BUSINESS AFFAIRS

A Guide To Commercial Network Television Development and Production Agreements (Part 1)

by Henry I. Bushkin

In recent years the television industry has been shaken to its foundation by a revolution in the business. Major new areas have been created to exhibit programming, and the appetite for programs is ravenous. Nonetheless, network television remains the most important force in the medium and network competition is more rivalrous than ever before in television history. Today, television programs are on the air an average of eighteen hours a day and are broadcast on more than a thousand over-the-air channels and hundreds of cable channels. Despite the tremendous increase in the volume of television production, the basic contracts which a producer must enter into in order to make a new television show remain the same. This article focuses on two agreements which the individual producer must have in order to produce a television show for exhibition on one of the three major networks - ABC, CBS or NBC.

The Basic Agreement

There are two basic entities with which the Producer must deal: the Network and the production company. A common scenario is as follows. A Producer approaches a Network with a project. The Network likes the project and would like to go forward; however, it does not feel that the Producer has the resources to actually deliver the show. The Network will therefore require the

Producer to enter into a production agreement with a production company. This article tracks the elements of these two related deals: (1) the Producer and the Network, and (2) the Producer and the production company.

At the threshold, there is the "development deal," an agreement between the Network and the Producer to develop a particular show. It is documented in "deal memo" - a short letter or memorandum of agreement which sets forth the material terms of the agreement. The Network negotiates for the rights to the Producer's property, the right to order the script, and the right to order the movie, the special, the pilot, or the series. The Producer agrees to deliver a script.

If the script is acceptable, the Network then negotiates license fees and exercises its option rights for production and delivery of the show. Neither the Producer nor the Network is interested in investing the time or effort required at this point to reach a comprehensive "long form" agreement, since it is uncertain whether the particular show will progress beyond the development stage. Moreover, if the Producer needs to ally himself with a "major" production company, he must be cautious not to lock himself into terms which may prove objectionable to the production company. (Male pronouns are used in this article simply because the repeated use of "him or her" and "he or she" would be awkward.) Nevertheless, a deal memo is prepared whenever a Network negotiates a program order.

The Producer has several options to consider in securing a development deal. The most obvious is to approach the Network directly and present the idea. This entails a meeting with the Network's creative affairs executive who is responsible for the particular area into which the concept falls. (Creative departments at the Networks are commonly divided into several areas: comedy, variety, daytime programming, dramatic series, movies of the week, specials, mini-series, and late-night programming.) The show itself may take one of several forms: a series, a mini-series, a movie of the week or a special. If the creative affairs executive likes the idea, it will be passed through the appropriate decision making levels until the Network decides whether to make a development deal.

One of the Network's concerns will be the identity of the Producer and what the Network perceives as his ability to deliver an acceptable staff for the show. Under certain circumstances, the Network may insist that the Producer enter into a production agreement with a "major," "mini-major" or otherwise acceptable independent production company to actually produce the show. ("Majors" are production companies with production facilities and distribution arms. "Mini-majors" have distribution arms but not production facilities. Independent production companies have neither production facilities nor distribution arms.) The text of the Writers Guild of America Agreement is preceded by a list of signatory production companies, which presumably should be acceptable to the Networks.

If the Producer is relatively inexperienced, lacks strong financial backing, or is unable to obtain a "letter of credit" or post a completion bond, the Network will probably make a production agreement a condition of the development deal.

As an alternative, the Producer should consider whether to approach a production company prior to approaching the Network, especially if there is good reason to believe that the Network will insist upon the involvement of a production company. The advantage to this approach is that the production company will have access to network executives who have greater decision-making power than the executive with whom the Producer would otherwise meet. There are other advantages to starting with a production company. For example, a production company may be in a better position to evaluate which Network would be most interested in the Producer's show. Furthermore, especially in the case of a novice Producer, a production company will lend credibility, experience, and the ability to staff the show to the Network's approval. In any event, if the Producer is unable to make an agreement with a production company, he still has the opportunity to approach a Network directly.

Obviously, if the Producer succeeds in obtaining a development deal directly from a Network, he has more than just an idea to sell when he contacts the production company. Although he may still have to give up some or all of the ownership rights in the show to the production company, he will be in a far better position to bargain for a strong compensation package with profit participation.

A recent twist is the Network's occasional desire that the show be produced through the Network's own television production company. The Network's production unit is normally used when the idea for a particular show is generated internally at the Network. Some Networks are more aggressive than others in this regard. If the Network wants to use its own television production company, this naturally places the Producer in a difficult bargaining position with respect to compensation, ownership, control and credit. On the other hand, when two shows are being considered for the same time slot, the one which belongs to the Network's production unit will have an advantage. In addition, if the Producer participates in the show's profits, he may receive significant benefits since Network profit definitions are sometimes more liberal than those of studios, without nearly the typical studio overhead factors.

All of these considerations affect the negotiations of various types of development and production agreements.

Development Agreements

Overview

For the Producer, the most sought after program is an episodic series, with a half-hour situation comedy being the most desired. Ordinarily, a series is the result of a "step deal" whereby the Network has sequential options to place orders: first, for the script; next, for the pilot; and then, for the series. At any point, the Network may decline to take the next step, or two steps may be taken at the same time. For example, the Network may agree to develop the project, contingent upon finding an acceptable writer. If the Producer's initial presentation includes a committed, acceptable writer, the Network will proceed directly to order the script. On occasion, the Network may commit itself to order a pilot based on a yet-to-be delivered script.

In the exceptional circumstance, the Producer might obtain an immediate order for a series and by-pass the traditional "step deal" This exception occurs in the rare instance when the series evolves from a Movie of the Week ("MOW") or Special that has already aired, or a producer "packages" an approved concept, writers, production staff, and one or more star performers. Two examples of series which resulted from a MOW and a Special are "The Waltons" which evolved from the television movie "The Homecoming," and "T.V. Bloopers and Practical Jokes" which evolved from a Special. However, Series do not often develop from MOWs or Specials, probably due to the organizational structure of the networks. Since a network's development staff is often segregated into various creative departments and, within a given department, even further separated upon the basis of the various projects that are in development from time to time, there is competition among the departments to obtain commitments for their individual projects. While a successful MOW will gain recognition from the network's development division, it may not necessarily impress the network's series development staff.

The Producer may present his concept in a variety of forms: original idea, synopsis, short treatment, short story, novel, article, or true-to-life incident depending upon the circumstances. He may outline the overall framework of the show supplemented by a brief synopsis of the basic plot, themes, and principal characters. He may also present the Network with a list of possible ideas or "story lines" for the first few episodes of the show, Alternatively, the Producer may present the

Network with a "package" that includes writers, story editors and performers committed to the project.

Obtaining commitments for talented and reputable personnel can help sell the project to the Network. As a result, the Producer will strive to make them a part of his initial presentation. By the same token, the Network may not approve the suggested elements for its own reasons. For example, each Network maintains lists of writers, producers, directors and other "above the line" personnel who have been approved based upon prior experience. If the Producer has committed to a person whom the Network considers unacceptable for creative or business reasons, the Producer's chances of obtaining a development deal may be jeopardized.

An early decision will be which Network to approach. Each Network has its own research department which conducts on-going studies of product need and continually evaluates the strengths and weaknesses in its overall program schedule. The Producer wants to find a Network with a programming gap which his show will fill. This requires both an objective evaluation of a Network's particular type of television programming, and a subjective appraisal of the Network's internal judgment.

Since the most successful Network will renew the greatest number of existing shows for the upcoming season, the Producer may have a greater chance for success by approaching a Network with low Nielsen ratings. The Producer should also consider which time slots are achieving high ratings within a given Network's overall program schedule. It is also important to consider that shows for the most part are designed for given time periods. For example, family type shows generally air within the eight to nine o'clock time period, children's programs on Saturday morning, soap operas in the early afternoon, and game shows in the late morning or early evening.

The Script Order

After the Producer and Network agree upon a suitable writer, the Network places the script order which typically provides for reimbursement to the Producer for his development costs, including the writer's salary and any payments made by the Producer to option any underlying property. (The Producer options a property by paying its owner a small sum of money which eventually will be applied against the total acquisition cost if the option is exercised. The option entitles the Producer to acquire the rights to the property for a specified period of time, and the producer usually exercises the option by paying the owner the purchase price before the option expires.)

Generally, reimbursement payments for the writer's salary are tied to the delivery dates for different stages of the script - first draft, revisions, and polish - and coincide with the dates when the Producer owes payments to the writer. If the Producer also functions as the writer, the deal memo provides for compensation to the Producer for such writing services. The Producer who is able to provide writing services may commission the script to an outside writer, while locking himself into the project in the capacity of "script supervisor" though he will rarely be separately compensated for such supervisory services. If the Producer has a significant reputation or has written previously successful shows, the Network may insist that the Producer supervise the project.

Among the deal memo terms which pertain to the script order, the Network will be granted certain creative controls, such as the right to review the script in various development stages. Although the Network's creative input may be viewed by the Producer as a loss of creative control, the Producer must assume that the

Network is developing the script along the lines of a show that it will want to broadcast.

Of course, there is always the possibility that the Network will decide not to pursue the project further than the script stage and that there will be no pilot order. To deal with this possibility, it is important for the deal memo to clearly delineate the Producer's rights and responsibilities in that regard. If there is no pilot order within the negotiated time period, which will be a minimum of sixty days after delivery of the final script, then the Producer should have the right to "turnaround" and sell the project to another Network. However, the original Network will condition the Producer's turnaround rights on its right to recoup all of its development costs if the Producer is successful in making a deal elsewhere.

It is not until a pilot or series is ordered that the Network and Producer begin to negotiate the license fee which the Network will pay the Producer for the right to broadcast the show. The deal memo will usually provide only two things with respect to the license fee-first, that it will be negotiated in good faith at the time of the pilot or series order, and second, that all development costs reimbursed to the Producer by the Network will apply against and reduce the license fee. The deal memo should also set forth the Producer's turnaround rights in the event that the Producer and the Network fail to reach an agreement on the license fee.

The Pilot Order

Assuming that the final script is approved, the next step will be for the Network to order a pilot. The deal memo generally specifies the period of time within which the pilot order must be placed, such as 60 to 180 days after delivery of the script. The pilot order should specify the fees which the Producer will be paid for producing the pilot; the period of time during which the Network may broadcast the pilot (i.e., not later than two broadcast seasons following delivery of the pilot); and the license fee.

The Network will retain control over creative elements such as the title and the format, and over key creative personnel such as producers, directors, writers and talent, or replacement of any of these elements. The pilot order may be conditioned on the involvement of certain persons, such as a particular star.

A pilot order may also be conditioned on the involvement of an acceptable production company. Since the Producer wants maximum flexibility with respect to this decision, he should attempt to obtain a "guarantee clause" permitting him to take the project to any production company. The Network, however, prefers a blanket provision preserving absolute approval over selection of a production company, and if it obtains such control, it will be able to force the Producer to align himself with a specific production company. The Producer can avoid this uncomfortable position by insisting that he be permitted to take the project to any production company with whom the Network is "presently doing business." Alternatively, he can arrange for the development deal to list a number of pre-approved companies the Network generally finds acceptable. A more cumbersome alternative is for the contract to delineate the precise nature of financial integrity an acceptable production company must have without identifying specific entities to whom the Producer must go with the project. Such forced alignment may be detrimental to the Producer since he will be precluded from "shopping" his Network commitment among various production companies. A Network may have any number of outstanding project commitments with outside production companies, and it may want to direct the Producer's project to one of those companies to satisfy one of its commitments. Alternatively, the Network may desire to produce the project "in-house" for a number of reasons. First, if the pressure from outstanding project commitments is reduced, Networks can more readily produce projects "in house" In addition, the Network may have uncommitted funds available in its own budget for the particular type of project.

The license fees for the pilot may be negotiated before the show is completely "packaged." Fees for the services of most of the professionals associated with the show tend to be standard or can be reasonably estimated. The cast will be subject to "breakage fees" (described under "The Series Order" below). The fee for the pilot is generally negotiated on a "cost up to" basis, which usually fails to cover the full cost of production. MOW license fees, by contrast, are flat fees set at a going rate without regard to actual production costs or particular project needs. In the unlikely event that the pilot is produced under budget, the "cost up to" arrangement means that the Network gains the benefit of any efficiency. However, in the more likely event that the pilot runs over budget, the Producer must make up the deficit from his own funds. Nevertheless, as a practical matter, the Producer will readily incur deficit financing because a pilot is a promotional vehicle. If the pilot is well received, the Network will order the series. A Producer, therefore, will be willing to spend substantial sums to enhance the pilot's production value, even at the risk of incurring deficits.

The fee for the pilot is typically paid in three installments - the first due upon commencement of principal photography, the next upon completion of the production, and the last upon delivery of the pilot (after post production). The Producer with a fair measure of bargaining power or lack of cash flow, however, may insist that as much as two-thirds of the pilot fee be paid upon commencement of principal photography.

The pilot fee generally entitles the Network to broadcast an hour or half-hour pilot twice within two broadcast years after delivery. If the pilot is a two-hour show and no series is ordered or picked up, the Network will be able to broadcast it twice within four years. If the Network decides to pick up the show and places a series order, this period will automatically be extended to authorize repeat broadcasts of the pilot during the period when the Network broadcasts the series.

The Series Order

After delivery of the pilot, the Network has a given period of time to decide whether or not to order the production of a program series. The initial Network television series order includes 22 or more episodes, which may be ordered in two option periods. The first option permits the Network to order 12 episodes (13 including the pilot). The second option permits the Network to order an additional nine episodes. The date on which the Network must exercise the second option is timed to enable the Network to obtain an adequate rating sampling, while permitting the production company to maintain an uninterrupted program production schedule. If the Network declines to order an additional nine episodes, its option to order programs for subsequent years is lost. Production orders for all years after the first are on a 22 episode basis.

Mid-season starts are scheduled on a slightly different basis. After the mid-season pickup, the Network need only order thirteen shows for the subsequent Fall season. In order to preserve its subsequent yearly option for an additional broadcast season, the Network must order an additional nine episodes completing the first full year and a half of actual broadcast production. There is a growing Network reluctance, however, to option a full twelve episode initial series order. Recent Network orders have been as small as four to six program episodes, or even less in the event of a mid-season pickup.

The Producer should amortize his costs on the assumption that both options will be exercised and 22 episodes will be produced. However, the deal memo should contain a "short rate" payment which is due to the Producer if the Network does not exercise its second option. The "short rate" payment reimburses the Producer for costs incurred during production of the first 13 episodes, which were amortized on a 22 episode basis. It specifically does not cover production overages.

In negotiating the license fee, certain factors in addition to those noted above must be considered. Since a successful series will continue for years, the license fee should be subject to built-in inflationary increases.

In addition, the Producer should attempt to obtain a specific and well-defined "breakage" clause, which will require the Network to pay for costs in excess of the license fee, if certain "special" creative elements in excess of budgeted amounts are added to the production at the Network's request or with its approval. For example, such a provision might estimate an amount to be added to the license fee if the Producer obtains a certain caliber of performer to star in an episode or in the series. In certain situations, the "breakage" figure may be applicable to additional desirable creative elements such as extraordinary special effects, set designs, or costumes required for a special period piece episode. It is also important to obtain a "breakage" fee to cover special production difficulties anticipated in relation to the particular context of a series.

As with the pilot fee negotiation, "breakage" fees are granted by the Network on a "cost up to" basis, which places the risk of overages on the Producer or production company while providing the benefit of any economic or organizational efficiencies to the Network. The more specific and carefully delineated the "breakage" provision is, therefore, the more the Producer will be protected should the license fee fail to cover production costs.

As an additional protection, the Producer may negotiate for reimbursement of location costs and set construction. Although unusual, if the Network will agree to such reimbursements, it will also be on a "cost up to" basis.

A Producer with certain talents can assure himself of receiving continued revenues after the series is ordered. If he is experienced and on the Network's list of preapproved "line producers," he may want to serve as line producer for the series, rendering services on an exclusive basis, with responsibility for daily production activities. A line producer will be given screen credit as "Producer,' and may be able to obtain this position on a "pay-or-play" basis for the first order of episodes, so that he must be paid the agreed fee for his services, regardless of whether he is actually used.

Alternatively, the Producer may seek the position of "executive producer" of the Series. In contrast to a line producer, the executive producer renders services on a nonexclusive basis and generally is responsible for overseeing the entire production schedule as well as the various line producers engaged throughout the season. An executive producer may be able to obtain his position on a "pay or play basis" (although this is difficult to achieve due to the difference in the nature of the position), and will be accorded credit as "executive producer." An executive producer may want to provide "line producing" services at the beginning of the series, and then later serve as executive producer. This enables him to establish the quality and continuity of the show before he delegates important creative and decision-making tasks to others. Once the series has been established, he then acts as executive producer in order to be free to develop other projects while maintaining his involvement with the series.

A Producer of lesser stature may attempt to persuade the Network that he should render "line producing" services on the series, but this will rarely be granted if the Producer has no prior credits in that capacity. In any event, the Producer's ability to obtain such a position is subject to the agreement between the Producer and a production company. The Producer with relatively little experience may reasonably hope to obtain a co-production credit from the production company, depending upon the production company's enthusiasm for the show. Alternatively, the Producer should be able to receive "consultation fees" which may be negotiated on either a per-episode or one-time-only basis, but this will not necessarily entitle the Producer to receive screen credit.

The Producer capable of providing writing services may be able to negotiate a royalty payment for creating the series. This royalty is not contingent upon the Producer's performance of any particular services in the event the series is produced, but rather is paid in addition to any other seriesrelated compensation. The series royalty is generally negotiated in the form of a fixed sum and is typically payable to the Producer on a per episode basis, contingent upon the Producer receiving sole "created by" credit in accordance with standards set by the Writers Guild of America. In the event that "created by" credit must be shared, the series royalty is generally reducible to not less than a "floor" of approximately one-half the negotiated sum. ("Created by,' "written by,' and many other terms throughout this article to describe the different roles which the Producer may perform in a given show are carefully defined in the Writers Guild of America Agreement.)

In addition to the development agreement, the Producer will need a production agreement. That agreement will be the focus of Part 2 of this article which will be published next month.

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RECENT CASES

United States Supreme Court rules that termination of copyright assignment by composer's heirs does not cut off music publisher's right to share further royalties from pre-termination recordings

A legal "miniseries" generated by the Copyright Act of 1976 has concluded with the resolution of a dramatic confrontation before the United States Supreme Court which resulted in a 5 to 4 decision upholding the continuing right of a music publisher to receive royalty income from sound recordings which were licensed prior to the termination of the publisher's interest in the song's copyright. The players in the series, which might appropriately be entitled "Who's Sorry Now," as was the song in question, have been described at length in the two prior episodes (reported in ELR 5:7:3 and 4:7:1). Briefly, in 1923, the original copyright in "Who's Sorry Now" was registered in the name of Waterson, Berlin & Snyder Co., a publishing company partly owned by Ted Snyder. Snyder was one of three persons who collaborated in creating the song (and the parties to the action agreed to treat the case as if Snyder were the sole author). The copyright eventually was assigned to Mills Music, Inc. In 1940, Mills sought to protect its interest in the 28-year renewal term of the copyright by entering into an agreement with Snyder, pursuant to which Snyder agreed to assign his entire interest in all renewals of the copyright to Mills in exchange for an advance royalty and certain specified additional royalties.

Mills obtained the renewal copyright in 1951 and issued more than 400 licenses to record companies authorizing the use of the song. The record companies were contractually obligated to pay royalties to Mills, and Mills, in turn paid 50 percent of the royalties to Snyder (whose widow and son succeeded to his interest in the Mills agreement).

The enactment of Section 304 of the Copyright Act of 1976 affected the rights of Mills and the Snyders by providing an automatic extension of the life of the song's copyright. Instead of expiring in 1980, the copyright in "Who's Sorry Now" will endure until 1999. Section 304(c) gave Marie Snyder and Ted Snyder, Jr., a right to terminate the 1940 grant to Mills of the renewal copyright. And Section 304 (c)(6) provided that the termination would cause all rights "covered by the terminated grant" to revert to Snyder's widow and son. However, the reversion was subject to an important exception: a derivative work prepared under the authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination.

The Snyders, on January 3, 1978, terminated the agreement with Mills; the termination was to become effective on January 3, 1980. In August 1980, when the Snyders notified the Harry Fox Agency (Mills' licensing agent) to remit to the Snyders all royalties earned by recordings of "Who's Sorry Now," Fox filed an interpleader action in a Federal District Court in New York. The court entered judgment for Mills in an "exhaustive" opinion, which the Court of Appeals later reversed. The Court of Appeals determined that Mills was relying on two separate grants in licensing the preparation of recordings: the 1940 grant from Snyder to Mills, and the later grants by Mills to the record companies. In the appellate court's view, the Exception preserved only the second set of grants, with the result that the Snyders' termination of the underlying copyright grant also terminated Mills' right to collect royalties payable under grants to record companies.

The appellate court also determined that Section 304 was enacted for the benefit of authors and that the Exception was enacted for the benefit of "utilizers" of derivative works. Mills, as neither an author nor a utilizer, was not entitled to the benefits of the section. Furthermore, the legislative history of the section did not suggest to the Court of Appeals that Congress intended publishers to share in the royalties earned by derivative works after the termination of an assignment of copyright.

The United States Supreme Court has reversed the Court of Appeals decision on the basis that "the consequences of a termination that Section 304 authorizes simply do not apply to derivative works that are protected by the Exception defined in Sec. 304(c)(6)(A)." Justice Stevens did not agree that Congress intended to distinguish between authorizations to prepare derivative works that are based on a single direct grant and those that are based on successive grants, and declared that the derivative works in the case "unquestionably" would fall within the Exception.

Justice Stevens first pointed out that it was "undisputed" that the 1940 grant did not specify the terms that would apply to the use of any particular work; those terms were contained in the licenses issued by Mills or Fox. But the Mills/Fox licenses did not provide for payments to the Snyders; the source of the Snyder's interest in the royalties from the derivative works was the 1940 agreement. The fact that the statutory termination caused the ownership of the copyright in the song to revert to the Snyders did not accomplish a statutory assignment of Mills' contractual right to collect royalties from the users of previously-authorized derivative works, stated Justice Stevens. The licensees had no contractual obligation to the holders of the reversionary interest in the copyright. Thus, a "fair construction" of the

Exception's use of the phrase "under the terms of the grant" would have to include the terms both of the 1940 grant and the terms of the licenses executed by Mills/Fox, according to Justice Stevens. The Snyders would then continue to receive their 50 percent share of the continuing royalties generated by the pretermination derivative works.

The Court of Appeals' "proposition" that Mills was not the "utilizer" of the derivative works and therefore was excluded from the coverage of the Exception was an erroneous reading of the statute, stated the Supreme Court, again because of the necessity for maintaining the "crucial link" between the licensee recording companies and the Snyders. Also rejected was the Court of Appeals' evaluation of the legislative history of the Exception. Congress was "well aware" of the prevalence of multiple licensing agreements in the music publishing industry, declared Justice Stevens, and of the importance of music publishers in the marketing of copyrighted songs. In light of this awareness, the Exception would serve to protect the owner of a derivative work whether the authority to prepare the work was received in a direct license from an author or in a series of licenses and sublicenses. In either case, the owner would continue to pay royalties under the "terms of the grant" in existence at the time of termination; the terminating party would not be entitled to renegotiate the terms of that grant. The Court found no reason "to differentiate between a book publisher's license to a record company,' and concluded that Mills was entitled to a share of the royalty income from derivative works prepared prior to the termination of the assignment agreement.

Justice White, joined by Justices Brennan, Marshall and Blackmun in dissent, declined to accept the view that the "terminated grant" at issue was the grant from Snyder to Mills. Rather, in Justice White's opinion, the termination extended to the right given to Mills to share in the royalties paid by licensees. Allowing the Snyders to receive all posttermination royalties would not necessarily mean that utilizers would be subject to a renegotiated royalty rate. Only the identity of the payee would change. The agreement between Mills and Snyder to divide royalties was irrelevant to protecting the utilizers of the derivative work, in the dissent's view.

The majority's reading of the Exception was not only "awkward and clumsy," but also unsupported by legislative history, stated Justice White, who noted the absence of any reference to multiple licensing in the music industry in the various drafts of the Exception. Rather, the Exception was designed to protect the actual owners of derivative works, such as film producers, from having to renegotiate rights in underlying works such as the novels or plays on which the films were based. This purpose could be carried out without protecting "middlemen" as well, particularly in view of the preference for authors' interests which the termination provisions express. The derivative works clause was an "accommodation" between the concerns of providing compensation to authors and promoting public access to derivative works - purposes well served regardless of the identity of the recipient of royalties. The majority's interpretation of the Exception would "frustrate" the Congressional purpose of protecting authors who "struck unremunerative bargains" when their works were in their "infancy," especially when such bargains consisted of the assignment of rights for a one-time lump sum payment.

Justice White concluded by observing that the Mills-Snyder agreement surely did not contemplate a division of royalties earned during the additional 19-year term created by the 1976 Act. With respect to this "windfall," Mills could not argue that it was being deprived of an incentive to disseminate creative works of art to the public, since the company already had realized "the benefit of its bargain" The outstanding compensation therefore rightfully belonged to the Snyders in light of the Congressional purpose of encouraging the compensation of authors, opined Justice White.

Mills Music, Inc. v. Snyder, U.S.Sup.Ct. Case No. 83-1153 (Jan. 8, 1985) [ELR 6:9:8]

Supreme Court agrees to review "transporting stolen goods" conviction of manufacturer of bootleg Elvis Presley albums; similar cases have involved other albums and pirated movies

Law enforcement agencies around the country have been coming down hard on movie and music pirates. Although the Copyright Act itself contains criminal penalties, some prosecutors have relied instead on state and federal statutes prohibiting the sale and interstate transportation of stolen property.

In Crow v. Wainwright, a Federal Court of Appeals ruled that the Copyright Act preempts state statutes prohibiting the sale of stolen property, when the statute is used to prosecute the sale of bootleg tapes, and where the only "property" actually "stolen" is the copyrighted works recorded on the tapes. (ELR 6:4:9) The Supreme Court recently declined to review this case, much to the disappointment of the creative community.

On the other hand, federal prosecutors thusfar have enjoyed success with prosecutions based on the National Stolen Properties Act - a federal statute that prohibits interstate transportation of stolen "goods, wares or merchandise." In cases such as these, preemption is not the issue. Instead, the question is whether copyrighted works - apart from the records and tapes on which they are recorded are "goods." So far courts have said "yes."

One of the first of these cases is the by now oft-cited Belmont case. In l977, two FBI agents, as part of an undercover operation, established Gold Coast Specialties, Inc., and pretended to be interested in purchasing pirated motion pictures. The agents eventually bought 442 videocassettes from two companies. John Belmont was the source of motion pictures for one of the companies.

Belmont was convicted of conspiring to transport stolen goods in interstate commerce in violation of 18 U.S.C. section 2314 and of willfully infringing motion picture copyrights.

On appeal, Belmont argued that copyrights were not the type of "goods, wares or merchandise" to which section 2314 applies. Federal Court of Appeals Judge Goodwin, in affirming the judgment of conviction, rejected this argument, citing Ninth Circuit law which has held that copies are goods or merchandise and that illicit copying is theft within the meaning of the statute. The fact that Belmont's copying was "off the air," with no proof of the interstate transportation of stolen originals, was not a meaningful distinction in terms of the purpose of the statute. Judge Goodwin pointed out that the National Stolen Property Act concerns owners in their protected property are just as deserving of protection from interstate transportation as are the ownership interests of those who own other types of property.

Belmont also argued that the enactment of new copyright legislation increasing the penalties for copyright infringement meant that Congress did not intend section 2314 to apply to charges of copyright infringement. But Judge Goodwin did not find evidence of any such intent to limit section 2314.

The court also ruled that the government proved by "abundant" circumstantial evidence that the tapes had an illegitimate origin, and demonstrated the absence of a first sale. The court held that it was proper to aggregate the value of all shipments in determining whether the jurisdictional amount was satisfied. The sale price was valid evidence of the tapes' value, stated the court, and the $5,000 limit was exceeded, even after a deduction was taken for the cost of the blank tapes.

In a separate but similar case, the foundation for a 78-count indictment has been found solid enough to support charges that seven individuals engaged in the interstate transportation of stolen property.

The indictment arose from the operation of an enterprise involved in the manufacture and distribution of "pirated" eight-track and cassette tapes. The brigands appealed their convictions, arguing that the counts alleging the interstate transportation of stolen property were invalid because the pirated tapes in issue were copied from legitimately acquired records and thus were not "stolen" property within the meaning of section 2314 of the National Stolen Property Act.

In affirming the convictions, Federal Court of Appeals Judge Albert J. Henderson noted that under section 2314, it is a federal felony to transport "in interstate or foreign commerce any goods, wares or merchandise ... of the value of $5000.00 or more, knowing the same to have been stolen, converted, or taken by fraud. . . ." Judge Henderson also noted that in United States v. Gottesman (ELR 6:4:9), it was held that "the intangible idea protected by a copyright is effectively made material by its embodiment upon tape and therefore constitutes 'goods, wares or merchandise' that may be 'stolen, converted or taken by fraud.'" The fact that Gottesman involved the reproduction of stolen copyrighted works was not a meaningful distinction in the court's view; the brigands' unauthorized reproduction and distribution of multiple copies of copyrighted works without the authority of the copyright owners was an interference with the owners' property rights which amounted to conversion. Judge Henderson emphatically declared that "the rights of copyright owners in their property are just as deserving of protection as those of the owners of other types of property ... (and) the legitimate acquisition of copyrighted material does not ameliorate the effect of subsequent illegal duplication and distribution of that material."

The effect of concluding that the unauthorized duplication and interstate distribution of the tapes was a violation of section 2314 was to validate the use of the stolen property counts in the remaining convictions.

An attempt to raise a defense based on the "first sale" doctrine was rejected, because the doctrine only applies to lawfully made copies and relates to the sale of a particular lawfully made copy, not its reproduction. Here, there was sufficient evidence to establish the illicit source and origin of the pirated tapes.

The "it's not goods, wares or merchandise" defense to a section 2314 National Stolen Property Act prosecution involving copyrighted material also was raised, unsuccessfully, by Paul Edmond Dowling in appealing his felony convictions for mail fraud and interstate transportation of stolen property.

Beginning in 1976, Dowling and co-defendant William Samuel Theaker manufactured and distributed "bootleg" Elvis Presley phonograph records. Dowling and Theaker made seven unauthorized albums without the consent of the copyright proprietor, RCA Records, or Presley's estate (the holder of an interest in royalties on Presley recordings made after March 1, 1973). A "massive" mailing of advertising catalogs and records was conducted.

In 1983, Dowling was found guilty of stolen property, copyright infringement and mail fraud offenses. On appeal, Dowling argued that the government could prosecute him only under the criminal infringement provisions of the Copyright Act. Federal Court of Appeals Judge Tang found no merit in this argument.

Judge Tang first cited United States v. Belmont, which held that "while the wrongful copying of sound and video tapes and motion picture materials constituted copyright infringement, the interstate transportation of the stolen copies also was punishable under section 2314 . . ." The rationale of Belmont was found applicable in Dowling's case.

Dowling's acts also constituted mail fraud. Dowling contended that the fact that he concealed his activities from the copyright holders (with the intent to deprive them of their royalties) could not serve as the basis for an alleged fraudulent scheme since there was no fiduciary relationship between Dowling and the copyright holders. The court declined to accept this "fiduciary duty" limitation, but did state that "a non-disclosure can only serve as the basis for a fraudulent scheme when there exists an independent duty that had been breached by the person so charged." In this case, section 115 of the Copyright Act creates an "explicit independent statutory duty" pursuant to which Dowling was required to report to RCA his intent to manufacture and distribute Elvis Presley recordings. The mailing of advertising catalogs by Dowling without reporting to RCA amounted to a breach of the statutory duty and was sufficient to form the basis of a scheme to defraud under the Mail Fraud Statute.

The court distinguished the case of United States v. Gallant (ELR 5:11:14) in which the defendant's failure to disclose to the copyright owners his intention to distribute recordings of copyrighted musical performances was determined to be insufficient to prosecute him under the mail fraud statute. In Gallant, the defendant was a middleman distributor, not a manufacturer. Hence, the reporting requirement of section 115 was inapplicable and a breach of an explicit statutory independent statutory duty did not occur.

The mailing of advertising catalogs to potential customers occurred "in furtherance" of the scheme to defraud, ruled the court, even if the mailing was not from the perpetrator to the victim of the fraud. The use of the mails to attract customers was an "integral feature" of the business's success.

In turning to the National Stolen Property Act conviction, the court again adverted to the decision in Belmont in which it was held that the unauthorized sale of videotape cassettes of copyrighted motion pictures involved goods, wares or merchandise within the meaning of the statute. Belmont was dispositive of the facts before it, concluded the court. Dowling's argument that Belmont was effectively overruled by the United States Supreme Court in Sony Corp. v. Universal City Studios (ELR 5:9: 10) was held to be without merit.

The Supreme Court has agreed to hear the Dowling case. Thus, the question of whether intangible copyrighted works can be "stolen goods" will be answered definitively later this year or early next.

United States v. Belmont, 715 F.2d 459 (9th Cir. 1983), cert. den., 104 S.Ct. 1275 (1984); United States v. Drum, 733 F.2d 1503 (11th Cir. 1984); United States v. Dowling, 739 F.2d 1445 (9th Cir. 1984), cert. granted, Docket No. 84-589 (1985) [ELR 6:9:9]

Capitol Records is denied recovery of California sales and use taxes paid prior to 1976 on the acquisition of master tapes from independent producers; tax exemption granted to motion picture acquisitions did not apply to record industry, California Court of Appeal rules

Capitol Records, in addition to challenging California's unitary method" of taxation (ELR 6:9:13), has had a strong contender on the litigation charts with its action involving the State Board of Equalization's imposition of a use tax on Capitol's acquisition of master tapes made by independent producers and used in the production of phonograph records.

The master tapes at issue are the prototypes from which record companies manufacture their products. As described, at instructive length, by California Court of Appeal Justice Sims, the master tapes are made by editing and "mixing down" multiple-track tape recordings of the sounds emitted by instruments and performers at studio recording sessions. For record production, the master tape is used to cut a "lacquer master" from which a "stamper" for use in compression molding machines is derived. Cassette and eight-track prerecorded tapes are made from a "duplicating master," which in turn is made from the master tape.

Capitol acquires original master tapes by hiring the exclusive services of an artist, conducting recording sessions at its own facilities, and making its own master tapes (Type A contract); by purchasing master tapes made by others before any copies or lacquer masters are made (Type B contract); and by financing the costs of independent production companies (with whom artists have exclusive contracts) and paying royalties in exchange for the ownership of master tapes produced by these independent companies (Type C contract).

The State Board of Equalization assessed use taxes on the amounts paid by Capitol to acquire, during the period from 1968 through 1971, certain original master tapes made outside the state in connection with Type B and Type C contracts. The Board also imposed use taxes on the amounts paid by Capitol for its acquisition of duplicate master tapes from other record companies, located out of state, and imposed sales taxes on the amounts received by Capitol for furnishing duplicate master tapes to other companies pursuant to licensing agreements.

Capitol paid the amounts assessed - about $863,363, including interest - and claimed a refund from the Board. When the Board denied its claim, Capitol filed this action.

The tax statute at issue, section 6201 of the Revenue and Taxation Code, provides, in pertinent part: "An excise tax is hereby imposed on the storage, use or other consumption in this state of tangible personal property purchased from any retailer ... for storage, use or other consumption in this state . . ." The purpose of the use tax, according to the court, was to insure that all taxable property would be taxed once for the support of the state government.

In 1975, the California Legislature enacted section 6362.5 of the Revenue and Taxation Code. This section exempted from tax the gross receipts received for the sale, lease, storage or use of master tapes or master records. However, subdivision (a) of the statute provided that tax would continue to be due on "amounts ... paid by a customer in connection with the customer's production of master tapes or master records to a recording studio for the tangible elements of such master records or master tapes."

Thus, section 6362.5 did provide Capitol with an exemption from taxation on the transfer of master tapes in the years after 1975.

In an effort to clarify existing law, the Legislature, in 1982, amended section 6362.5(b)(2) by adding the following italicized language: "Amounts paid for the furnishing of the tangible elements' shall not include any amounts paid for the copyrightable, artistic or intangible elements of such master tapes or master records, whether designated as royalties or otherwise including, but not limited to, services rendered in producing ... tangible personal property or any other services or production expenses in connection therewith which may be construed as constituting [a] 'sale . . . '"

(In the summer of 1984, the California Franchise Tax Board entered the fray by voting against imposing a retroactive sales tax on the services provided by music industry personnel, including independent producers, engineers, production companies and recording studios. ELR 6:2:19.)

Capitol argued that the 1982 amendment was intended to extend section 6362.5's scope, retroactively, to all "pending proceedings" including Capitol's case.

A California appellate court, upholding a trial court decision (ELR 3:14:5), has disagreed with Capitol's interpretation of the relevant legislation. The court determined that the 1982 amendment was an attempt to clarify whether the fabrication costs of independent recording engineers and producers were subject to tax under the 1975 statute and was not indicative of any intent to apply the 1975 legislation retroactively.

The court then turned to Capitol's arguments challenging the propriety of imposing a use tax on its acquisition of master tapes made outside the state, the first such argument being that the trial court erred in finding that agreements between Capitol and independent production companies for the acquisition of the tapes were "sales" agreements and not employment contracts. According to Capitol, the same supervision and control were exercised by the company over the recording sessions of the "independent artists" as Capitol exercised with its Type A contract artists.

Judge Sims pointed out that the Type C contracts themselves provided substantial evidence that no employer/employee relationship existed between Capitol and the makers of the master tapes. This was so, the court explained, because the royalty agreement which, along with an agreement for the production of master tapes, constituted the Type C contract, stated that the production agreement called for the independent production company to produce for its own account phonograph record masters embodying the performances of specified artists and to sell such masters to Capitol. The production agreement also refers to the sale of masters to Capitol, and thus, on its face, was a sales contract, not a contract of employment.

Furthermore, during the time period at issue, Capitol did not exercise defacto control over the making of master tapes under Type C contracts. The court noted that there was no requirement that selections or song titles be submitted to or approved by Capitol before the recording sessions began; the sessions generally were directed by producers chosen by the independent production company - producers who usually were not Capitol employees. These independent session producers hired musicians and vocalists, directed the performers in the studio, and assisted in the mix-down process resulting in the master tapes. Capitol employees did approve (or disapprove) the budgets submitted by the production companies and paid certain bills.

But given the evidence presented, the trial court's determination that the master tapes furnished to Capitol under the Type C contracts were purchased by Capitol from independent contractors was not in error, the appellate court ruled.

Capitol next argued, unsuccessfully, that the State Board of Equalization was unreasonable in imposing a use tax on master tapes. But the applicable requirements of the use tax statute were met, declared the court, in that the master tapes were used by Capitol in California and were acquired, as discussed above, by purchase from a retailer. Furthermore, the master tapes were tangible personal property, and they were physically useful in the manufacturing process notwithstanding the value of their "intellectual" content.

Reaching perhaps its core argument, Capitol claimed that the imposition of the use tax on original master tapes acquired under the Type B and Type C contracts violated guarantees of equal protection of the laws, because allegedly identical transactions between independent film producers and motion picture studios are exempt from tax.

The court acknowledged that major movie studios have not been subject to tax in acquiring rights to films made by independent producers, although films do have a physically separate soundtrack and picture negative. However, in 1933, the Board of Equalization adopted Ruling No. 19, which, in part, exempted from tax the amounts received by a film producer for the right to exhibit or reproduce motion pictures. The ruling derived from the practice whereby independent producers did not sell their movies to the studios but rather allowed the studios to lease the movie for exhibition and distribution. Hence, the "transfer" of the right to exhibit did not constitute a sale or purchase for purposes of assessing a sales tax or a use tax.

In 1965, when leases of tangible personal property were categorized as sales or purchases for tax purposes, the Legislature specifically exempted from taxation leases of motion picture and television films and tapes.

Capitol's attempt to challenge this exemption was fraught with perilous procedural considerations, which the court carefully navigated to reach the ultimate task: deciding whether the Legislature indeed had adopted an impermissibly discriminatory classification by taxing the purchase of master tapes under section 6201 and by exempting the leasing of movies in section 6010(e)(1).

The court's efforts yielded a finding that Capitol had not met its burden of proving that its acquisition of master tapes was the same type of activity as the acquisition of movies by movie studios, thereby warranting similar tax treatment of the two activities. The Legislature's classification was justified, declared the court, by "fundamental differences in the economic transactions by which movies, on the one hand, the master tapes, on the other, get from producers to others."

The Legislature's classification also was upheld because Capitol did not prove that movies and master sound tapes " are functionally the same things." Movies do have soundtracks, which are recorded on 35 millimeter sprocketed magnetic tape, synchronized with the film. But this film soundtrack is not immediately useful (without editing, mixing and transfer to another form of tape) for the production of commercial tapes or records for sale to the public. A distinction between soundtrack and master tapes on the basis of their utility in production was reasonable, ruled the court.

A final argument raised by Capitol was that the license fees paid by and to the company for the right to reproduce and market musical recordings were payments for intangible rights. The court found no indication that intangible rights were acquired apart from the supplying of duplicate master tapes in conjunction with the licensing agreement. Rather, the evidence showed that licensees obtain duplicate master tapes and the right to manufacture, market and distribute records and tapes made from the duplicates in exchange for their payment. The tax on the total value of the license agreement therefore was correctly imposed.

The court somewhat whimsically concluded that "Although a master sound tape may contain the stuff that dreams are made of, it is not a movie for purposes of the sales or use tax."

Capitol Records, Inc. v. State Board of Equalization, 158 Cal.App.3d 582 (1984) [ELR 6:9:11]

EMI Limited lacked standing to challenge California Franchise Tax Board assessment of taxes against its subsidiary, Capitol Industries; United States Supreme Court declines to review decision

Introducing, once again (see also ELR 6:9:11), the members of the band: Capitol Industries-EMI, Inc. (a Delaware corporation with its principal place of business in California); EMI Limited (a United Kingdom corporation owning the majority of the stock of Capitol); various EMI subsidiaries, most of which operate outside the United Kingdom, and some of which are engaged, as is Capitol, in the business of recording phonograph records and tapes. And the ever-attentive audience: the California Franchise Tax Board, which, in accordance with the state's "unitary method" of taxation, determined that Capitol, EMI and other EMI subsidiaries were engaged in a "unitary" business to the extent of their "music activities." Therefore, the Board contended, Capitol was required to combine, in its tax report, the net incomes of Capitol, EMI and all of EMI's other subsidiaries derived from the music portion of their businesses.

The combined income then would be apportioned between California and the rest of the world based on a formula using the California ratio of property, payroll and sales, to the worldwide figures for the same factors.

When Capitol and EMI brought challenges to the Board's claims in Federal District Court, the court declined to assert subject matter jurisdiction. Subsequently, a Federal Court of Appeals affirmed the dismissal of the action with respect to Capitol because the company had an adequate remedy under state law. Capitol Industries-EMI, Inc. v. Bennett, 681 F.2d 1107 (9th Cir)(ELR 3:23:3), cert. denied, 455 U.S. 943 (1982). However, the action brought by EMI was remanded for further proceedings since EMI, a nontaxpayer, apparently had no method available under state law to challenge tax assessments. On remand, the District Court held that EMI lacked standing to challenge the tax against Capitol (ELR 5:4:5), and this ruling has been affirmed on appeal.

Federal Court of Appeals Judge Skopil observed that EMI was involved in the tax controversy as the majority shareholder of Capitol stock. EMI's only possible injury from the imposition of taxes on Capitol would be a decrease in the value of its holdings in Capitol. But generally a shareholder does not have standing "to redress an injury to the corporation in which it holds stock."

EMI may have been attempting to challenge the legality of the unitary tax method. But the legality of the method recently has been upheld in Container Corp v. Franchise Tax Board, 103 S.Ct. 2933 (1983). Various treaty provisions allegedly conferring standing on EMI also were not applicable, concluded the court, declaring that "Capitol is best suited to assert rights that are distinctly its own."

The United States Supreme Court has EMI's petition for review.

EMI Limited v. Bennett, 738 F.2d 994 (9th Cir. 1984), cert. denied, Docket No. 84-613 (1984) [ELR 6:9:13]

Individuals receiving Home Box Office programming without paying subscriber fees did not violate federal wiretapping statute, rules Federal District Court in Oregon

A Federal District Court in Oregon has ruled that the federal wiretapping statute (Title III of the Omnibus Crime Control and Safe Streets Act of 1968) does not apply to the unauthorized reception by various individuals of the microwave broadcasts of Willamette Subscription Television.

Willamette, a pay television service, sued certain residents of the Portland Oregon metropolitan area who allegedly received the television signals of Home Box Office without paying a subscriber fee to Willamette, HBO's local distributor.

Federal District Judge Panner determined that Willamette's reliance, in part, on a wire or cable to carry a signal which was then transmitted by microwave did not make the broadcast a "wire communication" under 18 U.S.C. section 2510(1). The following factors were cited in support of the court's conclusion: the HBO signal can be received by anyone with the proper equipment, and thus there could be no expectation of privacy when the signal is so readily received; the HBO signal does not involve a "conversation"; it was unlikely that Congress intended that the definition of wire communication would include purely commercial microwave broadcasts; and there was no allegation that the HBO signal was "tapped" from a wire or cable.

Judge Panner also ruled that the HBO signal broadcast in Portland was not an "oral communication" as defined by 18 U.S.C. section 2510(2) since Willamette did not expect that its HBO signal would remain private (given its receivability), even if the company did expect that its property interest in the signal would be protected. Furthermore, Willamette did not "utter" the communications it unsuccessfully sought to protect as an oral communication.

Judge Panner stressed the fact that the federal wiretapping statute is a criminal statute, notwithstanding a provision creating a civil cause of action in favor of victims of unlawful electronic surveillance. No civil cause of action arises under Title Ill unless the criminal provisions of the same statute have been violated; and no case has held that Title III applies to the unauthorized reception of pay television signals, according to Judge Panner. The individuals sued by Willamette could have had no fair warning that their conduct would violate the federal wiretapping statute, and the motion to dismiss the claim was granted accordingly.

It should be pointed out that in November 1983, Judge Panner enjoined certain Portland area companies from manufacturing or selling antennas designed to receive the HBO signal. Furthermore, in this case, Willamette did not allege that the individuals intercepting the HBO programming "videotaped and sold the broadcasts, invited others to view the broadcasts for a fee, or otherwise profited from the unauthorized interception."

Willamette Subscription Television v. Cawood, 580 F.Supp. 1164 (D.Ore. 1984) [ELR 6:9:13]

Federal Court of Appeals reinstates $2.1 million jury verdict in antitrust action filed by unsuccessful applicant for a cable television franchise in Houston

In 1978, the city of Houston, Texas began to consider pending applications for a cable television franchise. Rather than following the general practice of evaluating the applications and awarding a franchise to the most qualified party, Houston's mayor left the task of allocating franchise areas to the five companies whose applications were on file at the time. After the companies had prepared a franchise plan, the city received an application for a cable television franchise from Affiliated Capital Corporation.

Affiliated Capital appeared before the city council in December 1978 to request that its application be given due consideration. The company was advised by a city councilman to work out an agreement with the five allocating entities. Affiliated chose not to follow this advice. In January 1979, the city council and the mayor approved the franchise package proposed by the five companies.

Affiliated then filed a lawsuit alleging that the allocating companies had engaged in a conspiracy to prohibit its entry into the Houston cable television market, thereby violating section 1 of the Sherman Act. The lawsuit claimed that the franchise allocators had agreed to define the territories in which they would apply for franchises so that no two members of the conspiracy would compete for the same territory. Affiliated also alleged that the applicants had participated in a general conspiracy to limit competition for cable television franchises by excluding non-conspirator competitors.

A Federal District Court jury found that the city of Houston (which was voluntarily dismissed from the lawsuit in 1982), as well as Mayor Jim McConn and Gulf

Coast Television had participated in a conspiracy in unreasonable restraint of trade to limit competition for cable television franchises in violation of the Sherman Act. The jury further found that Affiliated had suffered $2.1 million in damages. The District Court, however, granted judgment notwithstanding the verdict to the Gulf Coast parties on the basis of a finding that Affiliated had failed to demonstrate that its injury was caused by any action of the franchise allocators apart from the boundary agreement. However, the jury had determined that the boundary agreement was not part of a conspiracy in unreasonable restraint of trade.

The District Court judgment has been reversed by a Federal Court of Appeals, and the jury verdict has been reinstated against Gulf Coast. Judge Garza declared that it was "abundantly clear" from the record in the case that a group of Houston business entities, at the "behest" of the mayor, agreed to divide the city among themselves and exclude anyone who wanted to compete on the merits for a cable television franchise. The resulting "gentlemen's agreement" to exclude other parties seeking to compete for a franchise had a "devastating competitive impact," given the structure of the cable television industry.

It was acknowledged that cable television is considered a natural monopoly in that the high fixed costs of operation require non-overlapping franchise areas. Indeed, all of the parties in the action agreed that awarding franchises for various areas, rather than a city-wide franchise, was a preferred course of action and would not unreasonably restrain trade. But it appeared that the phrasing of the jury interrogatory as to franchise areas may have caused the jurors to believe that they were being asked whether or not it was preferable to have one franchise for the city or multiple franchises, resulting in the somewhat problematic jury finding that the franchise allocation did not violate the antitrust laws. Judge Garza noted, however, that the determination of franchise boundaries was an issue distinct from the lack of competition for the award of an exclusive franchise to a cable television system within those boundaries. And evidence was present, stated the Court of Appeals, to support the jury finding of conspiracy based on the exclusion of parties seeking to compete for a franchise territory, and to support the finding that the conspiracy was the proximate cause of harm to Affiliated.

Some of the factors found significant by the court in reaching the conclusion that the general conspiracy operated to exclude Affiliated (which was likely to have received a franchise via a competitive process) were the following: Affiliated was the leading rival of Gulf Coast and the other franchise allocators; Affiliated was told by a city councilman that "the pie has already been cut," i.e., the decision of whom to exclude from the award of the franchise did not "hinge" on the boundary agreement; the mayor stated that his vote on the franchise allocation was subject to the wishes of the alleged conspirators; three councilmen testified that they would have voted to grant Affiliated a franchise if the franchise allocators had approved; and the record showed that Affiliated was more qualified to receive a franchise than the five successful applicants in terms of its financial status, local community ties and the capacity to provide immediate service.

The Court of Appeals also rejected the allocator's attempt to rely on the Noerr-Pennington doctrine - a doctrine providing that citizens or businesses seeking to influence or petition public officials to take action that may harm or eliminate competition may not be held liable for antitrust violations. When the petition is a "mere sham" or when public officials participate in the conspiracy, the exception to antitrust liability does not apply.

The jury could correctly conclude that the franchise allocators were not entitled to immunity, particularly since there were "numerous examples of official involvement in the conspiracy . the court noted.

The court concluded by upholding the jury finding that Mayor McConn was a conspirator. Nevertheless, McConn was absolved of liability because he possessed qualified immunity in that, among other factors, he did not violate a clearly established law.

In a special concurring opinion, Judge Patrick E. Higginbotham emphasized that the conduct found illegal by the jury was that the city and the private business entities had agreed that Affiliated's application for a cable television franchise would not be considered, thereby "blocking competitive access" to the franchise award process. Judge Higginbotham cautioned that the court's decision should not be read as implying that a municipality must employ competitive bidding to award all contracts or franchises. In this case, however, no legitimate municipal purpose was set forth to override the public interest in competition.

In a dissenting opinion, Chief Judge Clark cited the majority's failure to make the "critical determination of relevant market." In the dissent's view, the relevant market was not the city of Houston, but rather each "discrete segment of the city that any competitor for a franchise wanted to designate." Affiliated could have competed in any one or more of the relevant markets designated by any of the allocating entities, declared Judge Clark. And the dissent would have agreed with the trial court that Affiliated did not establish causation. Furthermore, even if the causation of damages were shown due to the alleged "conspiratorial refusal by Gulf Coast to remake a valid boundary agreement," the jury's responses to the interrogatories propounded by the trial court were inconsistent, thus requiring a new trial. In all, the fact that Affiliated did not seek a cable television franchise until the other interested parties "legally" agreed on market areas should not entitle the company to recover any losses caused by its business mistake, concluded Judge Clark.

Affiliated Capital Corporation v. City of Houston, 735 F.2d 1555 (5th Cir. 1984) [ELR 6:9:14]

Federal District Court in New York enjoins enforcement of state commission order restraining construction of SMATV system in Coop City housing development

In 1982, Satellite Television of New York Associates and Riverbay Corporation, the owner of the Coop City cooperative housing development in the Bronx, entered into a contract whereby Satellite agreed to install a Satellite Master Antenna Television System to serve the 50,000 tenants of Coop City. Satellite began constructing the system, but in August 1983, the New York State Commission on Cable Television issued a temporary order for Satellite to cease and desist construction. The Commission stated that Satellite was constructing a "cable television system" without having obtained the requisite franchise.

After a hearing on the Commission's charges, the hearing officer concluded that the Satellite system was a cable television system and that the Commission had jurisdiction to regulate the system. The hearing officer therefore recommended to the Commission that the temporary cease-and-desist order be made permanent. The Commission promptly followed this recommendation. Satellite and Riverbay then filed a lawsuit seeking to enjoin the members of the Commission from enforcing its order.

A Federal District Court in New York has granted Satellite and Riverbay's motion for a preliminary injunction to bar the Commission from taking any further action to regulate the Riverbay system unless and until the Commission's jurisdiction to regulate the system is "properly and firmly established."

In considering the jurisdictional question, the court noted that the physical features of Coop City, a mammoth but self-contained complex, resulted in there being "no absolute need to place television cables over or under any public thoroughfares in order to distribute satellite signals to the residents ... Rather, it will be possible for the cables from the receiving antenna in each section to run only to the residences located within that section..."

The hearing officer's report did not contain any findings as to the crucial question, for the court, of whether signals would have to be transmitted across public thoroughfares. This omission most likely resulted from the hearing officer's assumption that this question was not relevant to the Commission's jurisdiction over the Riverbay system, an assumption derived, in turn, from the view that the federal government has not preempted state and local regulation of SMATV systems. It was this view as to federal nonpreemption that was "completely invalid," according to Federal District Court Judge Goettel.

The Federal Communications Commission, in November 1983, declared its preemptive authority over "state and local regulation of SMATV systems that [has] the effect of interfering with, delaying, or terminating interstate and federally controlled communications services."

Judge Goettel did not conclude that the federal government has preempted all state and local regulation of SMATV systems, pointing out that local governments still may have the authority to regulate any SMATV system to the extent that the system crosses or makes use of public streets and rights of way. However, the hearing officer had made no finding that the Riverbay system would involve any such thoroughfares; the ensuing Commission cease-anddesist order therefore was "insupportable" as lacking a basis for the Commission's jurisdiction.

Accordingly, injunctive relief on behalf of Satellite and Riverbay was warranted, because the companies demonstrated irreparable harm, a likelihood of success on the merits and a balance of hardships in their favor.

Satellite Television of New York Associates v. Finneran, 579 F.Supp. 1546 (S.D.N.Y. 1984) [ELR 6:9:15]

Individual musicians were not liable for legal services performed on behalf of their corporate entity, the Rossington Collins Band, rules Federal District Court; but law firm may recover for other services rendered to each musician personally

In a fee dispute between the New York law firm Arrow, Edelstein & Gross, P.C., and musicians Gary Rossington and Allen Collins, a Federal District Court judge has directed the law firm to file additional records as to the allocation of its services to the musicians. In an earlier proceeding, District Court Judge Duffy held that no written contract existed between the parties for the recovery of the attorneys' fees (ELR 4:13:8). Judge Duffy suggested, however, that the law firm proceed on a theory of quantum meruit.

A nonjury trial subsequently was held on the law firm's claim for $123,500 in fees. Rossington and Collins contended that they were not individually liable for the fees because the law firm did not render services to them individually but rather to the three Florida corporations which served as the musicians' recording company, music publisher and tour coordinator.

Judge Cannella agreed with Rossington and Collins that the evidence did not support a finding that Allen Arrow or Joseph Rascoff, an accountant and financial manager who assisted in the organization of the Rossington Collins Band, considered the individual musicians as their clients. Among the factors found significant by the court in reaching its conclusion were: the corporate parties were formed to shield Rossington and Collins from liability; the musicians never were advised of their personal liability for attorneys fees; the work performed by the law firm was rendered to the band and to the corporate parties; Allen Arrow, having formed the corporate parties, was on notice of Rossington and Collins' limited liability; and there was no intent to hold Rossington and Collins liable for corporate obligations.

On the other hand, legal services rendered by the law firm with respect to the musicians' wills, estates and matrimonial matters were matters for which Rossington and Collins are personally liable, the court ruled. It was in connection with these services that benefitted the musicians individually that the court requested a breakdown of the work performed for each musician. The court also requested further information on the legal services for which the corporate parties might have incurred liability, such as those performed by the law firm in arranging a recording contract for the band and the work done on the band's 1980 tour.

Arrow, Edelstein & Gross, P.C. v. Rosco Productions, Inc., 581 F.Supp. 520 (S.D.N.Y. 1984) [ELR 6:9:15]

Federal Court of Appeals refuses to enjoin American licensee of Arthur Guinness & Sons from distributing 1984 edition of record book

The Guinness Book of World Records, "a fascinating chronicle of human achievement and natural wonders," has been published in the United States since 1961 by Sterling Publishing Company. In January 1973, Sterling entered into a new licensing agreement with Arthur Guinness & Sons whereby Sterling was granted the exclusive right to publish the record book in the United States until the year 2016, subject to editorial review and approval of each edition by Guinness. The parties also entered into a publishing agreement which gave

Sterling the exclusive right to negotiate merchandising "tie-ins" involving the Guinness name, such as licenses for puzzles, chewing gum and coloring books, again subject to approval. Guinness was to receive fifty percent of the net proceeds from such licenses after Sterling deducted expenses, including agency commissions and legal fees.

In 1981, Guinness acquired new management. The company then issued revised guidelines for merchandise licenses and also suggested that Sterling itemize its legal fee deduction from royalty payments since it appeared to Guinness that certain legal fees may have been incurred in connection with negotiations for licenses which Guinness refused to approve. Sterling, which paid Guinness approximately $300,000 in royalties in 1982 (including merchandising royalties) had claimed a $33,600 legal fee deduction to which Guinness objected. Eventually Guinness advised Sterling that the company's refusal to pay the amount at issue amounted to a wilful breach of an "important obligation" under the publishing agreement. In April 1983, Guinness, citing its dissatisfaction with the quality of Sterling's merchandising efforts, as well as the legal fee dispute, declared that it considered the licensing and publishing agreements terminated.

During the next six months of 1983, Sterling continued to request that Guinness furnish it with 1984 page proofs because Sterling still intended to produce a 1984 edition of the record book, and, by May 1983, had ordered paper for the project, placed advertisements and received orders for the next edition. However, Guinness refused to supply page proofs to Sterling. Sterling therefore proceeded to produce a 1984 edition by revising and modifying the 1983 version of the work. Sterling, as it had done in the past, prepared new editorial material for the American market and updated records from information available to the company. Guinness refused to review the page proofs prepared by Sterling. By October 24, 1983, Sterling shipped 90,000 nonreturnable hardcover copies of the 1984 American edition of the record book to customers throughout the United States. This was the date on which Guinness, alleging trademark infringement by Sterling, sought a temporary restraining order to bar the company from distributing the American edition of the Guinness Book of World Records.

A Federal District Court denied Guinness' request for a temporary restraining order and, after a hearing, also denied a motion for a preliminary injunction. The court found that Guinness did not show that Sterling's publication would cause irreparable injury or that Guinness was substantially likely to prevail on the merits of the fee dispute. A Federal Court of Appeals has upheld the District Court's ruling.

Judge Irving R. Kaufman first pointed out that Sterling was Guinness' licensee since 1961; any harm from the publication of the 1984 American edition was unlikely to be irreparable unless Guinness demonstrated that the 1984 publication was so inferior that it could severely injure Guinness' reputation in the United States. Guinness claimed that the 1984 edition did not contain up-to-date records, but this was a "necessary concomitant" of its refusal to cooperate with Sterling, stated the court. And, in any event, since new world records are claimed daily, the trial court's conclusion that the record book in some sense is continually out of date was not clearly erroneous.

Judge Kaufman also upheld the trial court ruling that Guineness failed to demonstrate that the balance of hardships was in its favor.

The court then stated that although it would not decide the merits of Guinness' claim that Sterling's actions empowered the company to terminate the publishing and license agreements, there was "sufficient doubt" whether Guinness would prevail on the merits so as to preclude injunctive relief. Again, in view of Sterling's status as a licensee, recovery would have to be premised on a showing that the publishing agreement no longer was in effect. But a "bona fide dispute concerning royalty payments does not, as a matter of law, establish a material breach justifying rescission of the contract absent an express provision in the agreement." The Guinness-Sterling publishing agreement did not contain such a provision. Thus, it will remain for further proceedings to determine whether Sterling's refusal to pay the disputed legal fees amounted to the breach of an "important obligation" under the agreement.

Guinness & Sons v. Sterling Publishing Company, Inc., 732 F.2d 1095 (2d Cir. 1984) [ELR 6:9:16]

Summary judgment granted to McGraw-Hill in defamation action brought by corporate distributor of Laetrile-related product in connection with articles in Medical World News

McGraw-Hill, Inc., the publisher of the magazine Medical World News, has been granted summary judgment by a Federal District Court in Vermont in a defamation action brought by FoodScience Corporation, a leading producer and distributor of the product B-15.

FoodScience was founded in 1973 by Guido Orlandi. A corporate predecessor of FoodScience had marketed a product labelled B-17 which is referred to by the name Laetrile. FoodScience based its action against McGraw-Hill on allegedly defamatory statements contained in the January 21, 1980 issue of Medical World News. The article recounted the following statement from the 1979 book entitled "B-15 - The 'Miracle Vitamin'" as to a source of funding for Laetrile research: "In the early 1960s, a wealthy Italian-American family named Orlandi sought out Ernest Krebs when the elder Mrs. Orlandi developed breast tumors. . . . Krebs secretly administered his B-17 therapy to Mrs. Orlandi, and within two weeks, the tumors disappeared." Another paragraph of the Medical World News story, which was entitled "Feds Closing in on 'Vitamin' B-15," contained a reference to the "Mafia connection to the Krebses' compounds. . . ." And a sequel item in the same issue of the magazine, was entitled "B-15, Laetrile and the Mafia." FoodScience alleged that the articles were defamatory in that they created the inference that FoodScience had Mafia connections.

Federal District Court Senior Judge James S. Holden first ruled that FoodScience was a limited purpose public figure within New York Times v. Sullivan. The court described FoodScience as "a corporate person that has thrust itself into the public controversy that attends the preparation and distribution of [Laetrile]." It was noted that when FoodScience became the defendant in an action brought by the Food and Drug Administration, with respect to the company's distribution of B-15 tablets, the company hired a public relations firm which proceeded to distribute a press kit containing 150 pages of material. By circulating the press kit to media representatives nationwide and inviting media comment, FoodScience "sought to influence public opinion concerning its product. . . . The Laetrile controversy has persisted and been kindled by [FoodScience's] public relations representative," stated the court.

As a public figure, FoodScience was required to establish by clear and convincing proof that Medical World News acted with actual malice in publishing the complained-of statements. The court found that the record did not warrant the conclusion that the magazine acted with knowledge of the falsity of the statements or with reckless disregard of the truth. Many of the factual statements in the article were derived from information in the press kit. The reference to the organized crime connections of Laetrile enterprises apparently was confirmed by the deposition testimony of a member of the Orlandi family. The corporation also was unsuccessful in its contention that the magazine's alleged failure to conduct an adequate investigation established malice; and it was observed that certain errors initially made by the author of the article were corrected by his editors prior to publication.

McGraw-Hill's motion for summary judgment was granted accordingly.

FoodScience Corporation v. McGraw-Hill, Inc., Case No. 80-186 (D.Vt., July 10, 1984) [ELR 6:9:17]

ABC wins summary judgment based on fair report doctrine in defamation lawsuit relating to investigative report about General Services Administration scandals

Widespread attention has been focused recently on defamation lawsuits brought against the television media, and American Broadcasting Companies, Inc. has won a summary judgment in just such a suit, based on the fair report doctrine.

In late 1978, ABC News initiated an investigation into allegations of misconduct within the General Services Administration, resulting in a five-part series of news reports about GSA scandals. In the course of the investigation, the show's producer obtained copies of GSA documents from a confidential source and copies of related documents submitted in Congressional hearings which uncovered serious deficiencies in the performance of Excelon Security Services, the provider of security guards for Internal Revenue Service centers near Boston. Noted in the documents were details of uncleared and unqualified guards, possible falsification of time records, bill padding and unconfirmed suspicions that the company's president was linked to organized crime. Despite all this, Excelon's contract was renewed. Bettina Gregory, an ABC correspondent assigned to the story, verified the genuineness of the GSA investigative memos and letters with the head of the GSA Office of Investigation in Washington, D.C. She and the show's producer pursued the investigation on their own. In November 1978, ABC News broadcast the story, relying heavily on the information revealed in the GSA documents as the basis for the show's focus on the GSA's failure to investigate or resolve the serious allegations and suspicions of possible corruption that had been uncovered.

ABC asserted that because its broadcast was a fair and accurate report of governmental action, it was protected by a constitutional or common law privilege. Excelon and its president countered that the privilege was inapplicable here because the GSA documents were "internal memoranda not for public disclosure." A Comment to the Restatement (Second) of Torts notes that it is unclear whether the fair report privilege extends to a report of an official proceeding that is not public or available to the public under law.

Federal District Court Judge Rya W. Zobel has held that ABC's reliance on information not available to the public did not change the protection afforded by the fair report privilege. She quoted from a U.S. Supreme Court case which stated that "A free press cannot be made to rely solely upon the sufferance of government to supply it with information." Judge Zobel concluded that had ABC "been required to wait for GSA to conclude its investigation and make its official findings in order to be insulated from liability, as plaintiffs seem to contend, this report would never have aired; the very point of the story was that GSA failed to act in the face of serious unresolved allegations of misconduct."

Excelon further contended that even if the privilege existed here, ABC abused it because its report was not fair and accurate. Judge Zobel disagreed, pointing out that the broadcast made clear that the GSA documents contained only charges and allegations about Excelon which had never been proven to be true or false.

Thus, because there was insufficient evidence from which a jury could conclude that ABC had abused its privilege, Judge Zobel found no genuine issue of material fact as to the substantial accuracy of the report and granted a summary judgment.

Salvatore J. Ingenere and Excelon Security Services, Inc. v. American Broadcasting Companies, Inc., Case No. 81-2894-Z (D.Mass., September 18, 1984) [ELR 6:9:17]

Federal Court of Appeals orders arbitration of employment dispute between Las Vegas hotel and orchestra leader

A dispute involving the Las Vegas Sahara Hotel's employment of orchestra leader Jack Eglash has been ordered to arbitration by a Federal Court of Appeals.

Eglash's employment began in April 1980 when he signed a contract with the Sahara-Nevada Corporation, a subsidiary of Del E. Webb Corporation, to serve as house orchestra leader for the Sahara Hotel until April 1984. Both parties reserved the right to cancel the contract on thirty days notice. In 1982, the Sahara exercised this option and notified Eglash that his orchestra leader contract would terminate on June 15, 1982.

The Musicians Union of Las Vegas, Local No. 369, AFM, AFL-CIO, filed a grievance with the Sahara. The union claimed that the termination of Eglash without just cause violated the terms of the collective bargaining agreement between the union and the Sahara. Under the collective bargaining agreement, a contract for a definite term of employment cannot be canceled without just cause. The hotel argued that the collective bargaining agreement did not apply to its contract with Eglash.

The union filed a petition with the Federal District Court to compel arbitration of the dispute under the terms of the collective bargaining agreement. The court granted the Sahara's motion to dismiss, finding that although the Sahara-Eglash contract did specifically incorporate the terms of the collective bargaining agreement, the contract did not include a provision that the agreement was binding in all circumstances and that any terms inconsistent with the collective bargaining agreement were null and void.

On appeal, Judge Sneed noted that the arbitration clause in the Sahara-union collective bargaining agreement was broad enough to cover the Eglash matter. Eglash did not contract away the benefits guaranteed by the agreement, as found by the District Court. Although Eglash was hired under an individual employment contract, this did not mean that he could or did renegotiate the provisions of the collective bargaining agreement.

The court also rejected the hotel's contention that Eglash was not a member of the bargaining unit. The collective bargaining agreement specifically stated that orchestra leaders were included in the employee group. Any question about Eglash's status (due to the fact that he also was serving as Vice President of Entertainment for the Sahara when he accepted the orchestra leader position) would have to be determined by the arbitrator.

The District Court judgment therefore was reversed and, upon remand, the court was instructed to grant the union's petition to compel arbitration of the dispute.

Musicians Union of Las Vegas, Local No. 369, AFM, AFLCIO v. Del E. Webb Corporation, 736 F.2d 1388 (9th Cir. 1984) [ELR 6:9:18]

Weightlifter does not have right under Amateur Sports Act to require United States Olympic Committee to provide hearing on validity of drug test results

Year after year amateur athletes seem to get better and better. Every four years the Olympic Games provide a forum in which, in one sport or another, records are bound to be broken. Some athletes will go to great lengths to achieve their "peak" performance. In the sport of weightlifting, some believe that it has become common for athletes to take steroid drugs such as testosterone to enhance performance, or at least to remain competitive with those who do use the drug. However, according to amateur sports rules, the use of such drugs is forbidden. In a decision that ultimately kept American amateur weightlifter Jeff Michels from competing in the 1984 Olympic Games in Los Angeles, a Federal Court of Appeals has ruled that Michels had no private cause of action under the Amateur Sports Act to require the United States Olympic Committee to provide a hearing on the validity of his testosterone test results.

In August 1983, Michels competed at the Pan American Games in Venezuela. "The athletes at those games were required to take a test to determine if they had ingested testosterone, the use of which is banned under IOC (International Olympic Committee) 'anti-doping' rules. Michels test results showed an impermissible testosterone level according to IOC rules," the court observed.

Michels was subsequently suspended from international competition for two years by the International Weightlifting Federation, the IOC-recognized committee selected to oversee international weightlifting. "Because this suspension precluded Michels from competing at the 1984 Games, the USWF (United States Weightlifting Federation) refused to let Michels compete for a position on the American weightlifting team."

In May 1984, Michels brought suit against the USWF, the USOC, and the IWF claiming in part that "the test results were invalid and that the defendants were required to conduct a hearing on his claim." The District Court immediately issued a temporary restraining order permitting Michels to participate in the Olympic trials on May 11 and 12. Michels qualified as an alternate for the American team.

Later in May, the IWF conducted a proceeding in Italy to consider Michels' claims, but sustained his suspension. In June, the District Court ruled that the IWF proceeding did not constitute a "hearing" under the IWF constitution and by-laws, and entered a default judgment against the IWF declaring Michels' suspension invalid. Nevertheless, the USWF refused to grant Michels a position on the American Olympic team "on the grounds that the entire team could be disqualified if an ineligible athlete were on its roster."

On July 7, the USOC held a special proceeding to hear Michels' claims. On July 12 the USOC ruled against

Michels. Because the deadline for submitting team rosters was July 14, the District Court granted Michels' motion for a preliminary injunction as the only way to "protect Michels against the irreparable harm that would be occasioned by his total omission from the designated team." The injunction required the USOC and the USWF to name Michels as an alternate to the team subject to a determination of Michels' rights by the IOC.

The USOC immediately appealed that decision. Since the 1984 Olympic games were to begin soon, the appellate court expedited the hearing and orally announced its decision to dissolve the injunction on July 24, just five days before the weightlifting competition began.

In a brief opinion published several weeks after its initial ruling, Federal Court of Appeals Judge Bauer first noted that "the Act contains no express private cause of action," and Michels could therefore receive relief under the Act only if "there exists an implied cause of action."

Judge Bauer stated that recent Supreme Court decisions have emphasized that "the issue ultimately is one of congressional intent."

After reviewing the legislative history of the Act, the appellate court concluded that "Congress intended not to create a private cause of action under the Act." Judge Bauer stated that the Act as originally proposed did include a private cause of action, but the bill met with such strong resistance that ultimately the compromise reached did not include the private cause of action section. The appellate court found that Congress intentionally omitted such a cause of action in its final version of the Act. As the appellate court stated, "Congress thus considered and rejected a cause of action for athletes to enforce the Act's provisions."

Michels v. United States Olympic Committee, 741 F.2d 155 (7th Cir. 1984) [ELR 6:9:18]

Briefly Noted:

Privacy.

A Federal Court of Appeals has denied Chic Magazine's petition for a panel rehearing and suggestion for rehearing en banc in connection with the court's opinion in an action against the magazine for defamation and invasion of privacy (ELR 6:4:15). Chic contended that the jury award for invasion of privacy was based on instructions authorizing recovery on either a false light or appropriation theory. According to Chic, there was no evidence to support an award based on appropriation. The court declared that it was "reasonably certain" that the verdict awarding damages to Mrs. Braun was not based solely on the challenged appropriation theory. The evidence presented at trial focused on Mrs. Braun's charges that the unauthorized publication of her picture in Chic created a false impression of her and damaged her reputation. Furthermore, in answer to a separate interrogatory relating to the invasion of privacy claim, the jury found that "Chic published Mrs. Braun's picture in a manner highly offensive to a reasonable person" - a finding that is necessary to a false light invasion of privacy claim, but that is not part of a claim for the appropriation of a likeness. Furthermore, the jury's answers to special interrogatories relating to defamation (a cause of action closely related to false light invasion of privacy) also indicated to the court that the basis of the invasion of privacy damage award was Chic's creation of a false impression of Mrs. Braun. In all, the appellate court concluded that it was unreasonable for Chic to assert that the outcome of the trial might have been affected by the inclusion of the appropriation issue in the jury instructions.

Braun v. Flynt, 731 F.2d 1205 (5th Cir. 1984) [ELR 6:9:19]

IN THE NEWS

Jury rules that Time magazine did not act with malice in publishing inaccurate report on former Israeli Defense Minister Ariel Sharon's role in the massacre of Palestinian refugees in Beirut

A Federal District Court jury has concluded that Time magazine acted without malice in publishing an account of former Israeli defense minister Ariel Sharon's role in the massacre of 700 Palestinians at two refugee camps in Beirut. Briefly, the disputed February 21, 1983 Time magazine article, which was entitled "The Verdict is Guilty," reported that shortly before the massacre, Sharon had "discussed" with Phalangist leaders the need to take revenge for the assassination of Lebanese President-elect Bashir Gemayel. (For further details on the report, see ELR 6:4:14 concerning the District Court ruling denying Time's motion for summary judgment.)

The jury, in two previous rulings, found that the challenged paragraph was false and that it defamed Sharon because the report implied that Sharon had "consciously intended" the occurrence of the Phalangist-led massacre of the civilian refugees. But the jury determined that Time employees believed the information about Sharon to be true and did not act maliciously or recklessly when they reported, edited and published the article. The finding as to Time's absence of malice meant that Sharon is not entitled to recover any of the $50 million in damages he had sought.

In what has been called an "extraordinary" admonitory statement to Time, which was issued along with its verdict, the jury did note that certain Time employees "acted negligently and carelessly in reporting and verifying the information" contained in the disputed paragraph. [Feb. 1985] [ELR 6:9:20]

Law enforcement agencies confiscated more than $78 million worth of illicit records, tapes and equipment during anti-piracy operations in 1984

FBI, state and local law enforcement agencies, with the assistance of the Anti-Piracy Unit of the Recording Industry Association of America (RIAA), confiscated more than $78 million worth of illegal sound and video recordings and related manufacturing equipment in 1984, according to a recently released RIAA review of its anti-piracy activities for the year.

This figure represents the loss to the legitimate industry which was prevented by the seizure of record counterfeiting and audio/video tape duplicating equipment; masters and raw material; counterfeit, pirate and bootleg LPs, singles, 8-tracks and cassettes; and bootleg and pirate videocassettes seized in raids across the country during the year. The illicit software confiscated in these actions included more than 9,117 bootleg records; 85,297 pirate and counterfeit albums, singles, 8-tracks and cassettes; 6,965 audio masters, 509 mothers and 2,072 stampers, and 566 videocassettes and video masters; and 294,500 counterfeit labels.

According to Joel M. Schoenfeld, Director of Anti-Piracy Operations for RIAA, the $78 million worth of illicit audio and video product and equipment confiscated during the year represents just a portion of all hardware and software recovered by law enforcement agencies in their continuing effort to reduce piracy and counterfeiting. In over 50 major actions initiated in 21 states, more than 33 search warrants were executed for sound recording piracy, counterfeiting and bootlegging. In 1984, more than 39 arrests were made involving piracy related violations; criminal prosecutions of more than 54 individuals and corporations were commenced; and 40 individuals were convicted for violation of various piracy statutes. [Feb. 1985] [ELR 6:9:20]

The Rev. Jerry Falwell recovers $200,000 in damages in action against Hustler Magazine

A Federal District Court jury has awarded the Rev. Jerry Falwell $100,000 in actual damages for emotional distress against Hustler Magazine, and against Larry Flynt (the magazine's publisher) and the distributor of the magazine. An additional $50,000 each in punitive damages was assessed by the jury against Flynt and Hustler.

Falwell claimed that a parody advertisement, published twice in Hustler, was libelous and resulted in an intentional infliction of emotional distress. He sought $45 million in damages. But the jury determined that the "advertisement" was not libelous because no one would take it seriously, and limited its award accordingly. [Feb. 1985] [ELR 6:9:20]

Crime victims agree to allocate royalties earned by "Son of Sam" murderer David Berkowitz

In 1976 and 1977, "Son of Sam" murderer, David Berkowitz, killed six persons and wounded several others. If the tragic events of the time are recounted in any publications or films, the royalties which might be payable to Berkowitz will be allocated to his victims and their families in accordance with a stipulated formula which has been entered in the minutes of the New York State Supreme Court, Kings County, by Judge Dominic J. Locata.

The stipulation, in anticipation of a $20 million fund for the crime victims, gives each of the consenting parties a specified percentage of compensation, ranging from 0.5 to 39 percent.

Attorney Harry H. Lipsig represented two of Berkowitz's victims and was instrumental in expediting the proceeding against Berkowitz and in obtaining the entry of the stipulated agreement. [Feb. 1985] [ELR 6:9:20]

WASHINGTON MONITOR

Justice Department decides not to seek modification of Paramount antitrust consent decrees

The Department of Justice has announced that the Antitrust Division has completed its investigation of the consent decrees in United States v. Paramount Pictures, and has determined not to seek modification or termination of those decrees at this time.

The Paramount decrees, which were entered between 1948 and 1952 against eight of the major motion picture companies then operating in the United States, changed the structure of the motion picture industry and imposed a variety of restrictions on the methods employed by the defendants to license films for theatrical exhibition.

Today, the decrees continue to affect the operations of most U.S. film distributors and theater operators.

J. Paul McGrath, Assistant Attorney General in charge of the Antitrust Division, communicated the Department's decision in a letter to U.S. District Judge Edmund L. Palmieri of the Southern District of New York. Judge Palmieri has presided over the administration of the decrees for approximately 30 years.

A 1981 letter from William E Baxter, then Assistant Attorney General in charge of the Antitrust Division, had informed Judge Palmieri that the Division was undertaking an investigation to determine whether the decrees should be terminated or modified. McGrath's letter notified Judge Palmieri of the result of that investigation.

McGrath's letter said that the Paramount investigation was part of an Antitrust Division project to review all judgments previously entered in government antitrust actions. In the course of that program, the Division has not itself instituted motions to terminate or modify decrees. Instead it has supported such motions by defendants in cases where the Division believed that the action was in the public interest.

McGrath's letter said that during the last several months, he had undertaken to determine whether the Paramount distributor defendants were prepared to file motions seeking termination of the decrees and to demonstrate in court that this action was in the public interest. The letter stated that, at the current time, most of the defendants are not willing to make this commitment. Under the circumstances, the Antitrust Division was not prepared to expend resources to terminate the decrees, McGrath said.

McGrath's letter noted that, in recent years, the Division's policy has been that new antitrust decrees should be entered for a period of no longer than 10 years, except in the most extraordinary circumstances. This policy is based on the Division's experience with longer decrees and the related observation that market conditions change over time, so that a decree that is procompetitive and in the public interest when entered may have unintended effects after the passage of time. For this reason, McGrath's letter said that the court and the parties may find it appropriate to decide whether a termination date should be put into the Paramount decrees. The letter added that the Division's present decision was not meant to suggest that the Division would oppose a future effort to subject the Paramount decrees to a termination date.

The original Paramount case was filed July 20, 1938, in New York against eight major motion picture corporations, 25 affiliated corporations, and 133 officers and directors of the defendant corporations. The case was the culmination of a series of efforts by the Justice Department to end anticompetitive practices in the movie business. The civil suit alleged a violation of both Sections 1 and 2 of the Sherman Act, charging price-fixing and attempts to monopolize trade in motion pictures through theater ownership.

At the time, the eight "majors" were Paramount Pictures Inc., Twentieth Century-Fox Corporation, Loew's Incorporated, Radio-Keith-Orpheum (RKO), Warner Brothers, Columbia Pictures Corporation, Universal Corporation, and United Artists Corporation.

After a series of legal steps, the case went to trial on the basis of an amended complaint, which dropped all the individuals as defendants.

In 1948 the Supreme Court found that the Sherman Act had been violated. A series of decrees covering the eight majors followed over the next several years.

Five of the majors (all except United Artists, Universal, and Columbia) owned theater circuits, and the decrees against those five required them to divest their theater circuits. The decrees placed restrictions on efforts by some of the distributors to reenter the exhibition business, or by the divested theater circuits (the exhibitors) to enter the distribution business, without court permission. The decrees also prohibited some of the divested theater circuits from acquiring any additional theaters without court permission.

The decrees prohibited the distributor defendants from entering into "franchise agreements" in excess of one year or entering into "formula" or "master agreements." Franchise agreements involve a distributor offering an exhibitor the distributor's entire output. A formula agreement requires an exhibitor to pay for the picture on the basis of how much it grosses nationally. A master agreement is one in which the distributor provides a number of feature films to a circuit and allows the circuit leeway in determining how they are exhibited.

The decrees also provided for a number of licensing controls. Among them was a bar against price fixing and a requirement that the distributor defendants license films on a theater-by-theater basis without discriminating in favor of affiliated theaters or others. Another provision prohibited block booking, a practice by which the right to show a film is conditioned on an agreement to exhibit one or more other films.

The decrees have been modified periodically since their entry. [Feb. 1985] [ELR 6:9:21]

Congress passes bill denying tax benefits in connection with advertising on Canadian television

In October 1984, Congress passed a bill denying any tax benefits to American advertisers who buy time on Canadian television stations for advertising aimed primarily at American audiences. The Canadian Parliament, in 1976, had adopted similar legislation applying to Canadian advertising on American stations.

The United States government and broadcasters from the 30 to 35 television stations along the border have sought the repeal of the Canadian legislation. According to news reports, broadcasters have claimed losses of between $50 million and $100 million in Canadian advertising since the Canadian law went into effect. When the repeal campaign proved unsuccessful, the "mirror" legislation passed, about four years after it was first introduced.

Reaction to the legislation among Canadian officials and broadcasters seems to indicate that Canadian policy will not change in response to the passage of the bill. [Feb. 1985] [ELR 6:9:22]

Federal Communications Commission rejects Central Intelligence Agency Fairness Doctrine complaint against ABC News

The Mass Media Bureau of the Federal Communications Commission has rejected a complaint filed by the Central Intelligence Agency against ABC News. The complaint claimed that an ABC report, which alleged that the CIA engaged in a conspiracy to assassinate United States citizens, violated the personal attack rule and the fairness doctrine. The CIA asked the FCC to reconsider ABC's fitness as a broadcast licensee.

When the complaint was filed on November 21, 1984, ABC News officials stated that they no longer could prove certain statements in the challenged report, which was broadcast on ABC World News Tonight in September 1984. The report concerned alleged CIA covert operations conducted through an investment advisor in

Honolulu. The CIA stated that the broadcasts relied solely on the unverified statements of a source who had been discredited and proven unreliable.

But the Mass Media Bureau, declaring that it would not attempt to "authenticate" the news, determined that the complaint did not warrant further action because it failed to prove that ABC had deliberately falsified the new or intended to deceive its audience. Furthermore, news programs are not subject to the personal attack rule, which requires broadcasters to notify individuals who will be "attacked" on the air and allow them an opportunity to respond. The Bureau also decided that the CIA did not show that the broadcast was controversial or that ABC did not otherwise meet its fairness doctrine obligations. [Feb. 1985] [ELR 6:9:22]

Federal Communications Commission revises proposal to eliminate seven station rule

The Federal Communications Commission has arrived at a modification of its proposal to eliminate the current seven station restriction on the ownership of television stations, AM radio stations and FM radio stations.

The modification will allow group owners to expand their holdings to as many as twelve television stations as long as the stations do not reach more than 25% of the nation's viewing audience. UHF station ownership will be counted at 50% of VHF stations. And groups that include at least two minority-controlled stations will be allowed to extend their holdings to fourteen stations with 30% national audience viewership.

The three major television networks now own stations that reach about 20% of the national audience. Hence, the networks most likely will not aspire to twelve station ownership.

The Commission originally had planned to increase the ownership limits to twelve AM radio stations, twelve FM stations and twelve television stations and to end all restrictions by 1990 (ELR 6:3:21). The twelve station limit will go into effect for AM and FM radio stations without an audience reach limitation. Under the modified proposal, the twelve station limit will not be phased out for radio or television stations. [Feb. 1985] [ELR 6:9:22]

Federal Communications Commission declines to consider rule requiring broadcasters to electronically encode commercials

The Federal Communications Commission has refused to consider a proposal that would have required broadcasters and cable operators to electronically encode commercials aimed at children, enabling parents to delete such commercials.

The proposal, which was supported by Action for Children's Television and Public Advocates, Inc., suggested that broadcasters insert inaudible signals before and after commercials broadcast on children's programs, i.e., programs aired primarily during after-school hours and on Saturday morning. Electronic boxes attached by parents to television sets then would sense the signals and block out the purportedly harmful commercials.

The FCC stated that parents could control their children's television viewing without the suggested rule, and also noted that the rule might sharply reduce the number of children's television shows due to a lack of economic support from advertisers. [Feb. 1985] [ELR 6:9:22]

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[ELR 6:9:23]

ENTERTAINMENT LAW REPORTER

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