out that "the law is clear that a report that a person has been indicted or otherwise charged with an offense may not state that the accused committed the crime or comment upon or infer his probable guilt." Furthermore, the magazine was unaware that the author of the article was named as a co-defendant in the indictment which named Marcone. In all, there was "no basis whatsoever" for the publication of the false statements, particularly since Penthouse did possess information which cast doubt on the accuracy of its article. Thus, the circumstances presented to the jury clearly and convincingly demonstrated reckless disregard for the truth or falsity of the statements in the article, concluded the court and supported the punitive damages award, as reduced.

The compensatory damages award for Marcone's actual injury was upheld on the basis of the attorney's testimony that he was "frustrated, distraught, upset and distressed" about the article, that he feared retribution by clients who believed they were the "victims" of his alleged cooperation, and that he lost clients because of the article. Moreover, the defamatory statements at issue imputed to Marcone the commission of a crime. As such, the statements were actionable as libel per se and did not require proof of special damages.

Judge Broderick did agree with Penthouse that the punitive damages award of $537,500 was so excessive as to "shock his sense of justice." In this instance, under Pennsylvania law, a trial judge has the authority to order a remittutur of damages. The amounts of the two damage awards bore no reasonable relationship. And there was no evidence that Penthouse was engaged in "sustained harmful activity" against Marcone which might be deterred by such a large award. Judge Broderick concluded that a punitive damages award of $200,000 would not shock the court's sense of justice and ordered a new trial on the issue of the amount of punitive damages unless Marcone accepted this award. In response to Marcone's motion for reconsideration of the court's order, Judge Broderick declined to change his decision, but did declare that a retrial would require resubmitting to the jury the inseparable issues of the existence of actual malice and the amount of punitive damages. However, the question of negligence on the part of Penthouse and the amount of compensatory damages would not be resubmitted to the jury since the findings on these questions were not "the result of passion or prejudice or influenced by the excessive amount of punitive damages awarded."

Marcone v. Penthouse International, Ltd., 577 F.Supp. 318 (E.D.Pa. 1983) [ELR 6:8:12]

Summary judgment granted to author and publisher in libel action brought by United States government officials in connection with distribution of book and Universal "Missing"

In a decision of considerable significance for the publishing industry, Federal District Judge Abraham Sofaer, in a characteristically thorough and thoughtful opinion, has granted summary judgment to author Thomas Hauser and to Harcourt Brace Jovanovich, Inc., in a $150 million libel action brought by three government officials in connection with the 1982 Universal film entitled "Missing."

Hauser was the author of a book entitled "The Execution of Charles Horman: An American Sacrifice." Execution, which was published in hardcover in 1978 by Harcourt Brace, recounted the disappearance and death of Charles Horman, an American citizen residing in Santiago Chile during the 1973 military coup that deposed the government of Salvador Allende Gossens. Horman's survivors brought a lawsuit against several United States officials who were serving in Santiago in 1973 alleging complicity in Horman's death. Among the officials were Nathaniel Davis, then United States Ambassador; Frederick a Purdy, Consul to the Santiago Consulate; and Captain Ray E. Davis, Commander of the United States Military Group and Chief of the United States Navy Mission in Santiago. The lawsuit eventually was voluntarily dismissed.

In 1979, Hauser signed an option agreement to sell all movie rights in his book to Warner Brothers. Warner later assigned the option to Universal City Studios. Universal exercised the option in 1981. The book was utilized by director Constantin Costa-Gavras in preparing the film "Missing," starring Sissy Spacek and Jack Lemmon.

Harcourt Brace, also in 1979, sold the paperback rights to Execution to the Hearst Corporation. Hearst's Avon Books division issued a paperback edition of the work in 1980 under Hauser's original title, and a second paperback edition in 1982 retitled Missing; this edition bore the redlettered logo of the Universal film.

On January 11, 1983, Messrs. Davis, Purdy and Davis sued Hauser, Harcourt Brace, Hearst, Costa-Gavras, Universal and MCA, charging that the books and the film "falsely accused the plaintiffs of ordering or approving the order for the murder of Charles Horman."

Hauser and Harcourt Brace moved for summary judgment on the ground that New York's one-year statute of limitations had run on the original publication of the hardcover and paperback editions of Execution and that they were not liable for Hearst's republication of the paperback Missing or for any alleged libelous statements contained in the film.

In granting Hauser and Harcourt Brace's motion, Judge Sofaer first considered at length certain complex jurisdictional and choice-of-law issues arising from the government parties' initial decision to file their action in the Eastern District of Virginia. A transfer of venue brought the matter to the Southern District of New York. Judge Sofaer determined that federal venue would not have been proper in Virginia. And Virginia's long-arm statute did not authorize the exercise of personal jurisdiction over the "Missing" parties since the statute did not contemplate an exercise of jurisdiction on the basis of the shipping of two books and several videocassettes into the district within the relevant limitations period, stated the court.

On the other hand, the Southern District of New York was the location where "the vast majority" of the acts giving rise to the government officials' claim took place. The following activities which occurred in New York suggested to the court that the Southern District was a convenient and appropriate forum for the action: Hauser's research and writing of his book; Harcourt Brace's negotiations of contracts with Hauser and with Hearst; all editing and promotional planning; Costa-Gavras' discussions with Hauser; the premiere of the film; the sale of twenty-five percent of the total national sales of the Hauser book during the limitations period; and meetings and negotiations between Hauser, Warner Brothers and Universal. Furthermore, Charles Horman's widow and father live in New York City. Thus, stated the court, "the bulk of witnesses and evidence relevant to Hauser's care in researching his book, as well as to the various publishers' and film-makers' notice of any alleged inaccuracies, are to be found in New York." Virginia lacked this outstanding "plausibility" to serve as a locus of the claim.

Judge Sofaer's ensuing choice of law analysis noted the above contacts with New York City and concluded with his ruling that the application of New York substantive law was required in the case. Additional contacts were cited as follows: Hauser's and Harcourt Brace's principal offices and activities are located in New York, and Hauser signed his option contract in the city. And applying New York law, stated the court, would serve to further the city's significant interest "in assuring that the risks and liabilities flowing from publishing and related option contracts, negotiated and largely performed here, will be uniform. Publishers, authors, and film makers consciously attempt to mold their conduct to legal norms, with the expectation that the legal consequences of their conduct will be predictable. Their justified expectation that their conduct will be judged by the rules of jurisdictions in which they carry on their activities merits protection." In all, New York was the state with the most significant relationship to the parties and "the most appropriate source of legal norms."

The legal norm applicable in this case was that issuing any one edition of a book or newspaper constitutes publication for purposes of tolling the statute of limitations. Thus, any claims against Hauser, Harcourt Brace or Hearst based on the publication of the book Execution or on the 1980 paperback edition were time-barred. Hauser and Harcourt Brace contended that their liability could not be based on the film or the 1982 paperback since they did not exercise authority or control over any republication of the alleged libel.

Judge Sofaer reviewed recent New York case law on the issue of what level of involvement by an author and original publisher will subject them to liability for a subsequent republication. He observed that the cases "establish that a deliberate decision to republish or active participation in implementing the republication resurrects the liability otherwise laid to rest by the statute of limitations." And active participation sufficient to impose liability requires "real authority to influence the final product, not ... acquiescence or peripheral involvement in the republication process."

Judge Sofaer declared that liability cannot be based, as the government officials contended, on the ground that Hauser reasonably could have foreseen that republication would occur. This foreseeability standard has not been applied by the New York Court of Appeals in prior libel cases in which such a standard would have been more relevant than in this case. And jurisdictions that have adopted this standard still require a showing of demonstrably "concrete and specific expectations of republication."

Furthermore, New York Times v. Sullivan and its progeny appeared to the court to preclude imposing liability for a republication without actual or corporate responsibility for the decision to republish if the publication is entitled to constitutional protection.

So - what was Hauser's involvement with the republication? The author, in 1977, had granted Harcourt Brace all rights in the paperback edition of Execution. He retained "no authority over future softcover printings ... his approval was not required for any aspect of republication ... [and he] was not a party to the negotiations between Harcourt Brace and Hearst." The option agreement exercised by Universal in 1981 gave the company the "exclusive, absolute and unlimited" right to use its "uncontrolled discretion" to adapt and dramatize

Hauser's work. These agreements established that Hauser "had no authority and exercised no influence over the screenplay's authors." The government parties cited Hauser's participation in activities to promote and publicize his book, his discussions with Costa-Gavras and Universal concerning his sources, and his attendance at a March 1981 "preproduction libel review." None of these activities, emphasized Judge Sofaer, demonstrated Hauser's authority or control over the final product so as to subject him to liability under New York Times v. Sullivan as a "publisher" of the 1982 paperback or the film.

The receipt of royalties from a republication also was insufficient to establish a genuine issue of material fact as to Hauser's liability for the republication, as were Hauser's contacts with Universal and Hearst to verify sources, or his addition to his original text of openingpage material for the paperback. Summary judgment was granted accordingly.

Summary judgment also was granted to Harcourt Brace. The company had no authority, control or pecuniary interest in the film. Even if liability could be predicated on the foreseeability of a movie "spin-off," such a spin-off seemed improbable in view of the limited interest in Harcourt Brace's "auction" of the paperbook rights to the Hauser work. Harcourt Brace's contract with Avon Books provided that Avon would have the right to publish a paperback edition in exchange for paying Harcourt Brace an advance of $2,000 plus eight percent royalties on the first 100,000 softcover books sold and ten percent on any further sales. The contract did not impose on Avon a commitment to publish that might of itself render Harcourt Brace responsible for any new edition. Avon's decision to reissue the paperback in a movie tie-in edition was "unrelated to any of its contractual obligations to Harcourt Brace ... Harcourt Brace did not attempt to influence Avon or involve itself in Avon's decision whether, when, or in what quantities to publish the paperback."

Davis v. Costa-Gavras, 580 F.Supp.1082 (S.D.N.Y. 1984) [ELR 6:8:13]

Federal District Court in Illinois grants summary judgment to CBS in libel action brought by chiropractor mentioned in television report on "cancer quackery"

A Federal District Court in Illinois has granted CBS's motion for summary judgment in a defamation action brought by licensed chiropractor John Spelson in connection with a series of broadcasts produced and aired by WBBM-TV Channel 2, a CBS-owned television station in Chicago.

The series, entitled "Cashing in on Cancer," aired from April 25, 1982 through May 5, 1982; it purported to reveal "an international network of medical quackery." Included in a report on various fraudulent or discredited cancer remedies was a therapeutic machine which was described as a worthless device used by a local chiropractor. A picture of Spelson then was flashed on the screen. In another broadcast, the station's anchorman introduced the upcoming segment of the series by stating, "Untrained, unqualified and unscrupulous health practitioners" are exploiting desperate patients. One of the practitioners named was John Spelson; he was specifically referred to and pictured on screen. Other references in the series, to which Spelson objected, included a cancer patient's view that Spelson was exploiting stricken individuals; a Mayo Clinic doctor's statement that "metabolic" vitamin therapy administered by chiropractors "really borders on the criminal"; an anchorperson's reference to "cancer con artists"; and a station editorial commenting on the series' expose of "unscrupulous charlatans victimizing cancer patients."

Federal District Court Judge Bua discerned from Spelson's "potpourri of charges, allegations and vague contentions" a cause of action for defamation in that WBBM's broadcasts damaged his reputation and moral character. But the court declared that much of the broadcast material was incapable of a defamatory construction as the expression of opinion and commentary, protected both by the First Amendment and by the Illinois common law right of fair comment and criticism. Furthermore, the facts upon which the reports were based were presented for the individual viewer's evaluation; CBS criticized only Spelson's acts, not Spelson personally; and the report concerned a matter of vital public interest.

Judge Bua observed that in CBS's opinion, the treatments offered by Spelson, as reported, were "contrary to the beliefs of health science practitioners in the mainstream of medical and chiropractic thought and that such practices [were] therefore worthless or even dangerous." CBS was entided to hold and to expound this view, regardless of the merit of its opinion, stated the court, which then proceeded to review the specific complained-of statements. The statements were found to be either protected expressions of opinion, or fair comment based on clearly evident facts. Even if the statements were construed as statements of fact, they would not be actionable as libel per se, stated the court. Under Illinois law, a claim for libel per se must involve words which impute (1) the commission of a criminal offense, (2) infection with a communicable disease, (3) unfitness for or want of integrity in the performance of the duties of an office or employment, or (4) the lack of ability to perform in his or her business, trade or profession.

Spelson was not accused of any specific crime; there was no assertion that he lacked the ability to perform in his profession and the other categories of libel per se did not apply. Furthermore, Spelson did not allege special damages with the specificity necessary to support a claim for libel per quod.

In granting summary judgment, Judge Bua concluded with the observation that it was "wholly incredible [that Spelson] could expect to engage in a method of treatment which, at best, is highly controversial, without drawing severe and detailed criticism."

Spelson v. CBS, Inc., 581 F.Supp. 1195 (N.D.Ill. 1984) [ELR 6:8:14]

Defamation claim against publishers of book about secret agents is dismissed on statute of limitations rounds in case applying "single publication rule"

Virginia's one-year statute of limitations barred a defamation claim against William Morrow and Company, Inc., and Bantam Books, Inc., the publishers of the hardcover and paperback editions of the book "Spooks: The Haunting of America - The Private Use of Secret Agents," a Federal Court of Appeals has ruled, upholding a District Court judgment.

On December 1, 1980, Michael J. Morrissey, an attorney and electrical engineer, brought a complaint alleging that false and malicious statements in the book damaged his personal and business relationships. But a Federal District Court found that Morrissey had tarried in filing his action. The court declared that it would follow the single publication rule (not as yet adopted by the

Virginia Supreme Court) in determining the date of the accrual of Morrissey's claim. The rule, most often used in actions involving periodicals with widespread circulation, is summarized in section 577A(4) of the Restatement (Second) of Torts as follows: "As to any single publication, (a) only one action for damages can be maintained; [and] (b) all damages suffered in all jurisdictions can be recovered in the one action..."

In this case, it was noted, William Morrow began shipping Spooks to customers, including bookstores, on August 1, 1978. The court found that the book was generally available and sold to the public on or by that date. With respect to the paperback edition (a separate edition, rather than a republication), Bantam claimed that shipping began on November 9, 1979, and that the work was generally available to the public on or before November 20, 1979. The paperback edition did contain a reference to its official publication date as December 19,

1979. But the use of an arbitrary "official publication date" has been found not to be determinative of the date of publication for statute of limitations purposes, noted the court.

Morrissey did not challenge the publishers' statements as to the shipment and availability of Spooks. The District Court properly found that the action was time-barred and that William Morrow and Bantam were entitled to summary judgment, ruled the Court of Appeals.

In a lengthy dissent, Judge Murnaghan questioned the court's factual findings, in particular, those findings relating to the distribution of the paperback edition of Spooks. The affidavit submitted by Bantam did not serve to establish that an actual sale of the paperback book took place before December 1, 1979, or that there was any other occurrence constituting publication. It did not appear to Judge Murnaghan that evidence was presented that the book, albeit "available for sale'" was read by some member of the public. Thus, a jury might find that no single copy of the paperback edition was sold or distributed, and that an incident of publication necessary for the commencement of the accrual of an action for defamation based on the paperback edition had not occurred.

Judge Murnaghan also questioned the correctness of applying the single publication rule in this case since Bantam had not shown that repeated publication via widespread circulation of its edition had occurred. Furthermore, Judge Murnaghan cautioned that "the fact that but one publication may be deemed to have occurred, so that numerous suits, each on a different copy of the same newspaper, magazine or book may not . . . be brought, does not even indicate ... a requirement, for statute of limitations purposes, that the earliest individual item to appear shall determine when the single publication occurred, thereby fixing the date of the accrual of the action." A "correct" date for accrual purposes, in Judge Murnaghan's view, would be "the first date by which a sufficient number [of copies] had been published to render the single publication rule applicable."

Judge Murnaghan also stated that if indeed enough copies of the paperback edition of Spooks had been published prior to December 1, 1979 so as to warrant the application of the single publication rule, the significance of the printed date of publication would remain to be determined. It was pointed out that facts also were lacking as to matters such as when the news of the appearance of the paperback edition of Spooks first came to Morrissey's attention, and when the bulk of the publication of the paperback edition occurred. In all, reversal of the decision granting summary judgment to the publishers was required, according to the dissent.

Morrissey v. William Morrow and Company, Inc., 739 F.2d 962 (4th Cir. 1984) [ELR 6:8:15]

Federal Court of Appeals reverses order restraining CBS from broadcasting videotapes taken during government investigation of John DeLorean

In the course of John DeLorean's trial on charges of conspiracy to import cocaine, DeLorean sought a temporary restraining order from a Federal District Court in California which would have prevented CBS from broadcasting certain videotapes made by the government during its investigation of DeLorean. The District Court found that the public dissemination of the government tapes "would irreparably harm" DeLorean's Sixth Amendment fair trial right and October 22, 1983, it issued the requested order.

On October 23, 1983, a Federal Court of Appeals (treating CBS's request for relief as a petition for a writ of mandate) determined that the temporary restraining order violated CBS's First Amendment rights and reversed the District Court order. (The decision was not filed until April 6, 1984.) Following the guidelines set forth in Nebraska Press Association v. Stuart, 427 U.S. 539 (1976), Federal Court of Appeals Judge Norris first observed that the widespread publicity afforded the DeLorean case would not automatically lead to an unfair trial. In order to justify a prior restraint, Nebraska Press requires that "further publicity, unchecked, would so distort the views of potential jurors that 12 could not be found who would ... fulfill their sworn duty." But the District Court did not analyze whether the proposed dissemination of the videotapes would have the capacity "to inflame and prejudice the entire community." Furthermore, concluded Judge Norris, the nature of the case and the setting for the trial would not support a finding that the release of the tapes would create a "pattern of deep and bitter prejudice ... throughout the community." The proceeding did not involve lurid or inflammatory subject matter, and the case was being tried in a large, heterogeneous community with a correspondingly large pool of potential jurors.

The Court of Appeals also found unconvincing the District Court's consideration of measures for assuring a fair trial other than a prior restraint of expression. The District Court did not cite any special circumstances in the case which would support its rejection of the use of extensive voir dire as a viable alternative to prior restraint. And the District Court did not consider at all the alternative of emphatic and clear jury instructions to avoid prejudice. The temporary restraining order restricting CBS from broadcasting the videotapes therefore violated the First Amendment, stated Judge Norris, and was vacated accordingly. The court concluded by stressing that "under our constitutional system prior restraints, if permissible at an, are permissible only in the most extraordinary of circumstances" - circumstances which were not present in this case.

Judge Goodwin, in a concurring opinion, also pointed to the District Court's lack of any legal authority for enjoining CBS "or anyone else" from publishing anything concerning the case. Judge Goodwin noted that there was no suggestion that CBS had done anything illegal or unethical in obtaining a copy of the videotape (although no information as to CBS's acquisition of the tape appeared in the written record before the court).

Judge Reinhardt concurred in Judge Norris' opinion and agreed with Judge Goodwin's statements.

Columbia Broadcasting System, Inc. v. United States District Court for the Central District of California, 729 F.2d 1174 (9th Cir. 1983) [ELR 6:8:16]

FCC declines to reinstate Syndicated Program Exclusivity Rules and refuses to expand protection for sporting events carried by cable systems

The FCC has denied a request which sought the reinstatement and expansion of past syndicated program exclusivity rules and expansion of the protection afforded to sporting events broadcast by distant TV stations and carried on cable systems. The petition was denied because the FCC found that the petitioner had not "made a sufficient case for the need to reexamine either of these rules at this time."

The syndicated program exclusivity rules, which were adopted in 1972 and abolished in 1980, limited the cable coverage of certain syndicated programs on distant television signals in the largest one hundred markets. "In the top fifty markets, the exclusivity rules required cable operators, at the request of a local television station, to delete all distant signal programs that were also under contract for television exhibition by that local television station. Similar requirements existed in the second fifty markets with the exception that the rights of local television stations to have programs deleted from distant signals expired at the end of a specified time period or on the occurrence of a specified event depending on program type."

Starting in 1976 the Commission reevaluated the need for these exclusivity rules. It concluded that the original rationale behind the rules, to "protect local broadcasters and insure the continued supply of television programming," no longer seemed to apply because the "near term effect" of eliminating the rules on local television stations would be minimal and the "long term effect" would be offset by "other factors such as increases in population and advertising exposures."

Henry Geller, the director of the Washington Center for Public Policy Research at Duke University, disagreed with the result. In his petition he argued that the elimination of these rules "constituted an action against the market place and results in greater government involvement The thrust of his argument surrounded the fact that when the exclusivity rules were in effect "broadcasters were able to obtain exclusivity by bidding and paying for syndicated programming." With the elimination of these rules, however, "the Commission created a situation whereby a broadcaster could obtain exclusivity against other local television stations by outbidding them for a program, but no matter how much a broadcaster is willing to pay he cannot obtain exclusivity for this programming against cable systems bringing in the same program on a distant signal."

Both sides of this issue were supported by various organizations and cable groups. TBS (Turner Broadcasting System) was one of the organizations opposing the reinstatement of these rules. It argued that Geller's petition was deficient on procedural grounds because Geller failed to state the nature of his interests and that he failed to present sufficient factual evidence. Furthermore, it maintained that the petition was repetitive because it raised issues "recently decided by the Commission, without presenting evidence of changed circumstances warranting reconsideration of a termination proceeding."

The Commission agreed with TBS's position and consequently denied Geller's petition as to the exclusivity rules because it found the petition was repetitive and because it presented certain copyright issues which were beyond the Commission's jurisdiction. It stated, "Copyright protection is a matter of Congressional concern and not a communications policy issue within the Commission's jurisdiction."

The Commission next addressed the issue of whether its Sports Programming Rule's should be expanded. The rules relating to sports programming "prohibit cable systems located within 35 miles of a sport team's community from importing distant signal broadcasts of a live sports event taking place in that community, if it is not available live on a television station carried under the mandatory carriage rules."

Geller argued in his petition that the rules offer no protection for league agreements to telecast professional sports - agreements which Congress has approved by exempting them from antitrust laws. Similarly, since the adoption of these rules in 1971, "new experiences and apparent anomalies have occurred" which require a change in the rules.

While Geller did not explicitly describe the situations which needed remedy, he did attach to his petition excerpts of articles written by various authorities which highlighted the problem. These articles pointed out that "leagues, both collegiate and professional, are refusing to make their programming available because they are unable to control where they will be shown and the nature of the competition." The articles' authors conclude that full copyright liability would remedy the problem described.

The Commission concluded that Geller failed to "sufficiently justify the initiation of a rulemaking proceeding to re-examine the cable television rules relating to sports programming." Similarly, it found that the "requested actions would be redundant" because the Commission recently addressed the issues raised by Geller and no new evidence was presented. The only evidence which was introduced cited a few cases of anomalies in video distribution patterns. The Commission concluded, however, that these were isolated instances and did not represent "a problem of national scope."

In the Matter of Cable Television Syndicated Program Exclusivity and Carriage of sports Telecasts, 56 RR2d 625 (1984) [ELR 6:8:16]

Federal Communications Commission order granting RKO General's petition to relocate television station from New York to New Jersey is affirmed; competing applicant for Channel 9's license was not entitled to comparative hearing

In 1972, RKO General, Inc., filed an application to renew its license to operate WOR-TV Channel 9 in New York City. The renewal request was challenged by Multi-State Communications, Inc., and a comparative hearing was ordered to review the applicants' qualifications. After a series of administrative and judicial proceedings involving RKO's licenses in Boston as well as in New York, RKO, in 1982, proclaimed to the FCC that the company was born to run, and that it would agree to relocate Channel 9 from New York to New Jersey if the FCC would issue RKO a license for five years. The Commission agreed to the reallocation under section 331 of the Communications Act. Section 331, which became law just prior to RKO's decision, declares that the FCC will pursue a policy of allocating channels for VHF commercial television broadcasting to ensure that at least one such channel will be operating in each state, if technically feasible.

Multi-State, whose competing application for the Channel 9 license was dismissed as moot, argued that section 331 was not applicable to New Jersey since the Commission, in 1952, had "assigned" Channel 13 to Newark as a VHF commercial station. The station is so listed in the Commission's Table of Assignments.

Federal Court of Appeals Judge Tamm first noted that Channel 13 was transferred in 1961 from a commercial operator in New Jersey to a noncommercial operator in New York. The Table of Assignments turns slowly, for New Jersey has been without an operating VHF station for more than 20 years, with consequent incomplete coverage of local events. Judge Tamm further observed that the legislative history of section 331 revealed that Congress clearly intended the section to apply to New Jersey notwithstanding the fact that the state had been assigned a VHF commercial channel. Judge Tamm therefore rejected MultiStates construction of the term "allocated" as synonymous with the term "assigned"' because this construction would "thwart the legislative will" manifested in section 331.

The court also rejected Multi-State's argument that RKO was not the licensee of Channel 9 since the company's application for the renewal of its license still was pending before the Commission. During the renewal proceeding, stated the court, RKO's status as a licensee was unaltered. And a comparative hearing was not required under the terms of section 331, which "displaced" the normal procedures for channel reallocation, or under the due process clause of the Constitution.

Multi-State Communications, Inc. v. Federal Communications Commission, 728 F.2d 1519 (D.C.Cir. 1984) [ELR 6:8:17]

Federal Communications Commission is ordered to review decision denying Massachusetts broadcaster's license renewal application

In 1975, when Simon Geller of Gloucester, Massachusetts, submitted an application to renew his license for broadcast station WVCA, a license he had held for twenty years, Geller's application was challenged by Grandbanke Corporation. Geller, who was WVCA's sole owner, operator, announcer, technician and salesman, had, since 1968, broadcast primarily symphonic music. Nonentertainment programming accounted for less than one percent of the station's programming. Grandbanke, however, proposed a musical medley format for the station, with approximately 28.7% of its broadcast week devoted to nonentertainment programming.

At the conclusion of a comparative hearing, an administrative law judge found that Geller was the superior applicant and therefore entitled to the renewal of his license.

In June 1982, the Federal Communications Commission, while agreeing with the administrative law judge that both applicants were "basically qualified," denied Geller's renewal application and granted the license for the station to Grandbanke. The Commission denied Geller a renewal expectancy and awarded him only diminished preferences under the licensing criteria of diversification and integration, while awarding Grandbanke a substantial preference for its programming proposal.

In a highly critical opinion, Federal Court of Appeals Judge Mikva while affirming the Commission's denial of Geller's renewal expectancy, has remanded the matter to the FCC for a recalculation of the comparative factors at issue.

The court first found that it was reasonable for the Commission to conclude that Geller's previous service did not warrant a renewal expectancy. An expectancy is the "extra 'plus' an incumbent can receive in the comparative hearing if the public has enjoyed superior service during the previous license period." But Geller, according to the FCC's findings, "broadcast no news, no editorials and none of his [nonentertainment] programming was locally produced. None of his programs, moreover, were presented in response to ascertained community needs and problems."

Proceeding to the comparative criteria, the FCC had reduced Geller's "strong preference" on diversification of ownership of mass communications media to a "moderate preference" because, while Geller did not control any other broadcast stations, neither would he bring a new "voice" to the community.

The diversification of ownership criterion, observed the court, serves to avoid concentration of media ownership and to further First Amendment concerns by increasing the likelihood that the community will be presented with more viewpoints. The Commission's "operating presumption" has been that "as diversity of ownership increases, diversity of viewpoints expands." The actual diversity of views is not factored into this criterion. Indeed, stated Judge Mikva, conducting an evaluation of the diversity of views presented might raise substantial First Amendment concerns.

By reducing Geller's preference for diversification, the FCC improperly changed, nay, engaged in a "wholesale abandonment" of the presumption that diversity of ownership is the "litmus test" in seeking diversity of viewpoints. The Commission's conclusion that Geller's programming was of no value to the community was contrary to extensive testimony and was the type of content evaluation previously prohibited by the court.

The Commission contended that it had not engaged in a subjective analysis of program content. But by concluding that Geller's programming offered "no separate voice," the Commission was evaluating the material Geller planned to air, stated the court. And if the Commission was suggest ing a new presumption - that diversity of viewpoints is furthered by the applicant offering a greater amount of informational programming - an explanation by the Commission would be required. Since Grandbanke controlled other broadcast properties, the company, under the existing presumption, would not be increasing the diversity of viewpoints available to the public despite the fact that it proposed to offer more informational programming to Gloucester area residents. Judge Mikva observed that "a small 'new voice' may do more to further the First Amendment than a loud or large 'old voice.'"

The court therefore remanded the case to the Commission to review its comparative analysis of the diversification factor.

Judge Mikva also took issue with the Commission's treatment of the "integration of ownership and management" criterion and remanded this finding for a "better articulation" by the FCC of its approach to the criterion.

Integration is a significant factor in determining whether programming is likely to be in the public interest. Integration is evaluated by the degree to which station owners are involved in the day-to-day operation of the station (quantitative merit), and by factors such as the owners' past broadcast record, local residence and minority status (qualitative merit). The administrative law judge had noted the totality of Geller's commitment to the station, "strengthened by his extensive background in broadcasting and his years of residence in the community." But the Commission held that Geller's superiority under the integration standard had to be weighed against a poor record of responsiveness to community needs, resulting in only a slight preference on this criterion.

Judge Mikva pointed out that the Commission had not conducted an explicit weighing of the quantitative merits or explained its departure from applicable precedent. Rather, the Commission focused on "the highly questionable assumption" that because Geller provided "insufficient" programming during his past license period, he was less likely to respond to community needs than Grandbanke. To the extent that this approach could be considered a functional analysis, the FCC's decision had to be set aside as "unreasonable." The decision also was too "cursory and vague" if it was intended to represent an analysis of the quantitative/qualitative factors.

With respect to the criterion of proposed programming, the Commission granted Grandbanke a substantial preference. The Commission's approach was not unreasonable and its conclusion was not arbitrary or unsupported, stated Judge Mikva. It was within the Commission's expertise to conclude that Grandbanke's programming would be more in the public interest than Geller's, since Grandbanke had ascertained community needs and proposed substantial programming to meet those needs.

The court concluded by upholding the denial of Geller's petition for reconsideration, although leaving for the Commission the question of whether the case presented circumstances that might warrant the reopening of the record on remand.

Committee for Community Access v. Federal Communications Commission, 737 F.2d 74 (D.C.Cir. 1984) [ELR 6:8:18]

Federal District Court enjoins unauthorized distribution of cable television decoding devices

Cox Cable Cleveland Area, Inc., has obtained a permanent injunction restraining the sale by Donald S. King Of converters, decoders, descramblers and other devices capable of being used for the unauthorized interception and reception of Cox Cable's program services.

A Federal District Court in Ohio ruled that Cox Cable was likely to prevail on its claim that King had violated Section 605 of the Communications Act of 1934 due to his involvement in a scheme to distribute a device enabling individuals to receive programming to which they were not entitled. Furthermore, King's activities served to undermine "Cox's method and purpose of doing business which is based principally on the collection of monthly fees from subscribers who pay for 'premium' cable television programming." King's activities also threatened to "erode the base of Cox Cable subscribers. Every sale of an unauthorized converter/decoder results in the irretrievable loss of potential or present Cox subscribers," stated the court. An injunction would protect the availability of cable television service and the receipt of franchise fees by several Cleveland area communities.

Cox Cable's claim against King for damages under a section of the Omnibus Crime Control and Safe Streets Act of 1968 was rejected by the court. The cited section was concerned with wiretapping and electronic surveillance and did not extend to the complained-of activities in this case, because Cox Cable was not a common carrier transmitting a "wire communication" as defined in section 2510 of the statute.

Cox Cable Cleveland Area, Inc. v. King, 582 F.Supp. 376 (N.D.Ohio 1983) [ELR 6:8:19]

Briefly Noted:

Privacy.

A Federal Court of Appeals has reversed a lower court's dismissal of a claim brought by a woman whose surreptiously taped interview was broadcast on ABC's "20/20" television program. ABC aired an investigative report made by Charles Thompson and Geraldo Rivera regarding allegations that an Ohio judge regularly granted leniency to criminal defendants in exchange for sex. In the course of their investigation, they and other investigators interviewed the plaintiff, Sandra Boddie, an alleged participant in the scandal. She consented to be interviewed in her home, but refused to appear on camera. Unbeknown to Boddie, the interview was recorded by a hidden videotape camera and concealed microphones. A segment of the interview was shown on "20/20" including the videotape and audio recording. Following a trial, the jury returned a verdict favoring ABC and those connected with the show on plaintiffs claims that she had been placed in a false light, had her privacy invaded, and was defamed by the false statements about her personal life and her participation in the alleged leniency scheme. The third count, violation of title III of the Omnibus Crime Control and Safe Streets Act of 1968 (known as the Federal Wiretap Statute) was dismissed prior to trial by the District Court on its own motion. Plainappealed this dismissal. The Statute provides that anyone who willfully intercepts any wire or oral communication and willfully discloses to another or uses the contents of that communication, knowing it was obtained through interception, shall be fined or imprisoned. The Statute also sets forth a privilege for a consenting party to a conversation, except where such communication is intercepted for the purpose of committing any criminal, tortious, or injurious act. ABC maintained that the dismissal was correct because its employees were privileged (as parties to the conversation) to record the exchange, that there was no unlawful interception, and no intent to injure her. The court held that this dispute raises questions of fact for the jury and that the court, on the basis of the record before it, could not make this determination as a matter of law.

Boddie v. American Broadcasting Companies, Inc., 731 F.2d 333 (6th Cir. 1984) [ELR 6:8:19]

IN THE NEWS

Cable News Network to ask Supreme Court to review lower court rulings denying CNN permission to televise Westmoreland-CBS libel trial

CNN has announced that it will ask the Supreme Court to overturn earlier decisions by Federal District Court Judge Pierre N. Leval and a Federal Court of Appeals barring television coverage of the Westmoreland v. CBS libel trial. Trial Judge Leval ruled he had no discretion to waive local and federal rules barring such TV coverage, despite the merits of CNN's petition (ELR 6:6:21). The Second Circuit Court of Appeals affirmed the lower court's decision and ruled that the constitution guarantees the press only the right to attend the trial, not to televise it (ELR 6:7:21).

CNN will appeal the Second Circuit's denial of its petition to televise the trial on the grounds that the public's constitutional and common law right to attend the trial is trivialized if limited merely to physical access to the courtroom. In a democracy of 230 million people, where the majority of citizens rely on TV as their primary source of news and information, a prohibition of TV coverage of federal trials that involve important social and political issues denies the public meaningful access to the information essential to its electoral functions in violation of the First Amendment, CNN will argue. CNN also will argue that federal courts may not constitutionally exclude TV coverage where it causes no adverse impact on the fair administration of justice, as found by the trial court, and makes meaningful the public's right to hear and observe judicial proceedings. Finally, CNN will criticize the Second Circuit's affirmation of its rules prohibiting televised coverage of federal trials and its consequent failure to evaluate critically the respective constitutional interests implicated by CNN's request to televise the Westmoreland trial. CNN will ask the Supreme Court to apply the same balancing tests to its own actions that it historically has applied in evaluating the decisions of other branches of government.

"The constitutional issues raised in this case are of significant and continuing public importance," said Turner Broadcasting Vice President and General Counsel Robert W. Ross, "which merit Supreme Court consideration despite the fact that the Westmoreland v. CBS trial will likely have been concluded prior to the Supreme Court's review of CNN's petition for certiorari." CNN will be represented by Harvard Law School Professor Laurence H. Tribe, a scholar of constitutional and First Amendment law. CNN must file its petition for a writ of certiorari to the Supreme Court by February 2, 1985. [Jan. 1985] [ELR 6:8:20]

Jury rejects songwriter's copyright claim against CBS in connection with Michael Jackson's song "The Girl is Mine"

A Federal District Court jury has determined that CBS did not infringe songwriter Fred Sanford's copyrighted musical composition entitled "Please Love Me Now" when CBS released Michael Jackson's song "The Girl is Mine." Sanford had claimed that a copy of his allegedly similar song was delivered to CBS employees about three weeks before Jackson and Paul McCartney recorded a demonstration tape of "The Girl is Mine." Last August, the court denied a CBS motion for summary judgment because a reasonable possibility of access existed. (ELR 6.5:8) But the jury apparently concluded that there was not enough evidence to demonstrate that Jackson had ever heard Sanford's song. Jackson was not a defendant in the action. [Jan. 1985] [ELR 6:8:20]

More than $1 million in damages is awarded in action alleging unauthorized interception of cable television signals

Federal District Court Judge Frank X. Altimari has awarded Cablevision Systems Corporation $423,485 in compensatory damages and $650,000 in punitive damages in the company's action against a supplier of decoders, descramblers, converters and other devices that were being used to intercept Cablevision's television services.

Cablevision previously had obtained an injunction against Annasonic's distribution of the unauthorized equipment, but the injunction was disregarded and sales of the equipment continued.

The award may be the largest damage award ever granted under the Federal Communications Act. [Jan. 1985] [ELR 6:8:20]

Carol Burnett settles libel action against the National Enquirer for an undisclosed amount of money

Entertainer Carol Burnett's libel action against the National Enquirer has been settled with the payment to Burnett by the publication of an undisclosed amount of money.

Burnett's action had challenged the Enquirer's report, on March 2, 1976, of an incident involving her allegedly boisterous behavior in a Washington, D.C. restaurant. In 1981, a jury awarded Burnett $300,000 in compensatory damages and $1,300,000 in punitive damages - amounts that were reduced to $50,000 and $750,000 by the trial court judge (ELR 3:2:2). The California Court of Appeal affirmed the award of $50,000 in compensatory damages, but further reduced the punitive damage award to $150,000 (ELR 5:3:17). The appellate court did give Burnett the option, if she declined to accept the reduction in damages, of undertaking a new trial solely on the issue of punitive damages. In February 1984, the United States Supreme Court dismissed an appeal of the matter.(ELR 6:1:9). [Jan. 1985] [ELR 6:8:21]

WASHINGTON MONITOR

Record Rental Amendment to Copyright Act is passed by Congress and signed by President Reagan

The "first sale" doctrine, which is found in section 109(a) of the Copyright Act, has been amended by the Record Rental Amendment of 1984. It went into effect upon being signed by President Reagan on October 4, 1984.

Section 109(a) provides that the owner of a particular lawfully made copy of a work is entitled to sell or otherwise dispose of the possession of that copy without the authority of the copyright owner. However, under the newly enacted section 109(b)(1), the owner of a particular record may not dispose, or authorize the disposal, of the possession of that record by rental, lease or lending, if such activities are undertaken for direct or indirect commercial advantage, without the authorization of the owners of the copyright in the sound recording and in the musical works embodied therein. (The amendment does not apply to the rental, lease or lending of records for nonprofit purposes by a nonprofit library or educational institution.)

The violation of section 109(b)(1) will constitute copy right infringement, and the civil remedies available under the Copyright Act for infringement will apply; criminal penalties are not available under the section.

The privileges of sections 109(a) and (b) do not extend to any person who has acquired mere possession of the record without acquiring ownership of it (unless the person is authorized by the copyright owner).

The Amendment also revises the compulsory licensing provision - section 115 - of the Copyright Act. A compulsory license will cover the right of the maker of a record of a nondramatic musical work (i.e., the holder of a sound recording copyright) to distribute the record by lease or lending. But a royalty is payable by the compulsory licensee (in addition to any other applicable royalties) to the owner of the copyright in the underlying musical composition for each such rental, lease or loan under the authority of the compulsory license. The royalty will amount to a certain proportion of the revenue received by the compulsory licensee, as determined by regulations to be issued by the Register of Copyrights.

If the copyright owner does not receive the monthly payment due and monthly and annual statements of account, the owner may notify the licensee that the compulsory license will be automatically terminated unless the default is remedied within thirty days from the date of the notice. A termination serves to render the making and/or distribution of all records for which the royalty was not paid actionable as acts of infringement.

The Amendment also sets forth, in section 116(b), the requirements for obtaining a compulsory license for the public performance of works on a coin-operated phonorecord player.

There is a five-year "sunset provision" in the Amendment. [ELR 6:8:21]

DEPARTMENTS

Video Note:

Basics of Negotiation

Basics of Negotiation, a two-hour video cassette program, is now available from Practicing Law Institute. The focus of the program is on negotiations in general, rather than on entertainment industry deals in particular.

Nevertheless, the techniques are the same in all industries, thus making this tape of potential interest to the readers of these pages.

In this program, James C. Freund (of Skadden, Arps, Slate, Meagher & Flom in New York City) and Professor Joseph D. Harbaugh (of American University) demonstrate and analyze the legal negotiation process through the use of simulated negotiation sessions and commentary. Techniques of negotiation between two adversaries as well as between lawyer and client are illustrated. Poor as well as successful methods are demonstrated.

The negotiation process is analyzed from the preliminary counseling session with the client, to information exchanges and bargaining between counsel, through resolution of the case. Stages include identifying the issues, advising the client on the advantages and disadvantages of various options, presenting the client's interests and intentions to the adversary, and agreeing to compromises and a settlement.

Messrs. Harbaugh and Freund critique each role-playing session, taking opposite sides to show what was right and wrong about the methods used. They also point out instances of inappropriate behavior by the hypothetical lawyers that could impede the negotiations.

Other topics covered include: the question of citing legal authority in a bargaining session, fear of making a first offer or concession, need for justifying any demand, advisability of a client attending a negotiation, importance of agenda control, timing of concessions and counteroffers, use of bluffs, and the art of creative compromise.

The video cassettes, supplemented by a concise Primer on Negotiation which summarizes-basic negotiation issues and techniques, are available for purchase or rental.

Rental fees for a two-week period (includes one free copy of Primer) are: 3/4" U-matic, $100; 1/2 " BETA II, $100; 1/2 " VHS, $100.

Purhase fees (includes one free copy of Primer) are: 3/4 U-matic $200; 1/2" BETA II, $150; 1/2" VHS, $150. Additional copies of the Primer are sold only to purchasers or renters of the program at $5 per copy.

For further information or to receive a catalog of books, and video/audio cassettes, contact June E. McDonald, Book and Video/Audio Publicity Manager, Practicing Law Institute, 810 Seventh Avenue, New York, New York 10019, (212) 765-5700. [ELR 6:8:22]

In the Law Reviews:

Volume 6, Number 3 of Comm/Ent, Hastings Journal of Communications and Entertainment Law, has been published. It is available from Hastings College of Law, 200 McAllister Street, San Francisco, CA 94102 and contains Symposium: The Proposed Repeal of the Financial Interest and Syndication Rules as well as other articles.

The Proposed Repeal of the Financial Interest and Syndication Rules: Network Domination or Public Interest Representation? by Evie L. Kintzer, 6 Comm/Ent 513 (1984)

The Syndication and financial Interest Rules: Is it a "Prime Time" for a Change? by Robert M. Osher, 6 Commn/Ent 557 (1984)

Stay Tuned for New Technology: The Paradoxes of the Proposed Financial Interest and Syndication Rules by Eli H. Glovinsky, 6 Comm/Ent 589 (1984)

An Overview of Sex Discrimination in Amateur Athletics by Jeffrey K. Riffer, 6 Comm/Ent 621 (1984)

The Seven-Year Itch: California Labor Code Section 2855 by Jonathan Blaufarb, 6 Comm/Ent 653 (1984)

Mother Knows Best: Reconciling Parental Consent with Minors' Rights in Shields v. Gross by Charmaine Jefferson, 6 Comm/Ent 695 (1984)

Broadcasters' Rights: Whether to Air Independent Political Action Committee Advertisements by William C. Oldaker and Donald S. Picard, 10 Hastings Constitutional Law Quarterly 649 (1984)

Intercollegiate Athletics and Television Contracts: Beyond Economic Justifications in Antitrust Analysis of agreements among Colleges by Eugene D. Gulland, J.

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