BUSINESS AFFAIRS

A Guide To Commercial Network Television Development and Production Agreements (Part 2)

by Henry I. Bushkin

Production Agreements

Overview

The Producer who has obtained a Network development-ment agreement for a particular show, has to get his show made in a form acceptable to the Network. The Producer has three principal types of arrangements available to him: (1) an employment or co-production agreement, (2) a joint venture, or (3) a straight distribution agreement. The novice producer will most likely enter into an agreement with a production company in which the Producer will be an employee and/or co-producer of the particular show. A Producer with some producing experience may be in a position to enter into a partnership arrangement with a production company. Finally, the most experienced Producer who has the financial backing and expertise to produce the show himself, will usually seek an agreement directly with the Network to produce the show and, at some later point, enter into a distribution arrangement for that show with a distributor.

Employment/Co-Production Agreement

When a Producer associates with a production company, he invariably gives up various controls as a result of their agreement. The production company will either employ him or will co-produce the project with him. As an employee, the Producer usually relinquishes all ownership rights to the underlying property, so that the project belongs to the production company. All dealings with the Network are conducted through the production company, with the Producer coordinating the effort to convince the Network to proceed to each subsequent "step" of the step deal. After execution of this agreement, the Producer, practically speaking, will be an employee of the production company. Consequently, the agreement should enumerate all of the Producer's rights in the event of the success or failure of the project. The initial contract will typically be a form agreement originating with the production company which, on its face, will be most favorable to it.

If the Producer goes to the production company before going to the Network, he will give the production company a specific length of time to obtain a Network commitment for his show. If the production company does not obtain a Network production commitment, the Producer receives turnaround rights to reacquire from the production company all of the right, title and interest in the project by reimbursing the production company for its costs. This is an important consideration for the novice Producer. The Producer should not put himself in the position where, as an employee, he has no rights to do anything with the project and he cannot force the production company to proceed further with the development of the project. With a turnaround right, the Producer is in a position to develop the property on his own or in association with another studio or production company.

As part of his agreement with the production company, the Producer may be employed to supervise the writing of a pilot script or, if he is a writer, to provide his own writing services. Either way, the Producer will receive a fee and credit appropriate for the services he performs. The Producer should be paid for such services on a pay-or-play basis, so that he will receive his production fee even if the production company decides to replace him.

The Producer may provide services to the production company on an exclusive or non-exclusive basis. If the Producer works on a non-exclusive basis he can pursue other opportunities and projects while under contract to the production company. When the Producer works as a line producer of the show, he will have no choice but to be exclusive; however, any other position will enable the Producer to work on a non-exclusive basis.

The employment agreement between the Producer and the production company must include terms regarding the Producer's services after a production commitment has been obtained. For example, the Producer should be employed as a producer or executive producer (preferably at the Producer's election) for the first and each succeeding production year throughout the term of the Network series deal. While the production company may agree to this arrangement, it is the Network which will have the final decision as to the show's actual producer.

For each production year of the series for which the Producer renders his services, he should be compensated on a per episode basis, measured in part by the length of each episode and the Producer's role in the show. Because the series may run for several seasons, cumulative or noncumulative increases in compensation for successive seasons should be included in the agreement.

The Producer's credit and various royalty payments will depend upon the nature of his services and whether or not he is the sole creator of the underlying idea of the show. In most cases, production credit will he as "executive producer" or "supervising producer." Writing credit, although subject to final Writers' Guild determination, will probably be "created by" or "written by." If the Producer receives sole or shared "created by" credit, he will be entitled to series royalties, which are payable as a production royalty for each episode produced and as a repeat royalty for each rebroadcast of an episode. While the repeat royalty is equal in amount to the production royalty, it is generally payable in 20% installments over the second through sixth repeats of each episode.

The actual on-screen presentation of the credit is negotiable. The Producer will want his credit to be on a "separate card," so that his credit will not appear at the same time as that of another producer or artist. In addition, if the Producer is rendering services through his "loan out" company, he will probably want his corporation to receive a separate credit.

(There are a number of advantages to a Producer in having his own corporation which provides or loans his services to third parties. One such benefit is the corporation's ability to deduct expenses for various fringe benefits it provides for its employee, the Producer. Those same expenses would not be deductible if paid directly by the Producer. For example, the corporation can deduct the cost of premiums for $50,000 of life insurance per employee without the cost of the premiums creating taxable income to the employee; if the employee were to purchase the insurance himself, he would not be entitled to deduct the premiums. Another benefit is that the loan-out corporation can adopt a pension plan for the benefit of its employee and deduct amounts contributed to the plan as provided by the Internal Revenue Code. Although a self-employed individual could create a pension plan to which deductible contributions could be made, the rules for such plans are more restrictive than those for corporate plans, e.g., only corporate plans may make loans to participants.)

In terms of contingent compensation, the novice Producer lacks bargaining power to negotiate with a production company for a large percentage of the show's profit. With rare exception, unless the Producer has entered into a true co-production agreement, he will not share the profits equally with the production company. More likely, the Producer who is an employee will receive between ten and twenty-five percent of the series' net profits.

Two factors are particularly important regarding profit participations. First, the profit definition of the production company must be analyzed with precision, since the method followed to determine profits will make a significant difference in the amount of money the Producer actually receives. Second, it is important to note whether third party participations will be paid solely by the

Producer, solely by the production company, or shared equally by each. (Third party participants are parties, other than the Producer or the production company, who are entitled to participate in the profits of the show. For example, a star performer often will negotiate for and obtain such a participation.) The Producer's consent should be required prior to the grant of any net profit participation which will reduce his share.

The Producer who is an employee will most likely be required to share the creative, business, financial and legal decisions with the production company to a greater extent than the experienced producer. It may be anticipated that the production company will have final approval over such elements, though at the very least the Producer should seek the right to have the production company consult with him in good faith on these matters.

When he is an employee, the Producer is unlikely to obtain any benefits from the investment tax credit which is available to the producers of a television show. Although there are exceptions, and this is subject to negotiation, the investment tax credit is usually taken by the production company. (If the project in question is a "qualified film" as defined in Section 48(K) of the Internal Revenue Code of 1954 - that is, if it is created primarily for use as public entertainment of more than a transitory nature or for educational purposes - the project may generate an investment tax credit equal to six and two-thirds percent of "qualified investment" in the project. This credit will be allocated pro rata to persons who have invested money or property in the project. Whether or not the Producer will be entitled to share in the allocation of the credit depends upon several considerations, including whether he has any "basis" in his transferred ownership rights to the underlying property.)

Joint Venture

In a joint venture arrangement, the Producer with some successful television experience joins forces with a production company, perhaps for financial reasons or for an enhanced negotiating position with a Network, to produce a particular show. Since the bargaining position of the Producer and production company tend to be more balanced in this situation, the terms tend to be more equal than those obtained by the producer-employee. The benefit to the Producer from this arrangement is that he has many of the same advantages he would have if he produced the show himself, without the attendant financial exposure.

All property and assets of the joint venture, including all of the tangible and intangible rights, such as copyrights, relating to the show will be held in the joint venture's name. Ordinarily, the joint venture will exist for the duration of all copyrights relating to the show which are owned by the joint venture or for the term of all agreements relating to the show, whichever period is longer.

Many items included in the joint venture agreement are the same points of negotiation discussed above regarding services, credits, fees and royalties. For example, in the joint venture, the best situation for the Producer is to receive production or presentation credit "in association with" the production company and/or the joint venture. If possible, the Producer's services should be non-exclusive, and he should not be required to present any projects to the joint venture (except for the one which is the subject of the joint venture agreement) thereby ensuring his freedom to develop projects outside the joint venture.

One important item which is unique to joint venture agreements is capital contributions, which represent each party's contribution of a specified percentage of the joint venture's required capital (and additional capital, if the initial contributions are not sufficient). Each party's capital contribution will probably, although not necessarily, determine the amount of income, depreciation, profits, losses and investment tax credit which will be allocated to the Producer and the production company. Thus, if the Producer contributes twenty-five percent of the joint venture's capital, he may be allocated twenty-five percent of its profits and losses.

The responsibility for management and control of the joint venture will be specified in the joint venture agreement. Management and control are usually divided into the creative, business, financial and legal areas. Final authority for decisions with respect to each area may be delegated separately and may vary depending upon the stage of the production. Thus, there may be joint creative approval prior to principal photography of the pilot, while during principal photography the production company has final approval. Final approval will be a key area of negotiation for the Producer, since he will be interested in obtaining maximum creative control. If the Producer does not have final authority for a particular area, he should at least obtain consultation rights. Ultimately, however, creative decisions will be subject to approval by the Network with which the joint venture makes its development deal.

Finally, in the joint venture structure, the Producer may be able to negotiate for additional fees and advances. He can seek development and consultation fees, and should have a strong argument for them, especially if he relinquishes his approval rights. If the Producer is entitled to a share of the joint venture's profits, he may ask for advances against his share. He may be able to receive a specified sum for each episode of the series which the Network licenses for broadcast. This can take different forms such as advances against foreign sales or advances against domestic distribution of the show. (Advances are also available in the other types of production agreements discussed in this article.)

Straight Distribution Agreement

The experienced Producer who has a firm development deal in place with the Network, and has the financial capacity to produce Network programming, is in the enviable position of only having to look for ways to maximize the return on the investment in his shows. Since a Producer usually realizes little or no profit, and most likely suffers a loss, on the Network production (particularly if he has not covered his deficit and overhead costs from Network revenues), he will look to subsequent distribution of his show in order to recoup and profit from his investment. This distribution takes the form of syndication which occurs after the show's initial Network run, when the show is aired on domestic non-network stations and in the foreign market.

Since the license agreement with the Network grants it exclusive television broadcast rights in the domestic market, syndication broadcasts are prohibited during the series or license term. The Producer may obtain some additional income on his investment from Network reruns, and from Network "stripping," that is, running the show either early in the morning or late at night on a five times per week basis. However, the Network normally will pay only outof-pocket scale residual costs for Network reruns, and little more than the Producer's costs for Network stripping due to the limited audience for these shows.

Therefore, it is unlikely that the Network will be a source of significant additional income. Thus, a non-network distribution agreement offers the best income opportunities for the Producer. Despite the Network's exclusivity rights, the financially strong Producer who has a Network deal can make a distribution agreement in which he will be able to pre-negotiate substantial non-returnable advances or guarantees against his share of the distributor's profits from foreign and domestic non-network exploitation of his show.

Furthermore, since the Network license agreement does not have any restrictions on foreign television distribution (other than the telecast overlaps with Mexico in the San Diego market and Canada in the Detroit market), the foreign television market offers the Producer and his distributor an immediate, though not the most profitable, source of income. Therefore, the Producer's advances against foreign distribution profits should be negotiated separately from advances against domestic distribution profits. Ideally, advances against foreign distribution should be payable in installments for a minimum of the first 13 episodes of any series (although they are sometimes paid for all episodes produced). Payments should commence upon the distributor's receipt of a copy of the Network's written order for the episodes, with the last payment due no later than one year later.

Of the various income sources, the most profitable for the Producer will be the domestic syndication market, so that advances against domestic distribution profits will be significantly higher than foreign advances. Domestic syndication usually requires completion of four production years, with a minimum of 88 episodes, to realize the maximum financial potential for successful domestic syndication. While the Network generally broadcasts one episode of the series per week, the series will be broadcast five times per week when it is exhibited in domestic syndication, so that a series of 88 episodes will be repeated once in its entirety every sixteen weeks. Because audience dilution is the major concern for successful syndication, the greater the number of episodes, the greater the chance for success. However, this does not mean that the Producer must wait until he has 88 episodes produced before he can receive domestic advances. Domestic advances should be triggered upon completion of three years of production (with a minimum of 66 episodes), and there should be an escalation clause to increase the amount of the advances upon completion of four years of production (with a minimum of 88 episodes). The distributor will want to condition payment of the domestic advances upon the availability of the episodes for domestic syndication and their having been broadcast on the Network in prime time.

Advances for domestic distribution can range to more than $200,000 per episode, with the dramatic one-hour series episodes commanding the highest sum. The range of such advances varies depending upon whether they are for foreign or domestic markets, whether the series is successful in the Network market, whether the series is perceived to be likely to be successful in the foreign or domestic markets, and whether episodes are a half-hour or an hour long. In addition, the Producer may be able to obtain nonreturnable advances or guarantees for foreign and domestic syndication of pilots which do not become a part of a series. Although the Producer may not be able to negotiate advances in areas of distribution other than free television, he should be careful to protect his rights to receive residuals from the distributor's exploitation in such other areas.

Where the distributor has agreed to pay an advance to the Producer, it will usually want to recoup its costs, including the amount of the advance, prior to the Producer's participation in profits. This is commonly accomplished by applying the advance against what otherwise would have been the Producer's share of the gross profits. Although the gross profits division between the Producer and distributor may vary, depending upon the distributor's target fee for its distribution efforts in each market of exploitation, a distributor normally takes a thirty-five to forty percent fee for foreign and domestic syndication, and a twenty percent fee for Network stripping of a series.

In a gross participation deal, the Producer usually pays all residual costs and any third-party profit participations granted by the Producer from his share of the gross profits, while the distributor pays for all other distribution costs from its share. In negotiating an overall distribution agreement with the distributor for more than one type of show or series, there should be no cross-collateralization for purposes of recouping advances; rather each show or series should be treated as an entirely separate unit. It should be noted that while the distributor will differentiate between foreign and domestic advances for a series, the Producer may be able to negotiate one advance which would cover both foreign and domestic distribution for MOW's.

In contrast to other types of production agreements, in a distribution agreement, items such as property rights, copyrights, and investment tax credit benefits with respect to the shows are retained solely by the Producer, subject orly to the distribution rights granted to the distributor. The Producer retains control over all creative, business, and legal matters as well as credits, in connection with the production of the shows.

The Producer with a distribution agreement will be able to negotiate some form of gross participation deal. If for any reason the Producer must enter into a traditional net profits or joint venture arrangement, each and every element of the proposed agreement must be carefully reviewed, and the net profits definition is a critical consideration. A distributor involved in a net profits arrangement normally charges varying distribution sales fees (except with respect to the Network sale which is normally the Producer's province) and production and distribution expenses, which normally include a percentage of overhead and interest. After three to four years of production, these expenses reach a level where it becomes very difficult to achieve net profits, unless the term has been defined very favorably to the Producer.

Conclusion

The Producer with a proven track record and independent financial backing can obtain highly favorable terms in negotiating development agreements with the Networks, and production or distribution agreements with production companies. In many cases, he is in a position to deal directly with the Networks to make a production deal rather than having to resort to a production company for assistancefinancial or in negotiations with the Networks. At the other extreme, the inexperienced producer should anticipate that he will have to work his way up, probably starting in an employment arrangement with a production company. In between these extremes, there are a variety of arrangements the terms of which depend far more upon the diverse needs and capabilities of the parties than upon the nature of the particular project.

In negotiating a development or production agreement, it is necessary to be familiar not only with the types of terms generally present in these agreements but also with the needs and capabilities of the parties. It is only through the effective combination of these elements that a viable agreement can be reached which will meet the ultimate objective-completion of production and delivery of the finished product to the Network for broadcast.

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[ELR 6:10:3]

RECENT CASES

Society of Composers and Lyricists fails to obtain approval from National Labor Relations Board for representation election; composers and lyricists in proposed bargaining unit are independent contractors, rules regional director

The Regional Director of the National Labor Relations Board in Los Angeles has determined that composers and lyricists working for various motion picture and television production companies are independent contractors, and has dismissed a petition filed by the Society of Composers and Lyricists seeking recognition as a labor union representing the artists.

The Director evaluated the employment status of the composers/lyricists under a "right of control" test, as follows: Where the one for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished, the relationship is one of employment; while, on the other hand, where control is reserved only as to the result sought, the relationship is that of an independent contractor.

A full-scale examination of the representative working relationship between the composers/lyricists and the studios revealed that the studios do not control "the manner and means" by which music is produced, although the studios may control the way the music sounds so that it complements the production for which it is written and achieves a specified effect. The Director cited, as harmonious with his conclusion, the fact that artists may decline a studio's offer to work on a particular project; generally work at home, use their own pianos and other equipment and choose their own hours; and also may work concurrently on projects for other studios. During the writing process, any necessary meetings with the filmmakers usually are arranged at a mutually convenient time and place. The Director observed that "in deference to the creative process," the studios, apart from establishing deadlines for the delivery of a project "studiously avoid interfering with the freedom of composers to set their own hours, to work at their own pace, and to work wherever they please." Composers/lyricists are under no obligation to use the office and piano usually made available by the studios.

The studios may require, on occasion, minor revisions or even substantial rewriting on a completed or partially completed work, but once the music is completed to the filmmaker's satisfaction, the composers/lyricists' obligations are substantially complete and the studio assumes legal ownership of the "musical product." If the filmmaker decided not to use the music, the composer/lyricist still receives the contracted-for fee.

Thus, from "the record as a whole," it appeared that the studios do not retain or exercise any significant degree of control over the means and manner by which free-lance composers/lyricists go about their work of creating the music and lyrics for the studios' productions.

The composers/lyricists, in addition to their work procedures, also tended to have more the "look" of independent businesspeople than of employees, stated the Director. They retain agents and business managers to handle their business related affairs; make contractual commitments on a project-by-project basis and are paid a flat fee for each project, with the size of their fee calculated on neither an hourly nor a weekly rate; and, of paramount importance, are "highly skilled artistic individuals who receive no training whatsoever from the studios and whose talents and experience play an important role in their initial selection for work."

A finding of independent contractor status was not precluded by "boilerplate contract language" which may reserve to the studio restraints on the time, place, or manner in which composers/lyricists must provide their services; or by the fact that a studio may require a composer to attend theme, "spotting," and recording sessions on its own premises; o r that a lyricist's presence may be required at a studio's premises to teach a performer a song; or the fact that the studios retain the right to control the "final shape" of the musical product.

The studios' practice of compensating composers separately, in accordance with the collective bargaining agreement between the studios and the American Federation of Musicians, for services in arranging, orchestrating and conducting a piece also did not detract from the finding of independent contractor status with respect to the task of composing original music, nor did generally disregarded contractual exclusivity provisions.

Aaron Spelling Productions, Inc. and Society of Composers and Lyricists, Before the National Labor Relations Board, Case No. 31-RC-5755 (Dec. 14, 1984) [ELR 6:10:7]

NBA salary cap withstands antitrust attack, under the protective shield of the labor exemption, in suit brought by Philadelphia 76er's rookie guard Leon Wood

Philadelphia 76er's rookie guard Leon Wood has "fouled out" in his antitrust suit to bar the NBA from enforcing its confusing and somewhat controversial "salary cap" rules which attempt to limit the amount a team can spend on players' salaries. A Federal District Court in New York has ruled that the NBA's maximum salary cap and college draft provisions "come under the protective shield of our national labor policy and are exempt from the reach of the Sherman Act." The court also ruled that the league's ban on player corporations presented no antitrust issues.

In 1983, the NBA and the players association negotiated a new collective bargaining agreement. The key feature of the '83 agreement was the so-called "salary cap" which imposed a maximum and minimum team salary limitation with certain exceptions. The basic purpose of the salary cap was to limit the free-spending, and in most cases, successful teams from buying up the top free agents, or just buying the best players from less affluent teams. Essentially, effective at end of the '83-'84 season, the 23 NBA teams were each limited to the greater of either a fixed sum of $3.6 million or 53% of the total NBA gross revenues divided by the number of teams in the league.

The agreement further provided that those teams already exceeding the maximum salary level would be frozen at their existing levels. The 76er's are one of these teams. One of the exceptions provides that a team at or over the maximum level may still enter into a one-year contract with its draft selections, but only at the minimum wage set by the agreement. Under certain conditions a team may also freeup some of its money by altering its roster, thereby permitting the signing of a rookie to a higher salary.

Leon Wood, a talented college basketball player and a member of the United States basketball team that won a gold medal in the 1984 Olympic Games held in Los Angeles, was drafted by the 76er's in the first round of the NBA annual college draft in June 1984. The 76er's and Wood's agent, Fred Slaughter, began contract negotiations soon thereafter. Although the 76er's were frozen at their existing salary levels, they were willing to seek a way to get around the salary cap to negotiate a multi-year contract with Woods, but could not work out the terms. No agreement was reached, and to preserve its exclusive right to negotiate with Wood under NBA regulations, the 76er's left Wood with the allowable salary cap offer of a one-year contract for $75,000, the minimum wage for a first-round draft choice.

Wood then filed an antitrust suit in a Federal District Court in New York requesting that an injunction be issued barring the NBA from enforcing its salary cap rules. The antitrust suit against the NBA, the 76er's and the NBA Players Association also sought to ban the NBA's college draft and the rule prohibiting teams from dealing with player corporations. While the case was pending, the 76er's and Wood reached agreement whereby the 76er's found a way around the salary cap to sign Wood to a four-year contract worth an estimated $1.1 million. Shortly thereafter, Federal District Court

Judge Carter handed down a decision in favor of the NBA and other defendants.

Initially, Judge Carter summarized the facts and transactions that led to the alleged illegal NBA practices and procedures. In 1970 an antitrust suit was filed by the players challenging the NBA player allocation rules. After extensive anmslength negotiations between the parties to the suit, a settlement was reached wherein, among other things, the NBA reserve clause was eliminated, the reserve clause was eliminated, the reserve compensation clause was phased out, and the college draft was modified. The settlement agreement, which came to be known as the Robertson agreement, also provided for judicial oversight of enforcement and implementation of the terms of the settlement. The agreement was approved both by Judge Carter and the Court of Appeals.

Then, in 1983, again after intensive arms-length negotiations between the NBA and the Players Association, the Robertson agreement was modified to include the salary cap rules. The salary cap modification was presented to the court and approved.

Judge Carter found that the antitrust claim as to the college draft and the maximum salary limitation must fad. This was so because "both provisions affect only the parties to the collective bargaining agreement - the NBA and the players - involve mandatory subjects of bargaining as defined by federal labor laws, and are the result of bona fide arms-length negotiations." Both involve terms and conditions of employment and are, therefore, proper subjects of concem by the players association. Judge Carter concluded, "as such these provisions come under the protective shield of our national labor policy and are exempt from the reach of the Sherman Act."

Wood's main contention, however, was that since he was "a 'non-veteran' NBA player and was not within the bargaining unit represented by the defendant Players Association, . . . any condition relating to the wages of an unrepresented non-union member cannot be a mandatory subject of collective bargaining." Essentially, Wood argued that "since he was not a NBA player when the union and owners reached agreement on the issues in contention here, that agreement cannot bind him."

The court rejected Wood's argument, stating that Wood had cited no authority to support his proposition, and that indeed no authority could be found. "To adopt (Wood's) principle would turn federal labor policy on its head. The Players Association is the recognized exclusive bargaining agent for NBA players." Judge Carter stated further that according to the Supreme Court decision in J.I. Case Co. v. NLRB, 321 U.S. 332 (1944), "at the time an agreement is signed between the owners and the players exclusive bargaining representative, all players within the bargaining unit and those who enter the bargaining unit during the life of the agreement are bound by its terms." Judge Carter also stated that "the aim of federal labor policy is to promote peace in labor-management relations, not chaos and turmoil which adoption of plaintiffs theory would produce." Thus, the court ruled that the collectively-bargained for agreement was binding on any player who is in the unit or will be in the unit prior to the expiration of the agreement.

Finally, the court addressed the player corporation ban. This provision was also agreed upon between the owners and the union and became part of the collective bargaining agreement. Judge Carter found that "the ban arguably affects the terms and conditions of employment and could, therefore, fit the definition of a mandatory subject of bargaining." However, the ban presents no antitrust issues, the court ruled. "It is a restriction agreed to in labormanagement negotiations to simplify the union and NBA task of administering player benefits. Even though it may have an adverse impact on some individuals in the bargaining unit, . . . it is not the proper subject of attack in proceedings seeking relief from antitrust violations."

Wood v. NBA, 1984-2 CCH Trade Cases, para. 66,262 (S.D.N.Y. 1984) [ELR 6:10:7]

United States Wrestling Association decision in Randy Lewis vs. Leroy Smith Olympic trials wrestling match was vacated by arbitrator; wrestlers were ordered to re-do match from point of controversy

During the final trials for the United States Olympic Wrestling Team, a dispute arose over the determination of mat officials that Randy Lewis beat Leroy Smith 8 to 7 in the second match between the athletes. Lewis previously had defeated Smith "on criteria" in the first match of the best-of-three competition. When Smith protested the decision in the second match, the United States Wrestling Association ruled against the judgment of the mat officials, reversed the 8-7 decision, and directed Lewis and Smith to re-wrestle the entire second match.

Arbitrator Ken J. Denzel ruled that the Association did not follow its own written procedures in conducting the review of Smith's protest and vacated the protest committee's decision.

Denzel did not object in general to the protest committee's use of videotapes of the bout in evaluating Smith's claim, since the "1984 Olympic Trials Procedures" manual stated that videotapes would be used in connection with protests arising during the final Olympic trials. But there was nothing in writing to suggest that any change had been made in the established Association rule that "no protest of the officials' judgment shall be considered." Yet the basis of Smith's protest was a questioning of the mat officials' judgment. Thus, the protest committee "substituted its own judgment" in reversing the officials' scoring and did so, at least in part, on the basis of the viewing of videotapes without clear and sufficient guidelines as to their use.

In consideration of the fact that Leroy Smith did not participate in the arbitration proceeding, Denzel rejected Lewis' request that Lewis be declared the winner of the second match. Rather, Lewis and Smith were directed to rewrestle the "second match" from the beginning of the "flurry" and point-of-controversy at which time Lewis was leading 5 to 4 over Smith, and there were approximately 84 seconds left in the match. The results of a third match which Smith won 13 to 0 over Lewis, and a fourth match which Smith won due to an injury default by Lewis were "overturned, vacated and of no effect."

The arbitrator directed the United States Olympic Committee to wait for and recognize the results of these final Olympic trials before determining and certifying the United States Olympic Wrestling Team in freestyle 136.5 pounds weight class.

The arbitrator's decision was confirmed in a one-page order by a Federal District Court in Illinois.

In the matter of the Arbitration concerning Randy Lewis and USA Wrestling and US. Olympic Committee, (July 12, 1984); United States of America Wrestling Association v. Lewis, Case No. 84C6031 (N.D. Ill. 1984) [ELR 6:10:9]

Jefferson City, Missouri loses bid to dismiss cable company's antitrust complaint based on award of franchise to competing cable company

A Federal District Court in Missouri has refused to dismiss twelve of the fourteen counts contained in a complaint filed by Central Telecommunication against the mayor of Jefferson City, Missouri and a cable television company called TCI Communications. The complaint alleged that the defendants violated antitrust law, constitutional law and common law by conspiring to veto the city's award of a cable television franchise to Central.

Central was awarded a franchise by the City Council on April 20, 1982. Prior to that time, TCI was the sole company serving the Jefferson City area. Central alleged that during the time the City Council was accepting bids for a new cable franchise, TCI illegally contacted the consultant retained by the city and threatened to cut off cable television service to the Jefferson City area and to withhold franchise payments. Central further alleged that in response to these threats, the mayor of Jefferson City, the city attorney and others, vetoed the Council's franchise award to Central. On the same day that Central's franchise was vetoed, ordinances were presented to the Council awarding the franchise to TCI. The Council voted 6 to 5, with the decisive vote coming from the mayor.

The city presented a number of claims in its defense. First, it argued that it was immune from antitrust liability because its actions were authorized by the State of Missouri. This argument was based on the fact that federal antitrust laws do not prohibit a state "from exercising its sovereign powers to impose certain anti-competitive restraints." The court noted, however, that such an exemption (known as the Parker exemption) is only applicable to the extent that a municipality (which is not in and of itself a sovereign) acted pursuant to "a clearly articulated and affirmatively expressed state policy." Finding no such clearly articulated state policy, the court concluded that the Parker exemption did not shield the city from antitrust liability.

The city further asserted that the plaintiffs antitrust claims should be denied because they were barred by the Tenth Amendment. The Tenth Amendment, it argued, "bars the operation of any federal enactments that directly displace the states' freedom to structure integral operations in the areas of traditional government functions." The court rejected this argument, noting that the relevant test required, among other things, that "it must be apparent that the States' compliance with federal law would directly impair their ability to structure integral operations in the areas of traditional functions." The court held that since it was not clear whether antitrust law would impair the city's effort to structure its traditional government operations, the motion to dismiss based on this argument was not warranted.

The city unsuccessfully presented a number of other defenses, including the argument that is was immune from Central's antitrust claim because of the doctrine of sovereign immunity and the argument that Central failed to state a cause of action for violation of the antitrust laws.

The city was successful, however, in convincing the court that two of the fourteen allegations presented by Central should be dismissed. One was Central's constitutional claim that the city and TCI conspired to deprive Central of its legally protected rights, and the other was a cause of action for interference with a legitimate business expectancy. The constitutional claim was rejected because it required that there be some "racial, or ... class based, invidiously discriminatory animus behind the conspirators' action," and the court found no such discrimination on the part of the city. The other allegation was dismissed because the court held that it simply repeated another allegation of intentional interference with prospective contractual relations.

Central Telecommunications, Inc. v. City of Jefferson City, Missouri, 589 F.Supp. 85 (W.D. Missouri 1984) [ELR 6:10:9]

Motel owner's interception of cable programming violated newly-enacted antipiracy provisions of Communications Act and constituted copyright and trademark infringement

Heritage Cablevision of Texas, Inc., a subscription television service operator, and several programming services, including Home Box Office and the

Entertainment and Sports Programming Network, have been granted permanent injunctive relief, damages and attorneys fees in their action against Edinburg Community Hotel, Inc., doing business as the Echo Motor Hotel in Edinburg, Texas.

Federal District Court Judge Vela, in a thorough analysis of the issues raised, ruled that Echo's interception, exhibition and retransmission of Heritage's programming, by means of its own earth station, without the consent of, and payment to, the programming service companies or to any copyright owners, constituted a willful misappropriation of the audiovisual works involved, for commercial advantage, in violation of section 605 and the newly-enacted section 705(a) of the Communications Act.

The court stated that HBO, ESPN and Southern Satellite Systems (a resale common carrier which transmits superstation WTBS) had standing under the statute, as did Heritage, to protect their transmissions. The transmissions did not fall within the exception of section 605 which permits the reception of transmissions for "the use of the general public" and was not "private home viewing" as defined in section 705(c)(4).

Echo's conduct also violated the Copyright Act, because performances to occupants of hotel and motel rooms fall within the definition of a public performance. Moreover, the secondary transmission to the public of a primary transmission is actionable as an act of infringement under section 501 of the Copyright Act if the primary transmission is not made for reception by the public at large. Thus, Echo infringed the copyright owners' rights to the exclusive performance and display of their audiovisual works.

Judge Vela further found that Echo infringed the trade name and trademarks HBO and Home Box Office in that the motel's use of the marks in connection with the exhibition and distribution of HBO's services was likely to, and intended to, cause confusion, mistake and deception. Echo also was liable for the violation of section 1125(a) of the Lanham Act which prohibits the false designation of the origin of goods or services.

Echo's conduct was found likely to cause irreparable injury to the Heritage/HBO parties as follows: the loss of new customers, business goodwill and business opportunities with present and future customers; the dilution of product identity; and the continued infringement of copyright and trademark. Injunction relief was warranted on the basis of these continuing injuries, particularly since there was no adequate remedy at law. Judge Vela therefore permanently enjoined Echo from engaging in the unauthorized interception of satellite-delivered transmissions of the HBO parties' programming and awarded $40,000 in compensatory damages, reasonable attorneys fees, and costs.

Entertainment and Sports Programming Network, Inc. v. Edinburg Community Hotel, Inc., Case No. B-84-448 (S.D. Tex., Feb. 15, 1985) [ELR 6:10:10]

Unauthorized distribution of Lone Ranger radio plays infringed copyrighted scripts and constituted conversion of intangible personal property under California law, rules Federal Court of Appeals

A Federal Court of Appeals in California, with some delight, recited the following history of a case involving the rights to certain radio plays based on the adventures of the Lone Ranger. In about 1953, according to Judge Wallace, a Michigan company called The Lone Ranger Incorporated, owned several original scripts for radio plays about the fictitious early Western hero. The company also owned three scripts of Lone Ranger stories for use on phonograph records. The radio plays were broadcast in 1953 and 1954.

During 1954, Lone Ranger transferred all rights in the scripts and in the magnetic tapes thereof, to a California corporation with the same name. In 1962, the California corporation merged with the Wrather Corporation and the rights to the scripts and tapes passed to Wrather which, in turn, transferred them to a subsidiary, Lone Ranger Television, Incorporated. Since 1965, Charles Michelson, Incorporated has held an exclusive license in the Lone Ranger episodes for radio play.

In 1979, an individual named Jim Lewis, without a license, began leasing recorded Lone Ranger episodes to radio stations. In 1982, Lone Ranger Television sued Lewis and his two distribution companies, JL Productions and Program Radio Corporation, claiming copyright infringement and the conversion of its intangible property rights in the tapes.

The District Court permanently enjoined Program Radio from leasing the Lone Ranger tapes or otherwise infringing the copyrights in the scripts; ordered Program Radio's counsel to pay $1,100 in fees; granted summary judgment against Program Radio for federal copyright infringement; and awarded Lone Ranger Television federal statutory damages, damages for conversion, attorneys fees and costs.

In upholding the District Court ruling, Judge Wallace first noted that the Copyright Act of 1909 did not permit owners of copyrights in scripts to copyright separately any sound recordings produced from the scripts. The Copyright Act of 1976 does protect sound recordings of copyrighted scripts, but this protection does not extend to scripts "fixed" by recording prior to 1972. Lone

Ranger Television, accordingly, never requested a separate federal copyright in the Lone Ranger tapes.

Program Radio argued that in the absence of such copyrights, the duplication and distribution of the tapes was not a federal infringement. The court disagreed on the ground that Lone Ranger Television's valid copyrights in the underlying scripts provided the company with the right to produce derivative works. The Lone Ranger tapes qualified as derivative works in that the independent expression by the actors and the special editing work involved effectively created a new work for a market different from the market for the printed scripts. And the exclusive derivative rights in the scripts was infringed by Program Radio's activities in duplicating, remixing and distributing its own Lone Ranger tapes.

In turning to the conversion claim, the court determined that the District Court properly applied California law to Lone Ranger Television's pendent state law claim. And under California law, Lone Ranger Television had an intangible property interest in the performances on the tapes from the time of their recording. This interest, contrary to Program Radio's view, was "unaffected by notions of copyright," and the granting of summary judgment on the conversion cause of action therefore was affirmed.

In an unrelated case, "The Lone Ranger" enjoyed another victory recently when the Los Angeles Superior Court reinstated Clayton Moore's right to wear the "trappings" of the fictional hero including his famed mask. Moore, who had portrayed the Lone Ranger on over 200 television shows, in two feature films and in hundreds of personal appearances had lost the right to wear the mask pursuant to a 1981 ruling.

Lone Ranger Television, Inc. v. Program Radio Corporation, 740 F.2d 718 (9th Cir. 1984) [ELR 6:10:10]

Playboy Magazine was not required to disclose unpublished material gathered for an interview with Cheech and Chong to party involved in a civil action brought by the comedy team

A California appellate court, in a lengthy and emphatic opinion, has ruled that the undisseminated notes, records and editorial drafts assembled by Playboy Enterprises in connection with an interview published in the September 1982 edition of Playboy Magazine were within the protective scope of the state's constitution and Evidence Code.

The interview at issue was conducted by freelance writer Ken Kelly with Richard Marin and Thomas Chong, a comedy team known as Cheech & Chong. Cheech & Chong have been engaged in a lawsuit against Greene & Reynolds, the team's former financial advisor and business manager, for breach of contract and breach of fiduciary duty. Cheech & Chong alleged that Greene & Reynolds persuaded them to enter into an unfavorable contract with the production company working on their first film "Up in Smoke" According to the performers, their former advisors did not disclose an alleged conflict of interest arising from Greene & Reynolds' "business relationship and financial interest in" the production company.

Playboy Enterprises was not a party to the lawsuit but Greene & Reynolds subpoenaed Playboy seeking the production of notes, tapes and other records of the interview in order to determine the accuracy of statements attributed to Marin. Marin had disavowed that he made the alleged statements. Greene & Reynolds claimed that the material they sought might be used at trial to impeach Marin's credibility and demonstrate that Cheech & Chong were not defrauded.

The trial court ordered Playboy to produce all records and editorial material in its possession concerning the interview.

The appellate court, in response to Playboy's petition for a writ of mandate, first noted that section 1070 of the California Evidence Code "expressly and unequivocally" refers to the physical records constituting a journalist's source material and thereby protects the material sought by Greene & Reynolds. The trial court order compelling the production of Playboy's source material therefore was not enforceable by contempt, except to the extent that Playboy previously disseminated to the public any of those materials. The court, rejecting other arguments raised by Greene & Reynolds, stressed that section 1070 and article 1, section 2 of the California Constitution protect not only against the disclosure of confidential sources but also against the disclosure of "unpublished information" which "includes ... all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated (emphasis by the court). The protection of unpublished material or information does not depend upon the continued confidentiality of the source, stated the court. Thus, the material Playboy sought to protect against disclosure would be covered by article 1, section 2 whether the published interview was an exact transcription of the source material or paraphrased or summarized it. Furthermore, the fact that article 1, section 2 provides protection for all 'such material" indicates that a publisher's refusal to disclose is a prima facie demonstration of an interest sufficient to require protection; the determination of whether disclosure will be required does not depend upon the "degree of intensity" of the publisher's interest in nondisclosure.

Judge Wood then turned to the question of whether the protection of section lO7O and article 1, section 2 would withstand the competing interests claimed by Greene & Reynolds in obtaining discovery material from a nonparty, an issue characterized by the court as one of first impression in California. It was noted that where a criminal defendant demonstrates "a reasonable possibility that evidence sought to be discovered might result in his exoneration, he is entitled to its discovery." But civil litigants "do not have a constitutional right to unrestricted discovery of relevant information;' stated the court. The newsperson's privilege is specific and absolute in shielding newspersons from contempt proceedings for the refusal to disclose information falling within its protective scope. The court cautioned that the article I, section 2 protects newspersons only from contempt citations; if a newsperson is a defendant in a libel or civil rights violation action, he or she then conceivably might be compelled to disclose undisseminated material or information by the discovery sanctions applicable to all civil litigants.

Judge Wood noted that the only California case involving civil litigants attempting to compel disclosure of a newspaper's undisclosed source materials was KSDO v. Superior Court, 136 Cal.App.3d 375. KSDO involved a libel action brought by members of a police department against a newsperson who published stories indicating that the department was involved in narcotics trafficking. The police officers sought to compel disclosure of the newsperson's notes, including memoranda of his conversations with his sources (whose identities he already had disclosed). The trial court denied the newsperson's claim of protection under section 1070 and article I, section 2, and granted the police officer's motion for production. On appeal, it was held that the cited authorities were not available to afford protection to the newsperson since he was a party in the proceeding, and contempt sanctions were not threatened. KSDO was distinguished from this case by Judge Wood because it involved a newsperson-party. As a result of this distinction, the newsperson in KSDO had to rely upon the "indirect" and general First Amendment protection in "unhindered newsgathering" rather than the specific constitutional and statutory protection afforded to nonparty newspersons against the disclosure of confidential information.

Judge Wood declined to adopt KSDO's suggestion, in dictum, that certain criteria set forth in the case might operate to require disclosure by a nonparty newsperson to accommodate a civil litigant's interest in discovery. This rule, if followed, would "eviscerate" the nonparty newsperson's protection, stated Judge Wood. And recent legislative history of the newspersons protection was found to support the view that nonparty newspersons are entitled to the "highest possible level" of protection from the compelled disclosure of confidential sources and confidential information. Greene & Reynolds did not possess constitutional or other rights sufficient to overcome the constitutional protection, concluded Judge Wood.

The court therefore directed the trial court to vacate its order compelling Playboy to produce all source material in its possession, except to the extent that Playboy was ordered to disclose the address of the author who interviewed Cheech & Chong, an author whose identity was known to Greene & Reynolds. The scope of the privilege did not extend to this information in this case.

Playboy Enterprises, Inc. v. Superior Court, 154 Cal.App.3d 14 (1984) [ELR 6:10:11]

Manufacturer of "Hummel Figures" loses bid for sole proprietorship of five Hummel works but wins in separate action against importer who alleged anti-trust violation by manufacturer

It was a busy summer for W. Goebel Porzellanfabrik. In the first of two lawsuits in as many months, a Federal District Court in New York held that Schmid Brothers, a Massachusetts corporation, is a co-proprietor with Goebel in the renewal copyrights in five works, allegedly co-authored by the artist, Sister Hummel.

Goebel is a West German partnership which manufactures a number of different figurines, plaques, plates, belts and dolls based on the sketches and drawings of Sister Hummel. Goebel made these "Hummel figures" pursuant to a license from the Congregation of the

School Sisterhood of the Third Order of St. Francis at the Convent of Seissen, where Sister Hummel was a member until her death in 1946. These figures are imported into the United States by three authorized wholesalers who distribute them to retailers nationwide.

Schmid claimed that as assignee of Sister Hummel's natural mother and sole heir, it was a co-proprietor in five copyrighted works allegedly co-authored by Sister Hummel. Goebel, on the other hand, contended that Sister Hummel was not co-author of these five works, and even if she were, she took a vow of poverty when entering the convent and therefore, she was merely an employee for hire. Schmid denied these contentions and argued that when Goebel obtained the renewal copyrights in 1966 and 1967 to these works, it did so as trustee for Sister Hummel's mother who thus became joint proprietor of the renewal copyrights. The court agreed.

The court found that Sister Hummel was a co-author of the works at issue. This was evidenced by the original copyright registration certificates which cited Sister Hummel as author. These certificates were prima facia evidence that Sister Hummel was the author of these works, the court concluded, and Goebel's evidence to the contrary was insufficient to overcome this presumption. Furthermore, Schmid offered other evidence supporting the inference that Sister Hummel contributed to the creation of the five works at issue. Examples of these exhibits included Goebel's 1944 catalogue which listed the figurines as "Sister Hummel's original creations," and a 1967 letter from Goebel's then counsel stating that Sister Hummel "created the Hummel drawings and in her lifetime, participated in the modelling of the Hummel figures."

The court was equally unpersuaded by Goebel's argument that Sister Hummel was an employee for hire. To be considered an author, an employer must make some "significant contribution" to the work, the court stated. Furthermore, the employer must have the right "to direct and supervise the actual performance of the work." These criteria were not met. Pursuant to a number of agreements between Goebel and Sister Hummel, beginning in 1935 and ending in 1943, Sister Hummel, and not the convent, was given considerable control in approving or rejecting the various works undertaken by Goebel. "The licensing agreements ... gave her frill artistic control over the line to bear her name. She had the final say as to which of the works would be reproduced and how faithfully."

This conclusion was further supported by the fact that the convent, in earlier litigation with the German government involving the income derived from these works, successfully contended that the works were Sister

Hummel's personal property "which she and not the convent could dispose of during her lifetime."

In a separate action, a month later, Goebel was a bit more successful. There, a Federal District Court in New York granted Goebel's motion to dismiss Action Industries' antitrust counterclaims because Action faded to show sufficient injury to itself. This holding was based on the fact that none of the allegedly anticompetitive practices engaged in by Goebel were aimed at Action or anyone in privity with it.

Action's counterclaim was filed in response to a copyright infringement suit brought by Goebel. In its complaint, Goebel alleged that for the past few years Action had acquired "Hummel figures" from authorized vendors in Europe. These figures were imported into the United States without using Goebel's authorized distributors. Goebel sought an injunction barring Action from infringing its copyright and with interfering with its contracts with its American distributors.

Action argued among other things, that the Hummel figures were not new or original works and thus should not be protected under the Copyright Act. In addition, Action counterclaimed for five million dollars in damages alleging that Goebel violated certain sections of the Sherman Antitrust Act and the Wilson Tariff Act.

In its counterclaim Action argued that Goebel was using its copyright to "limit the quantity of Hummel figures being imported into this country, thereby keeping prices significantly high." Action argued that this amounted to a misuse of the copyright which consequently stripped Goebel of immunity from antitrust protection normally extended by the copyright laws. In addition, Action argued that Goebel was engaged in a number of other anti-competitive practices, among them, the requirement that merchants sell these figures at or above the published price and the requirement that retailers purchase non-copyrighted goods in order to get copyrighted goods.

The court rejected Action's counterclaims, primarily on the ground that it failed to allege sufficient injury as a result of Goebel's trade practices. It stated that "Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent ... The injury should reflect the anticompetitive acts made possible by the violations ... Plaintiffs must show more than a mere violation of the antitrust laws, he must also show an injury that is a direct result of the anticompetitive behavior of the defendant." The court also noted that a plaintiff has standing only if it is "within the target area of the alleged conspiracy, i.e., a person against whom the conspiracy was aimed."

Action failed to show the requisite injury because "none of the allegedly anticompetitive practices engaged in by Goebel were aimed at Action itself, or anyone in privily with Action. If anyone at all was affected by the alleged practices, it was the retailers who purchased the Hummel figures for resale and the consumers who ultimately purchased them." Although the court noted that Action suffered some loss, in that after Goebel filed its action it was forced to stop importing the Hummel figures, it held that such injury was "strictly self inflicted" and therefore insufficient.

The court also rejected Action's argument that the filing of the lawsuit was in and of itself an anticompetitive act because Action failed to show any bad faith on the part of Goebel, nor did Action present any evidence that there was any intent on the part of Goebel to harass Action.

Schmid Brothers, Inc. v. W. Goebel Porzellanfabrik, 589 F.Supp. 497 (E.D.N.Y. 1984); W. Goebel

Porzellanfabrik v. Action Industries, Inc., 589 F.Supp. 763 (S.D.N.Y. 1984) [ELR 6:10:12]

Former actor on "Leave it to Beaver" series was not entitled to pursue claim against distributor of allegedly libelous film absent a showing of actual malice, rules California appellate court

A California appellate court has ruled that EWAP, Inc. (also known as Erotic Words and Pictures, Inc.) was properly granted summary judgment in a libel action brought by Kenneth Osmond, a former actor who portrayed the character "Eddie Haskell" in the television series "Leave it to Beaver" Osmond claimed that EWAP was distributing, in its retail "adult bookstores," a "Playmate" series film, and that the label on the film carton contained, in addition to a photograph of a man and woman engaged in a lewd sex act, a statement that the male star of the film was "John Holmes, who played 'Little Eddie Haskell' on the 'Leave it to Beaver' show" At the time the film carton purportedly was so displayed and sold by the Le Sex Shoppe stores, Osmond was in his mid-thirties, was married and had a family, and was a police officer with the Los Angeles Police Department.

The trial court granted EWAP's motion for summary judgment on the ground that "the action had no merit and that Osmond presented no triable issue of material facts."

A California appellate court has affirmed the trial court judgment due to Osmond's failure to raise a triable issue on the question of malice. The court first noted that there was no California case directly on point on the question of whether, absent malice, civil liability may be imposed on a retail distributor of pornographic materials

- a distributor "which merely disseminated or circulated another's libel." A Federal District Court had held that under Califor nia law, a party suing a distributor for libel must show that the distributor either knew of the libelous content of the material or that facts were known to the distributor which imposed a duty to investigate.

California Court of Appeal Judge Arabian agreed with this position, and held that the actual malice requirement would apply as well to a case involving the distribution of an allegedly libelous statement in a pornographic work. The court also cited section 581 of the Restatement (Second) of Torts as follows: "One who only delivers or transmits defamatory material published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory character." This rule protects libraries, and vendors of books, magazines and newspapers. A bookstore which sells or rents films also would come within section 581, in the court's view. A comment to the Restatement does advise that if a particular author or publisher has frequently published "notoriously sensational or scandalous books," a bookstore offering such works may be held liable for defamations appearing in the material. But Judge Arabian did not interpret this comment as relegating all publishers of sexually explicit material to the category of "sensational or scandalous" publishers. Rather, the comment's description referred to authors or publishers who notoriously use defamatory material in their publications, stated Judge Arabian.

It was observed that Osmond failed to present evidence indicating that EWAP bought its films from a less than "reputable" producer. Thus, EWAP had no greater duty than any ordinary bookstore owner to examine its merchandise for potentially libelous contents. And officers of the company had declared that they lacked any knowledge of the libel or that they were aware of any facts which might have imposed upon them a duty to investigate. In all, there was not a sufficient showing of malice to warrant the consideration of Osmond's claims by a jury.

Osmond v. EWAP, Inc., 153 Cal.App.3d 842 (1984) [ELR 6:10:13]

California Supreme Court rules that Reader's Digest did not libel Synanon or its founder, Charles Dederich, in 1981 article; in related action, court recognizes a qualified reporters privilege allowing the media to refuse disclosure of sources of confidential information in civil actions

The California Supreme Court has ruled that an article in the July 1981 edition of the Reader's Digest did not libel the Synanon Church and Charles Dederich, its founder. And in a separate proceeding involving Dederich's claims against David and Cathy Mitchell, the publishers of reports utilized in preparing the Reader's Digest article, the court announced its recognition of a qualified reporters privilege for media parties in civil actions.

The Reader's Digest article, entitled "The Little Paper That Dared," was written by David MacDonald. MacDonald discussed how the Mitchells, the publishers of the Point Reyes Light newspaper, received the Pulitzer Prize for their series of reports critical of Synanon. MacDonald based his article on the following sources: the Mitchells' newspaper reports and their book entitled "The Light on Synanon"; research papers on Synanon by Richard Ofshe, professor of sociology at the University of California; and conversations with the Mitchells and Ofshe.

The article, according to the court, recounted the history of Synanon from its inception in 1958 as a program for the rehabilitation of drug addicts. MacDonald then described the transformation of Synanon into an "alternative life style community," and the article cited examples of the group's alleged policy of intimidation against former members. The intimidation extended to the highly publicized incident in which Paul Morantz, an attorney who had filed several lawsuits against Synanon, was bitten by a rattlesnake placed in his mailbox. Dederich and two Synanon members were charged with conspiracy to murder Morantz and were convicted and sentenced.

Somewhat surprisingly, given the serious charges of violence set forth in the article, Synanon and Dederich based their defamation claim on the following sentences: "Synanon was founded in 1958 by Charles Dederich, a reformed alcoholic, to rehabilitate drug addicts. Though his spectacular claims of success were never proved, Dederich and Synanon attracted publicity and enough cash donations to start a string of addiction centers ... Since 1968, minimal drug rehabilitation work had been attempted; funds, however, were still solicited on that basis." Dederich and Synanon asserted that this excerpt would lead a reader to conclude that they "have not been and are not successful in rehabilitating drug addicts ... and that their representations of success were fraudulently made to enrich themselves."

When the Reader's Digest and the Mitchells moved for summary judgment on the grounds that there was no triable issue of fact as to actual malice, the trial court denied the motion.

On appeal, Justice Broussard first determined, after a considered examination of relevant authority, that summary judgment is a "favored" remedy in defamation cases involving the issue of actual malice under the standard announced in New York limes v. Sullivan; thus, summary judgment would be available unless it appeared to a court that actual malice might be proven at trial by clear and convincing evidence.

Justice Broussard then found that Synanon was, at the very least, a "limited purpose" public figure with respect to the discussion of the controversy over the group's practices, and that Dederich was a public figure to the extent that his conduct in directing the activities of Synanon was at issue. It was pointed out that Dederich and Synanon had made "myriad" attempts since the group's founding to thrust their case and Synanon in general into the public eye. Examples of public attention included a 1966 full length movie entitled "Synanon," four books, articles in Time, Life and the Reader's Digest (two 1970 articles) and numerous newspaper articles. In the late 1970s, Synanon continued its self-promotion efforts via a campaign which undertook 'massive" media contacts on the issues raised by the Mitchell's reports. Therefore, the standards for public figure status were "clearly met."

The standards for concluding that the Reader's Digest did not act with actual malice also were met, ruled Justice Broussard, again after a thorough review of the applicable case law. There was no direct evidence that MacDonald or other Reader's Digest personnel believed that the challenged passages in the article were false or that they had serious doubts as to their truth. Furthermore, while Synanon and Dederich questioned the objectivity of Dr. Ofshe and the Mitchells, they did not question that Reader's Digest considered their sources to be "persons of unsullied reputation." In this case, the fact that Reader's Digest did not contact Synanon and did not conduct an independent investigation of MacDonald's statements was found "relatively inconsequential." A publisher may rely on the investigation and conclusions of reputable sources, stated Justice

Broussard, and does not have the duty to write an objective account, as long as no serious doubts are entertained concerning the truth of the story. For, as the court declared, "Fair and objective reporting may be a worthy ideal, but there is room within the protection of the First Amendment, for writing which seeks to expose wrongdoing and arouse righteous anger; clearly such writing is typically less than objective in its presentation."

The court then turned to the rather infrequently addressed issue of "literary license": to what extent would the New York Times standard of actual malice permit the Reader's Digest to depart from the statements and information furnished by Dr. Ofshe and the Mitchells? The language of the New York Times opinion itself was cited as support for the position that the free press goal of "robust debate" requires that publications must be permitted "some degree of flexibility in their choice of the proper words and phrases to describe the subject at issue." Although Synanon argued that the Reader's Digest interviews with the Mitchells and Dr. Ofshe did not support the challenged statements regarding Synanon's claim of "spectacular" success, Justice Broussard pointed out that documentary sources revealed that Synanon had claimed a high cure rate for addicts, while at the same time acknowledging that there was no statistical basis for such a claim. And there was evidence indicating that the Mitchells and Dr. Ofshe did doubt Synanon's claims. This evidence, considered along with an author's right to choose appropriate words and phrases, precluded a finding of actual malice.

MacDonald's statement concerning the "minimal" drug rehabilitation work performed by the group also was within an acceptable range of literary license and was "an accurate appraisal of reality," not a statement in reckless disregard of the truth.

Synanon and Dederich's causes of action for "false light" invasion of privacy, invasion of privacy by intrusion into their private affairs, and intentional infliction of emotional distress, also were subject to summary judgment in that they were based upon the same facts as the cause of action for libel, and "liability cannot be imposed on any theory for what has been determined to be a constitutionally protected publication."

In all, concluded the court, there being no clear and convincing evidence of actual malice, summary judgment should have been entered in favor of the Reader's Digest and MacDonald. Accordingly, a writ of mandate directing the trial court to enter an order granting the motion for summary judgment was issued.

The court also issued a writ of prohibition sought by David and Cathy Mitchell restraining the trial court from enforcing a discovery order in the Synanon-Reader's Digest proceeding, to the extent that such order would require the Mitchells to produce documents which revealed confidential sources or information furnished by such sources.

Synanon had sent the Mitchells a broad discovery request encompassing not only the documents shown to MacDonald or to the Reader's Digest, but all documents concerning Synanon available to the Mitchells. The trial court, over the Mitchells' objection, ordered the production of the documents sought on the ground that no reporters privilege of nondisclosure applied in this case. Since the Mitchells, along with the Reader's Digest, were defendants in the Synanon libel action, they would be subject to various sanctions if they chose to disobey the production order, including, possibly, the entry of judgment against them. Therefore, on appeal, the Mitchells asserted a nonstatutory privilege against disclosure based on the protection for freedom of the press as set forth in the United States Constitution and the California Constitution.

Justice Broussard, again after careful consideration of authority, concluded that "in a civil action a reporter, editor, or publisher has a qualified privilege to withhold disclosure of the identity of confidential sources and of unpublished information supplied by such sources. The scope of that privilege in each particular case will depend upon the consideration and weighing of a number of interrelated factors."

The first factor to be evaluated is the nature of the litigation and whether the reporter is a party in the proceeding. In general, it was noted, disclosure is appropriate in civil cases, especially when the reporter is a party to the litigation. A second factor is the relevance of the information sought to the cause of action asserted. However, "mere relevance" is insufficient to compel discovery; the information must go to "the heart" of the claim. The third factor is that the party requesting disclosure must exhaust all alternative sources of obtaining the needed information; compulsory disclosure of sources is the "last resort." And the court must consider the importance of protecting confidentiality in the case before it, with the possible attendant requirement, in some instances, of a prima facie showing that the alleged defamatory statements are false.

Upon applying these factors to the matter before him, Justice Broussard found that the case indeed was of the type suitable for requiring disclosure. However, Synanon was seeking the discovery of information that might not relate to the alleged libelous statements purportedly published originally by the Mitchells. Synanon and Dederich furthermore had made no showing that they had exhausted all alternative sources of obtaining the information sought. It was observed that sources of information favorable to Synanon - information which the Mitchells allegedly had deliberately ignored - would most likely have come forth on their own in response to inquiries from Synanon. And even if a party has no other way of obtaining information, confidentiality still would be called for when the matter at issue is one of great public importance where disclosure might present a substantial risk of harm to the source.

The Reader's Digest article and the Mitchells' reports clearly related matters of public importance, declared the court, as it recognized a qualified reporters privilege, depending upon a balancing of the relevant factors set forth above in each case in which the privilege is asserted. In this case, the balancing weighed against the discovery of documents which might reveal confidential sources or information furnished by such sources.

Reader's Digest Association, Inc. v. Superior Court of Marin County, 37 Cal.3d 244 (1984); Mitchell v.

Superior Court of Marin County, 37 Cal.3d 268 (1984) [ELR 6:10:14]

Suit by individuals shown in college football recruiting film is dismissed because Minnesota does not recognize cause of action for invasion of privacy

In October 1981, some people named House agreed to be filmed by a camera crew. The purpose of the film was to recruit high school athletes for the University of Minnesota's "Gopher" football team. The Houses did not sign a written release. Sometime later, a three-second segment of this film, depicting the Houses cheering "Minnesota Minnesota Rah Rah Rah," was televised as a public service announcement on a local television station. The Houses alleged that their reputation had been damaged as a result of this telecast because they had been opposed to the Gophers playing football at the Hubert M. Humphrey Metrodome and regarded the film clip "as a promotion for Metrodome Gophers ticket sales." The trial court dismissed the Houses' complaint.

The Court of Appeals has affirmed this ruling recognizing, as the trial court had, that Minnesota does not recognize a cause of action for invasion of privacy. Furthermore, it added, "even if we were prepared to adopt invasion of privacy as an actionable tort, the facts still warrant summary judgment."

The court noted that there are four kinds of invasion of privacy: appropriation, intrusion, public disclosure of private facts, and false light. The Houses argued that their rights had been violated by appropriation and by intrusion. The court rejected the argument of appropriation because the Houses had conceded that they were not celebrities. The court noted, "an action for appropriation has not been extended beyond the protection of celebrities because a celebrity's property interest in his name and likeness is unique"

Furthermore, the court held that there had been no intrusion by the camera crew "because the Houses were approached and filmed in public and they consented to being filmed" This, the court added, obviated the need for a written release.

House v. Sports Films & Talents, Inc., 351 N.W.2d 685 (Minn.App. 1984) [ELR 6:10:16]

Sportswriter and publisher win summary judgment in libel action brought by former college football star Darwin Holt in Connection with articles published about the infamous 1961 "Holt-Graning incident"

A Federal District Court in Georgia has granted summary judgment for sportswriter Darrell Simmons and publisher Cox Enterprises in a libel action brought by former University of Alabama football star Darwin Holt in connection with published newspaper articles referring to Holt's role in a controversy surrounding a sporting event that occurred eighteen years earlier.

Back in 1961, Georgia Tech and the University of Alabama played a highly publicized football game in Alabama. Holt was Alabama's defensive signal caller and was considered a "star" on the number-one ranked Alabama team. "In the final quarter of the game, Tech was forced to punt. In the course of the play, Holt struck Tech's captain, Chick Graning, in the face with his forearm or elbow. As a result, Graning suffered a broken jaw, a broken nose, a concussion, and the loss of several teeth. The officials called no penalty on the play."

For several months following the game, numerous articles in the Atlanta Press contained accusations that Holt's blow to Graning was a foul and that Alabama should have been penalized. The play and the ensuing controversy attracted national attention and came to be known as the "Holt-Graning incident" After the incident, and over the years, Holt declined many opportunities to publicly state his side of the incident. However, in the few interviews that he did grant, Holt maintained that "his block was within the rules and that the injuries to Graning were unintentionally inflicted."

Interestingly enough, after that game Tech decided to end its series of games against Alabama, even though the two teams were committed to play annually until 1964. Since then, there has been continuing controversy as to whether the "Holt-Graning incident" was the cause of Tech's decision. For fifteen years, the Alabama-

Georgia Tech rivalry remained dormant on the football fields.

Then, "in September 1979, Tech and Alabama resumed their series of football games, rekindling public interest in the history of the two teams' rivalry, and specifically in the event that many thought had led to the fifteen-year interruption of competition between the two schools."

Given this renewed interest, sportswriter Darrell Simmons wrote two of a series of five newspaper articles published by Cox Enterprises in 1979, each containing reference to Holt's role in the "Holt-Graning incident." The first article recounted contrasting views about the incident, described the emotions engendered by it, and republished many contemporary comments about the incident and specifically about Holt's character. Simmons did not express any particular view of his own regarding the incident, nor did he side with anyone's opinion as to the incident. The other article written by Simmons described how the passage of time affected the attitudes and feelings of the persons involved in the incident. The remaining articles concerned the resumption of the teams' rivalry and contain only passing mention of the incident.

Based on these articles, Holt brought suit against Simmons and Cox Enterprises alleging that the articles were libelous. In support of their motion for summary judgment, the defendants argued that Holt was a "public figure" and that "Holt could not show the requisite degree of fault - actual malice - necessary to hold them liable for their statements and disclosures regarding him" The District Court agreed with the defendants and has granted their motion.

Judge Freeman stated that references to Holt as "animal from Alabama," "caveman incarnate," headlines such as "New Darwin Theory," and characterization of Holt's manner of play as "more bestial than academic," were at worst hyperbolic, figurative name-calling and were not actionable. Judge Freeman also stated that other items to the effect that Holt made history in "a most negative fashion" and that he marred the Alabama team's "otherwise perfect season," were unverifiable opinions upon which no defamation action could be based.

Nevertheless, the court found that "much of the matter republished in the articles (was) clearly defamatory." Descriptions of Holt's act as a flagrant violation of standards of decency in football, and not simply overly-aggressive play, suggested that Holt admitted to violating the rules intentionally, Judge Freeman stated. Such references to Holt's contact as a "cheap shot," Holt's "latest act of violence," and an "illegal" blow," led the court to conclude that "a fact-finder could reasonably conclude that such statements tend to injure Holt's character, reflect shame, or 'put him without the pale of social intercourse.'"

The court next considered whether Holt was a "public figure" Judge Freeman found that even though Holt had not "achieved such pervasive fame or notoriety that he has become a public figure for all purposes and in all contexts," he was nevertheless a "limited purpose" public figure with regard to public comment on a limited range of issues. In either case, the court stated, the press is afforded greater leeway for error because such persons have greater access to the press for rebuttal than private persons, and also because by their voluntary acts they have invited public attention and comment.

As applied to Holt, Judge Freeman stated that Holt had voluntarily played; he assumed the risk of public comment; and the defamatory statements were within the limited range of issues upon which Holt invited comment, namely his play on the field. The court concluded that "Holt, like other sport figures who have sought redress through defamation actions, must be considered a public figure, whose actions on the field sportswriters may criticize within the protective 'breathing space' required by the First Amendment."

Finding that Holt was a public figure, the court proceeded to consider whether Holt had sufficiently shown that the defamatory statements were made with "actual malice." Judge Freeman stated that the "defendants could only be held liable if they published the statements in spite of a 'high degree of awareness of probable falsity' " The court found that Holt had "failed to demonstrate that any direct or circumstantial evidence of actual malice (could) be found in the record," and that Holt had not pointed to "any defect or inconsistency in the defendants' assertions with regard to absence of malice" The court concluded that given Holt's failure to show that the defendants published the statements with actual malice, Holt could not recover damages against them in a libel action.

Holt v. Cox Enterprises, 590 F.Supp. 408 (N.D.Ga. 1984) [ELR 6:10:16]

Federal Trade Commission order restraining deceptive advertising by drug manufacturer is enforced by Court of Appeals

It was enough to give you a headache. At least that's what Sterling Drugs must have felt when a Federal Court of Appeals enforced a Federal Trade Commission order which restrained deceptive advertisements by Sterling, the manufacturer of Bayer Aspirin, Bayer Children's Aspirin, Vanquish, Cope and Midol. The court concluded that the FTC order was not overbroad, as

Sterling had argued, and that it was necessary in order to prevent "potential health hazards" from occurring.

In 1983, the Federal Trade Commission issued an administrative complaint against Sterling in which it alleged that Sterling had violated various sections of the Federal Trade Commission Act because of deceptive advertisements used by Sterling. The case was argued before an administrative law judge which found the company liable.

In reviewing the Commission's decision, the court noted that it could not "reweigh the evidence, but must accept the findings of the Commission, if supported by substantial evidence in the record, as a whole." With this as a background, the court proceeded to review the Commission's findings.

The court first looked at Sterling's advertisement for Bayer Aspirin. The ad stated: "Bayer tested its aspirin against every other leading brand. For purity, stability, speed of disintegration, Bayer was consistently better." The Commission's complaint had alleged that Sterling violated the Federal Trade Commission Act by falsely claiming that (1) Bayer's overall pharmaceutical superiority to other brands had been established and (2) Bayer's superiority as to certain pharmaceutical attributes had also been established. Sterling contended that the statement regarding pharmaceutical superiority was not false because it was based upon a study which evaluated thirty pharmaceutical characteristics. These characteristics were compared with 220 other brands of aspirin with similar dosages. However, the Commission determined, based on its own tests, that Sterling's study did not support its claim of superiority.

Sterling also denied that its advertisements claimed superiority as to certain specific pharmaceutical attributes. It stated, "viewed as a whole, the advertisements claimed only that Bayer had overall pharmaceutical superiority, but made no claim as to superior freshness, purity or stability" In support of this argument Sterling introduced expert testimony. The expert concluded that the individual attributes complained of were buried in the advertisements and would not be noticed by the consumers. The Commission rejected this testimony because it believed the claim of superiority of individual attributes was clear from the "face of the advertisements."

The court also examined the Commission's ruling that Sterling's Cope advertisement violated the Federal Trade Commission Act. Sterling represented that the product contained aspirin, caffeine and methapyrilene fumerate, an antihistamine included to induce drowsiness. The advertisement stated: "Cope ... is different. Besides a powerful pain reliever, Cope gives a gentle relaxer. The others don't...."

This advertisement was found to violate the Act because a Bristol Meyers product, Excedrin PM, also contained aspirin and the antihistamine, methapyrilene fumarate. Sterling argued that although Excedrin did contain these ingredients, it was designed for use only at night. Cope, however, was designed for daytime relief. The court held that since consumers would not have been led to distinguish Cope from Excedrin, this representation was deceptive. As to the other products, Midol, Vanquish and Bayer Children's Aspirin, the court was equally persuaded that the Commission's ruling was proper.

Because of the Commission's "broad powers and expertise in protecting consumers," the court noted that the Commission's order would not be easily modified. Consequently, the court limited its inquiry to a determination of whether the order was sufficiently clear and precise "to give notice to the advertiser." Furthermore, it noted that the scope of the order should bear a reasonable relation to the advertisers' violation of the Act. In determining whether there is a reasonable relationship between the violation and the scope, the court observed that "the ultimate question is the likelihood of the petitioner committing the sort of unfair practice the order prohibits."

Sterling argued unsuccessfully that several provisions of the Commission's order were invalid. In particular, Sterling argued that a provision requiring that its claim of therapeutic superiority be supported by "two well controlled clinical studies" was too broad. The restraint should only apply to the Sterling products which advertise therapeutic superiority, it noted, and not to its other products. The court disagreed. Noting Sterling's past history for violations and recognizing that any future violations would be serious, such a provision was justified. "These advertisements convey a strong message to consumers-that doctors and scientists endorse the product-and do so in a manner so intentionally subtle that consumers are unlikely to analyze the message they receive."

Sterling Drug, Inc. v. Federal Trade Commission, 741 F.2d 1146 (9th Cir. 1984) [ELR 6:10:17]

California appellate court grants summary judgment to San Francisco Chronicle in invasion of privacy action brought by individual who thwarted assassination attempt against former President Gerald R. Ford

On September 22, 1975, Oliver W. Sipple helped foil Sara Jane Moore's attempt to assassinate then-President Gerald R. Ford, Sipple grabbed or struck Moore's arm as she fired a gun at the President and most likely deflected the shot. Ford survived the assassination attempt. Another survivor of the incident, at least until the spring of 1984, was Sipple's action for invasion of privacy against the publisher of the San Francisco Chronicle and columnist Herb Caen.

Sipple's action was prompted by Caen's column of September 24, 1975 in which Caen referred to Sipple's affiliaton with San Francisco's homosexual community. Sipple alleged that the disclosure of private facts about his personal life in the column, and in subsequent articles referring to this information exposed him to contempt and ridicule.

A California trial court eventually granted summary judgment to the media parties and an appellate court has upheld the trial court's ruling on the grounds that the facts disclosed by the articles about Sipple were not private facts, and that the publications in dispute were newsworthy and thus protected from liability.

Justice Caldecott noted that a "crucial ingredient" of an invasion of privacy claim is that there has been "an unwarranted publication of intimate details of one's private life which are outside the realm of legitimate public interest." Sipple's homosexual orientation and participation in gay community activities reknown, prior to the publication of the complained-of articles, to hundreds of people in a number of cities. The articles merely gave further publicity to a matter already "left open to the eye of the public."

Furthermore, summary judgment was justified due to the newsworthiness of the challenged articles. The articles were not published to sensationalize Sipple's private life. Rather, the reports raised the question of whether President Ford's delayed recognition of Sipple's heroic behavior revealed a discriminatory attitude toward the homosexual community, a matter of legitimate public concern.

Sipple argued that by saving the President's life, he did not intend to become a public figure. But the court concluded by citing the Restatement Second of Torts to the effect that individuals who have not sought publicity or consented to it, but who nevertheless have become legitimate subjects of public interest, may find that authorized publicity, to a reasonable extent, includes, in addition to the event that aroused the public interest, some publicity given to facts about the individual that would otherwise be purely private.

Sipple v. The Chronicle Publishing Co., 154 Cal.App.3d 1040 (1984) [ELR 6:10:18]

Federal District Court grants summary judgment to Atlantic City casino on claims arising from exclusion of an alleged "card counter"

One fine day in August 1981, security officers at Harrah's Marine Hotel Casino in Atlantic City, New Jersey accused Janet Hoagburg, who was playing blackjack in the casino, of engaging in an activity known as "card counting." Hoagburg was informed that she was no longer welcome to play blackjack at the casino and was escorted away from the gaming tables by the security officers. Mrs. Hoagburg and her husband responded by suing Harrah's on a variety of claims, most of which have been rejected by a Federal District Court in New Jersey.

The court first found that the charge that Harrah's slandered Mrs. Hoagburg's reputation and good character was not supported by proof of special damages. Proof of special damages was required since an accusation of card counting was not slanderous per se, in that card counting is not a crime; and Mrs. Hoagburg did not allege that her business reputation was affected by the accusation. Furthermore, since any physical or mental discomfort caused Mrs. Hoagburg by the alleged defamatory remarks were inadequate to establish special damages, the court found it appropriate to grant Harrah's motion for summary judgment on the defamation claim.

Mrs. Hoagburg also claimed that Harrah's had violated her federal constitutional civil rights including her First and Fourth Amendment rights. But the failure to allege any state action precluded relief with respect to these claims.

Hoagburg also alleged that Harrah's violated state constitutional law by excluding her from the casino, an issue which apparently was one of first impression for the court. But Judge Cohen found that "In light of card counting's limited significance as speech, the need and expectation that casino games will be regulated, and the fact that casinos are not traditional forums for the exchange of ideas, it does not appear ... that there is any violation of a patron's state constitutional right of free speech when a casino forbids that patron from utilizing card counting techniques at its blackjack tables." Therefore, Harrah's obtained summary judgment on this cause of action as well.

Judge Cohen then devoted some attention to Mrs. Hoagburg's assertion that Harrah's did not possess an absolute common law right to exclude her from its blackjack facilities and therefore violated her common law right of reasonable access onto Harrah's premises. The issue of whether a common law right of exclusion is available to owners of amusement enterprises was considered by the New Jersey Supreme Court in the case of Uston v. Resorts International Hotel, Inc. (ELR 4:14:4), a case in which Kenneth Uston challenged Resorts' authority to exclude card counters from its casino premises. The New Jersey Casino Control Commission had dismissed Uston's complaint but the Commission's order was reversed by a New Jersey appellate court (ELR 3:15:5) in a ruling which was issued three months prior to Mrs. Hoagburg's challenged exclusion by Harrah's. However, while appeals were pending, the appellate court order directing Resorts to allow Uston entry to its card tables was temporarily stayed, i.e., the original pro-exclusion decision of the Commission remained temporarily in effect at the time of the Hoagburg incident. The New Jersey Supreme Court eventually upheld the appellate court judgment, but Judge Cohen refused to give retroaction effect to the Supreme Court decision which basically denied casinos the absolute authority to exclude card counters in the absence of a valid Casino Control Commission regulation permitting such an exclusion. The factors cited by Judge Cohen in support of his non-retroactivity ruling included: Harrah's reasonable reliance on the Commission order which was still in effect, albeit temporarily, when Mrs. Hoagburg was ejected; the "immense" amount of litigation likely to be generated by a retroactive application of Uston; and the fact that the aims underlying Uston would not be hampered by limiting the decision to a prospective effect.

Hoagburg v. Harrah's Marina Hotel, 585 F.Supp. 1167 (D.N.J. 1984) [ELR 6:10:18]

Briefly Noted:

Defamation.

A Federal District Court in Michigan has dismissed a claim for negligent infliction of emotional distress in a defamation action arising out of the publication of two newspaper articles linking the plaintiffs businesses with prostitution. Originally the claim was dismissed without prejudice since the court, at that time, was concerned about a 1982 Michigan case which raised a question about the status of defamation law in Michigan. The court urged the parties to submit briefs on the issue of what standard of fault should be applied in actions where the plaintiffs are private individuals and the newspaper publication is on a matter of public interest. When no briefs were filed and the trial date was approaching, the court resolved the question. The court held that the actual malice standard of liability should be applied in defamation actions brought by private persons against the media when the subject matter of the alleged defamatory statement is of legitimate public interest. The count for negligent infliction of emotional distress was then dismissed with prejudice.

Apostle v. Booth Newspapers, Inc., 577 F.Supp. 962 (W.D. Mich. 1984) [ELR 6:10:19]

NEW LEGISLATION AND REGULATIONS

Kentucky adopts statute recognizing descendibility of right of publicity

The state of Kentucky has adopted a statute which recognizes that an individual has a property right in his or her name and likeness-a right which is entitled to protection from commercial exploitation. Thus, while the traditional right of privacy terminates upon the death of the person asserting the right, the statute declares that the right of publicity "which is a right of protection from appropriation of some element of an individual's personality for commercial exploitation" does not terminate upon death.

The statute also states that the name or likeness of a person who is a public figure shall not be used for commercial profit for a period of fifty years from the date of his or her death without the written consent of the executor or administrator of the deceased's estate.

Chapter 263 of the Acts of the 1984 Kentucky General Assembly [ELR 6:10:19]

IN THE NEWS

Federal District Court grants summary judgment to attorney representing musical group Boston in CBS's breach of contract action

A Federal District Court in New York has granted attorney Donald Engel's motion for summary judgment in a $20 million breach of contract action brought by CBS, Inc. against the musical group Boston, Tom Scholz (the leader of the group), Engel, and Jeff Dorenfeld (Boston's manager).

CBS, in October 1983, filed a lawsuit claiming that Boston breached its 1976 recording contract with CBS Records by failing to deliver the third album due under that contract. Boston responded that CBS had wrongfully withheld about $4,000,000 in royalties. In August 1984, Scholz entered into a recording contract with MCA Records. Scholz and Boston were represented by Engel in settlement discussions with CBS, in the contract negotiations with MCA, and in the CBS litigation. When Scholz signed with MCA, CBS charged that Engel had encouraged the artist to breach his contract and allegedly "orchestrated" the threatened conversion of master recordings (a conversion which, admittedly, has not occurred).

In announcing his decision, Judge Vincent L. Broderick called CBS's action against Engel "an absolutely outrageous and frightening suggestion that an attorney who represents a client in litigation or in negotiation is at risk for actions he takes in the course of the representation of that client" Judge Broderick stated that his outrage at CBS's suggestion that an attorney can be "effectively immobilized" from representing a client by naming him as a defendant, prompted the court to consider awarding attorneys' fees (which Engel had not requested) against CBS for making the motion necessary. Also dismissed was the breach of contract claim against Dorenfeld.

Mr. Engel, a member of the Advisory Editorial Board of the Entertainment Law Reporter, has stated that he plans to sue CBS for malicious prosecution. [Mar. 1985] [ELR 6:10:20]

General Westmoreland withdraws libel suit against CBS

General William C. Westmoreland has withdrawn his $120 million lawsuit against CBS. Westmoreland had charged that CBS libeled him in a January 1982 documentary entitled "The Uncounted Enemy: A Vietnam Deception." The documentary contended that Westmoreland, for political reasons, suppressed evidence of enemy force levels in Vietnam during the months preceding the critical Tet offensive.

The withdrawal of the lawsuit occurred after eighteen weeks of testimony, and it was likely that the jury would have been asked to consider the dispute shortly. It has been reported that the agreement between Westmoreland and CBS ending the lawsuit did not involve either a payment to Westmoreland from CBS or a retraction by the network. But CBS apparently will not sue Westmoreland to recover court costs estimated to range up to several million dollars. And in a statement concerning the withdrawal of the action, CBS did declare its respect for "General Westmoreland's long and faithful service to his country and [that CBS] never intended to assert and does not believe that General Westmoreland was unpatriotic or disloyal in performing his duties as he saw them." [Mar. 1985] [ELR 6:10:20]

Jury award of $100,000 to actress Vanessa Redgrave in lawsuit against Boston Symphony Orchestra is set aside by Federal District Court judge

A Federal District Court judge has set aside a $100,000 jury award to actress Vanessa Redgrave in her breach of contract and civil rights action against the Boston Symphony Orchestra. Redgrave had sued the orchestra for over $1,000,000 for canceling her scheduled appearance in 1982 as the narrator of Stravinsky's "Oedipus Rex" The jury, while rejecting Redgrave's claim that the orchestra blacklisted her because of her support for the Palestinian Liberation Organization, did award Redgrave $127,500-which was the $27,500 originally called for in her contract with the orchestra, plus $100,000 for harm to her professional career (ELR 6:7:21).

Judge Robert Keeton agreed that Redgrave's civil rights were not violated and that the orchestra had breached the actress' contra ct by firing her. But Redgrave's claim of harm to her professional career was determined to be "without merit" The award of $27,500 was sufficient to compensate Redgrave, stated the court. Redgrave also was ordered to pay the orchestra's court costs. [Mar. 1985] [ELR 6:10:20]

MPAA obtains injunction barring the unauthorized exhibition of videocassettes by Wisconsin correctional facility

The Motion Picture Association of America has been granted a permanent injunction which restrains the Wisconsin Department of Health and Social Services and the state's Waupun Correctional Institute from the unauthorized showing of videocassettes of copyrighted films to inmates. The MPAA, in its suit for copyright infringement (see ELR 5:5:18) claimed that the correctional facility was renting as many as ten videocassettes a week from a local retailer. Prior to obtaining VCR equipment in 1982, the facility had obtained licenses for its "public" performances of copyrighted films. [Mar. 1985] [ELR 6:10:20]

Federal District Court reduces jury verdict in NBC News' action against Lyndon H. LaRouche, Jr.

A Federal District Court judge in Virginia has upheld a jury's verdict that Lyndon H. LaRouche, Jr. interfered with the news-gathering activates of NBC News (ELR 6:7:21). However, the court reduced the judgment against LaRouche on NBC's counterclaim from $3,002,000 to $200,000.

LaRouche has sued NBC, unsuccessfully, for libel in connection with two broadcasts which described him as the head of a "political cult." Judge James C. Cacheris ruled that $3,000,000 in punitive damages was too high in rela tion to the jury's award of $2,000 for actual damages suffered by NBC. [Mar. 1985] [ELR 6:10:21]

Four record companies recover $25,000 in statutory damages for unauthorized importation of compact discs

CBS Inc., A&M Records, Warner Bros. Records and Geffen Records have been awarded $25,000 in statutory damages against Citidisc, Inc. and its president Louis Podover for the importation and distribution of compact discs without the authorization of the copyright owners. Parallel imports are records lawfully manufactured outside the United States but imported into America without the authority of the United States copyright holder.

Citidisc and Podover admitted that their importing activities infringed copyrighted sound recordings by artists such as Michael Jackson, Journey, Herb Alpert, Asia and Chicago. A Federal District Court in New York also enjoined Citidisc and Podover from further distributing, importing or selling imports of compact discs or other records without the proper authorization. [Mar. 1985] [ELR 6:10:21]

Jury rejects E. Howard Hunt's libel claim against conservative publication

A Federal District Court jury has rejected "Watergate conspirator" E. Howard Hunt's libel claim against The Spotlight, a weekly conservative publication operated by the Liberty Lobby in Washington, D.C.

Hunt had been awarded $650,000 when the case first went to a jury in December 1981, but that verdict was overturned on appeal, and a new trial was ordered because of "flaws" in the judge's instructions to the jury.

In the second trial, Hunt sought $500,000 in compensatory damages and $500,000 in punitive damages, claiming that an August 14, 1978 article entitled "CIA to Nail Hunt in Kennedy Killing" linked him to the assassination of President John F. Kennedy. It appeared that the jury concluded that the organization did not act with malice in publishing the article. [Mar. 1985] [ELR 6:10:21]

Movie theater admissions tax is ruled unconstitutional by California trial court

A Contra Costa County Superior Court has declared unconstitutional, as a denial of First Amendment rights, a five percent motion picture theater admission tax levied by the city of Pleasant Hill. The court enjoined the city from enforcing or collecting the admission tax and ordered the city to pay $23,000 in legal fees plus court costs to Festival Enterprises and the Syufy circuit, operators of two Pleasant Hill motion picture theater complexes. [Mar. 1985] [ELR 6:10:21]

DEPARTMENTS

Book Note:

Communications Law 1984 by James C. Goodale (Editor)

Every year, the Practicing Law Institute conducts a seminar on developments in Communications Law and publishes a course handbook for distribution to those enrolled in the program. In connection with last year's program, held in November of 1984, program chairman James C. Goodale assembled a massive two-volume set of materials that is now available to those who were unable to attend in person.

The volumes, which total almost 1,900 pages, address virtually every topic of interest to those who represent broadcasters and publishers. The contents include newsrack regulations, press access to judicial proceedings, privacy and publicity cases, libel, SEC enforcement actions against publishers, advertising and commercial speech, FCC regulation, reporters' privilege, and anti-trust issues.

The two-volume set, entitled "Communications Law 1984." is available directly from the Practicing Law Institute, 810 Seventh Ave., New York, N.Y. 10019; phone (212) 765-5700. The price is $35, and the order number is G4-3754. [ELR 6:10:22

In the Law Reviews:

Advertising and the FTC: How Much Can You "Puff" Until You're Legally Out of Breath? by Susan E. Grady and Michael B. Feinman, 36 Administrative Law Review 399 (1984) (published by A.B.A.-Circulation Dept., 750 N. Lake Shore Drive, Chicago, IL 60611)

The Federal Communications Law Journal, published by UCLA School of Law and the Federal Communications Bar Association, is available from UCLA School of Law, 405 North Hilgard Ave., Los Angeles, CA 90024 and contains the following articles:

Cable Television Franchising and the Antitrust Laws: A Preliminary Analysis of Substantive Standards by Michael Botein, 36 Federal Communications Law Journal 253 (1984)

Expediting FM Service Improvements When License Modification Hearings Are Required by Michael A. McGregor, 36 Federal Communications Law Journal 283 (1984)

To Defer or Not to Defer: The Question for the D.C. Circuit in Reviewing FCC Decision by Karen L.

Boudreau, 36 Federal Communications Law Journal 293 (1984)

Cable Franchising and the First Amendment: Does the Franchising Process Contravene First Amendment Rights? by William Owen Knox, 36 Federal Communications Law Journal 317 (1984)

Protecting Research: Copyright, Common-law Alternatives and Federal Preemption by David E. Shipley and Jeffrey S. Hay, 63 North Carolina Law Review 125 (1984)

Summary Judgment and the Actual Malice Controversy in Constitutional Defamation Cases by Martin B. Louis, 57 Southern California Law Review 707 (1984)

Video Wars: The Betamax Decision, 11 Western State University Law Review 261 (1984)

The Right of Publicity Survives in California: California Civil Code Section 990 by Evie K. Rubin, 12 Western State University Law Review 299 (1984)

Liability for Injured Baseball Spectators Under Rudnick v. Golden West Broadcasters: Still Playing the Same Old Game? by Kevin G. Musulas, 12 Western State University Law Review 345 (1984)

Indecency on the Cable: Can It Be Regulated? by Robert E. Riggs, 26 Arizona Law Review 269 (1984)

The Right of Publicity: Dispelling Survivability, Preemption and First Amendment Myths Threatening to Eviscerate a Recognized State Right by Michael J.

McLane, 20 California Western Law Review 415 (1984)

Uston v. Resorts International Hotel: An Unwarranted Intrusion on the Common Law Right of Exclusion by Marc S. Schechter, 20 California Western Law Review 511 (1984)

The New York Artists' Authorship Rights Act: Increased Protection and Enhanced Status for Visual Artists, 70 Cornell Law Review 158 (1984)

Challenging the Exclusion of Libel and Slander from Survival Statutes by Luke DeGrand, 2 University of Illinois Law Review 423 (1984)

The ABA Forum Committee on the Entertainment and Sports Industries has published Volume 3, Number 2 of

The Entertainment and Sports Lawyer. It is available from the American Bar Association, 750 N. Lake Shore Drive, Chicago, IL 60611 and contains the following articles:

Syndication of a Sports Team by Gerald M. Penner, 3/2 The Entertainment and Sports Lawyer 1 (1984)

"It's Not Over Till It's Over" by Michael Powers, 3/2 The Entertainment and Sports Lawyer 3 (1984)

Unreported Decisions and Other Developments edited by Richard L. Feller, 3/2 The Entertainment and Sports Lawyer 7 (1984)
[ELR 6:10:23]