BUSINESS AFFAIRS

Recording Artist Royalty Calculations: Why Gold Records Don't Always Yield Fortunes

by Lionel S. Sobel

Every industry has a bench mark for success. In the record business, that bench mark is the "Gold Record" Awarded by the Recording Industry Association of America to albums that sell 500,000 copies, Gold Records mean fame and fortune for their artists. Or do they?

The answer (like the answer to so many questions in the entertainment business) is "yes".. and "no." Yes, a Gold Record means fame. But does it always mean fortune? The answer to this question - at least insofar as

recording artists are concerned - may be "no." And the explanation for this apparent anomaly has nothing to do with "creative," unethical or fraudulent accounting practices on the part of record companies. The explanation is found in the royalty provisions of recording contracts, many of which are "customary" in the industry.

What follows is an explanation for how a recording artist may be entitled to as little as $7.36 - or even less - in royalties, though his or her first album ships "gold."

The following explanation requires some introductory caveats. First, the hypothetical on which this explanation is based is just that - a hypothetical. Like all good law school problems, the facts of the "hypo" are intended to be realistic. But they are not the facts of any actual case, and (admittedly) they have been selected to illustrate certain points clearly (and even dramatically). Second, the hypo includes - among its assumed facts - several contract provisions, all of which have a critical bearing

on the outcome of royalty calculations. These provisions are taken from one widely circulated record contract form. It is the sample contract that was appended to an article written by Jay Cooper (of Cooper, Epstein & Hurewitz in Beverly Hills) entitled "Recording Contract Negotiation: A Perspective," 1 Loyola Entertainment Law Journal 43 (1981), reprinted, 2A Lindey on Entertainment, Publishing and the Arts 1484 (2d ed. 1984). The contract is only a "sample," however. There is no industry-wide "standard" contract, and the provisions on which this article is based do not appear in all record company contracts. Furthermore, even contracts that contain the following provisions are printed on paper; they are not carved in stone. In other words, everything is negotiable. The outcome of negotiations over these provisions, or any others, depends on how badly the artist wants the deal as compared to how badly the record company wants it. As always, relative "clout" (as well

as negotiator skin) will determine the exact language of any
record contract's royalty provisions.

The Hypothetical

Here is the hypothetical. Ann Artiste signed her firstever record contract early last year with XYZ Records, and received a $7,500 non-returnable but "fully recoupable" advance against royalties when she did so. Artiste recorded her first album last summer and was thrilled when it shipped "gold" When she received her first royalty statement, however, that thrill turned to bitterness, for the statement showed that all she was owed was $7.36. A check for that amount was enclosed. Unfortunately, it did not cover some purchases Artiste had charged with her credit card, in anticipation of six-figure royalties she thought certain she would be receiving.

The royalty statement indicated that of the 500,000 albums that were shipped, half of them were regular single-disc records packaged in two-paneled jackets, and the other half were cassette tapes. The statement also showed that 6,000 of the 500,000 albums (3,000 records and 3,000 tapes) were given away free to radio stations, critics, and movie producers. The balance were shipped to record stores and distributors, 3 marked "free" with every 10 that were billed. XYZ's suggested retail price is $8.98 for both records and tapes. The album has 12 songs on it. Artiste does not write music, so all 12 songs were composed by other people. The recording costs for the album were $88,400. The statement showed that XYZ held a reserve of $30,000 for possible returns.

Artiste's contract with XYZ provides that she is to receive a royalty of 8% of the suggested retail list price of albums for the first 150,000 "units" sold, and 9% for

units sold in excess of 150,000. These royalty rates apply, however, only to albums sold in disc form, because the contract also specifies that the royalty rate for "records ... sold in tape form" shall be 50% of the "otherwise applicable rate." Thus, Artiste's royalty rate for cassette versions of her album is only 4% increasing to 4 1/2%.

The contract further provides that royalties are not payable at all with respect to records given away to "disc jockeys, radio and television stations, motion picture companies, distributors, sub-distributors, dealers, consumers, employees, publishers, reviewers, critics or others." Moreover, the contract provides that royalties will be paid only on 90% of those records actually sold.

The contract also authorizes a number of deductions. Advances and recording costs are deductible from royalties. XYZ also is authorized to deduct a "packaging charge" of 10% of the suggested retail price of records

sold in twopaneled jacket disc form and 20% of the retail price of records sold in tape form. The contract further provides that "...the combined mechanical license rates [payable by XYZ to music publishers] for all selections embodied in an LP shall not exceed the then current minimum statutory mechanical license fee rate multiplied by ten (10) for each LP sold at XYZ's invoiced price...." The agreement then provides that "Artist agrees to indemnity and hold XYZ harmless from [mechanical license] rates in excess of the applicable amounts specified..."; and "If XYZ pays any such excess, such payments shall be a direct debt from Artist to XYZ which ... XYZ may recover from royalties or any other payments to be made to Artist."

Finally, the contract provides that "In computing the number of records sold, XYZ shall have the right to deduct retums and credits of any nature and to withhold reasonable reserves therefor from payments otherwise

due Artist," though "Such reserves which are withheld by XYZ shall not exceed fifty percent (50%) of payments otherwise due Artist in connection with such records...."

Royalty Calculations

Here is how Artiste's royalties were calculated by XYZ. First, XYZ calculated the number of albums on which Artiste was entitled to receive royalties.

500,000	discs & tapes shipped
- 6,000	discs & tapes given free to D.J.'s, critics and producers
494,000	shipped, 3 free with every 10
x 10/13	to determine number actually sold
380,000	sold (190,000 discs; 190,000 tapes)
x 90%	to calculate number of which royalties

	are payable
342,000	on which royalties payable
	(171,000 discs; 171,000 tapes)

Next, XYZ calculated the gross royalties earned. This had to be done separately for discs and tapes, because the royalty rates and packaging deductions differ.

Disc Royalties:

$ 8.980	suggested retail price
- 0.898	packaging deduction of 10%
$ 8.082	on which royalties are payable
x 8%	royalty rate for first 75,000 discs sold
$0.64656	royalty per disc sold (at 8% rate)

$ 8.082	on which royalties are payable
x 9%	royalty rate for discs sold
	in excess of 75,000

$0.72738 royalty per disc sold (at 9% rate)
$0.64656 x 75,000 = $48,492.00 (at 8% rate)
$0.72738 x 96,000 = $69,828.48 (at 9% rate)

$ 48,492.00
+ 69,828.48
$118,320.48 total disc royalties

Tape Royalties:

$ 8.980	suggested retail price
- 1.796	packaging deduction of 20%
$7.184	on which royalties are payable
x 4%	royalty rate for first 75,000 tapes sold
$0.28736	royalty per tape sold (at 4% rate)

$ 7.184	on which royalties are payable
x 4.5%	royalty rate for tapes sold in excess of

75,000 (=96,000)
$0.32328 royalty per tape sold (at 4.5% rate)

$0.28736 x 75,000 = $ 21,552.00 (at 4% rate)
$0.32328 x 96,000 = $ 31,034.88 (at 4.5% rate)

$ 21,552.00
+ 31,034.88
$ 52,586.88 total tape royalties

$118,320.48 disc royalties
+ 52,586.88 tape royalties
$170,907.36 total royalties

Deductions

Next, XYZ calculated the deductions it was permitted to take from the total royalties Artiste's album had

earned. The easiest deductions to determine were the $7,500 recoupable advance Artiste was paid at the time she signed her recording contract, and the $88,400 in recording costs that XYZ paid in connection with the production of the masters of the 12 songs that are on her album. These amounts were deductible in full. XYZ also was entitled to deduct "excess" mechanical license fees and a reserve for possible retums. The calculation of these amounts, however, requires some interpretation of less than perfectly clear contract language. Here is how XYZ did it.

Insofar as excess mechanicals are concerned, XYZ's contract with Artiste provided that XYZ would have to pity no more than 10 times the statutory mechanical license fee, and that any excess could be deducted from Artiste's royalties. Artiste's album had 12 selections on it. Since all 12 were written by someone other than Artiste, XYZ in fact had to pay mechanical license fees

for twelve songs, per album. Moreover, under section 115 of the Copyright Act, statutory mechanical license fees are "payable for every phonorecord made and distributed in accordance with the license" - including records that are given away free. The current statutory mechanical license fee is 4.5 cents per song, per record. This means that XYZ had to pay mechanical license fees for two "excess" songs per album, at the rate of 4.5 cents per song per album, on a total of 500,000 albums, which came to a total of $45,000 in excess mechanicals (4.5 cents per song x 2 songs per album x 500,000 albums distributed = $45,000).

Insofar as the reserve for returns was concerned XYZ was entitled to withhold as much as 50% of the amount that would "otherwise" be due Artiste. In this case, XYZ withheld $30,000, concluding that $30,000 was far less than 50% of the $170,907.36 in royalties that "otherwise" would have been due to Artiste, had XYZ not

been entitled to deductions for advances, recording costs, and excess mechanicals. XYZ thus totaled its deductions as follows:

Amount	Item
$ 7,500.00	advance to Artiste
+ 88,400.00	recording costs
+ 45,000.00	excess mechanicals
+ 30,000.00	reserve for returns
$ 70,900.00	total deductions

From here, it was a simple matter to calculate the royalty actually payable to Artiste.

Amount	Item
$ 170,907.36	total royalties
- 170,900.00	total deductions
$ 7.36	royalty payable

Of course, Artiste has not really done as badly as it appears at first. She did receive $7,500 in royalties in advance. And the $30,000 reserve for retums is only thata reserve. Her recording contract provides that the reserve must be "liquidated" by XYZ within two accounting periods following the period for which the reserve was withheld. Since the contract also provides that XYZ will render accountings twice a year, XYZ will have to pay Artiste the $30,000 in one year, assuming there are no retums.

Alternative Interpretation of Reserves

Moreover it is possible that in withholding $30,000 as a reserve for retums, XYZ actually withheld more than it was contractually entitled to withhold. XYZ interpreted an ambiguous contract provision in its favor. An

alternative interpretation would have entitled Artiste to almost $15,000 in additional royalties, immediately.

Here, word-for-word, is the ambiguous provision: "In computing the number of records sold, XYZ shall have the right to deduct retums and credits of any nature and to withhold reasonable reserves therefor from payments otherwise due Artist. Such reserves which are withheld by XYZ shall not exceed fifty percent (50%) of payments otherwise due Artist in connection with such records."

Note that the provision does not indicate whether the payments that would "otherwise" be due are the full amount of royalties earned, before deductions are taken for advances, recording costs, and excess mechanicals; or whether the amount "otherwise" due is the amount that would have been paid, after such deductions are taken. If XYZ had interpreted the provision in the second manner, the calculation would have looked like this:

$170,907.36	total royalties earned
- 7,500.00	advance
- 88,400.00	recording costs
- 45,000.00	excess mechanicals
$ 30,007.36	royalties "otherwise" payable
x 50%	maximum amount of reserve
$ 15,003.68	amount actually payable to Artiste

There is a third possible interpretation of the reserve provision as well. Since the provision begins with the phrase, "In computing the number of records sold," it appears as though the reserve could reduce (by a "reasonable" number) the number of records sold, with the dollar amount of the reserve then being limited to 50% of the payments "otherwise" due in connection with "such records," meaning in connection with the

reasonable number of records reserved. Although this interpretation complies most closely with the literal language of the provision, it is unlikely that either Artiste or XYZ Records would have intended this interpretation. From Artiste's point of view, the difficulty with this interpretation is that it imposes no numerical limit on the "reasonable" number of records held in reserve, thus making illusory the 50% limit on the dollar amount of the reserve. From XYZ's point of view, this interpretation allows XYZ to withhold only half the royalties that would be payable on a "reasonable" number of records that may actually be returned, though no royalties at all are payable in connection with records that are in fact returned.

Thus, insofar as the reserve provision is concerned, the dispute between Artiste and XYZ would be whether Artiste was entitled to $7.36 in royalties or $15,003.68. Even if her $7,500.00 advance is kept in mind, neither

amount approaches the popular conception of the wealth to be attained by recording a "Gold Record."

Moreover, it is possible that while XYZ interpreted the reserve provision in its own favor, XYZ may have interpreted the equally ambiguous "excess mechanicals" provisions in Artiste's favor. If so, Artiste would not have been entitled to any royalties at all with her first statement, even if the reserve provision were re-interpreted in her favor.

Alternative Excess Mechanicals Interpretation

Here again is the excess mechanicals provision: "It is agreed that the combined mechanical license rates for all selections embodied in an LP shall not exceed the then current minimum statutory mechanical license fee rate multiplied by ten (10) for each LP sold at XYZ's invoiced price and not returned.... Artist agrees to

indemnity and hold XYZ harmless from rates in excess of the applicable amounts specified ... above. If XYZ pays any such excess, such payments shall be a direct debt from Artist to XYZ which, in addition to any other remedies available, XYZ may recover from royalties or any other payments to be made to Artist."

This provision is ambiguous in at least a couple of ways. First, it uses the word "rates" as though it were interchangeable with "fees." When used in connection with mechanical licenses, the word "rates" means pennies-per-record. Thus, at first blush, the quoted provision appears to say that XYZ agrees to pay only the number of pennies-per-record specified by copyright law for compulsory mechanical licenses. It is apparent, however, that the provision really specifies the total mechanical fees XYZ agrees to pay, rather than the pennies-per-record rate. This is so, because the provision says that the rate shall be multiplied by 10 per

album, and because it limits the fees XYZ agrees to pay to albums "sold at XYZ's invoiced price."

However, under the Copyright Act, mechanical license fees are payable on all records "distributed" (including those given away free to anyone) - not merely on those "sold at XYZ's invoiced price" Since Artiste did not write any of the songs on her album, she is legally incapable of agreeing that XYZ shall pay mechanical royalties only on those records which it "sold." As a result, XYZ will have to pay royalties for all 12 songs on Artiste's album, for all 500,000 albums distributed. And, had XYZ chosen to do so, it could have recovered from Artiste's royalties all of the mechanicals XYZ paid in excess of those on 10 songs per album for the 380,000 albums that were actually "sold." The arithmetic would look like this.

Mechanicals actually paid:

500,000	albums distributed
x 12	songs/album
x 4.5	cents/song
$270,000	mechanical royalties actually paid

Mechanicals XYZ agreed to pay:

380,000	albums sold at invoiced price
x 10	per album
x 4.5	cents/song
$171,000	mechanical XYZ agreed to pay

Excess mechanicals XYZ may recover from Artiste's record royalties:

$270,000
- 171,000
$ 99,000

If XYZ had deducted the full $99,000 in excess mechanicals which the contract appears to authorize, Artiste's first royalty statement on her "gold record" would have shown that she was still $53,992.64 in the hole, assuming a $30,000 reserve; or $23,992.64 in the hole, assuming no reserve whatsoever.

Negotiable Modifications

This is not meant to suggest that "gold records" never produce substantial royalties. In fact, even in this hypothetical, Artiste's royalties would have been dramatically more significant, had five small changes been negotiated in her contract with XYZ.

First, when pre-recorded tapes were a new item, they were usually manufactured and distributed by independent companies that obtained master recording licenses

from record companies-not by record companies themselves. This is why, customarily, tape royalty rates were only 50% to 75% of disc rates. Today, however, record companies manufacture and distribute their own tapes, so that a reduced royalty rate for tapes is no longer cost-justified. Thus, assume that in the hypothetical, Artiste's royalty rate had been 8% (escalating to 9% after 150,000 albums) for discs and tapes alike.

Second, when tapes were new and relatively few were sold, the cost of tape packaging did exceed the cost of disc packaging. And that is why, customarily, the packaging deduction for tapes was (and still is) greater than for discs. Today, however, tape sales equal (and in some cases exceed) disc sales, and tape packaging costs have dropped. Indeed, the manufacturing cost of a disc and conventional album cover is somewhat greater than the cost of a tape cassette and box. Thus, a greater packaging deduction for tapes than for discs is no longer

justified by record company costs. Assume that in the hypothetical, Artiste's packaging deduction was a straight 10% for discs and tapes alike.

Third, customarily, record companies paid royalties on 90% (rather than 100%) of records sold, because records used to be brittle and broke in shipment. Since record stores did not pay for broken records, record companies did not want to pay royalties for them either. A 10% breakage factor became customary between record companies on the one hand and stores and recording artists on the other. Today, however, records do not break in shipment. And some record companies do pay royalties on 100% of all records "sold" Assume that XYZ had agreed to pay Artiste on 100% of her albums sold.

Fourth, assume that in the "excess mechanicals" provision of Artiste's contract, XYZ agreed to pay mechanicals on all albums "distributed" (rather than only on

albums "sold"). And assume further that Artiste herself had given some thought to this provision while planning her album, and thus had recorded 10 songs for it, rather than 12.

Fifth, Artiste's contract did not limit the number of albums XYZ could give away free, even to stores. Customarily, record companies have shipped 3 free singles with every 10 sold, but only 2 free albums with every 10 sold. (Some record companies have eliminated free goods entirely.) Thus, in Artiste's case, XYZ gave away more free albums than was customary. Assume that in order to avoid this sort of thing, a sentence had been added to Artiste's contract expressly limiting XYZ's "free goods" royalty reduction to the customary "2 on 10"

New Calculation

If these five changes had been made, Artiste's royalty calculation would have looked like this.

Royalties earned:

500,000	albums shipped
- 6,000	given away free to radio stations, etc.
494,000	shipped to stores, 2 free with 10
x 10/12	to calculate the number "sold"
411,666	sold and on which royalties payable
$ 8.980	suggested retail price
- 10%	packaging deduction
$ 8.082	on which royalties payable
x 8%	royalty on 1st 150,000 albums sold
xl50,000	albums
$ 96,984	royalties on 1st 150,000
$ 8.082	on which royalties payable
x 9%	royalty on albums in excess of 150,000

x261,666	albums in excess of 150,000
$190,330	royalties on albums in excess of 150,000
$ 96,948	royalties on 150,000 albums
190,330	royalties on albums in excess of 150,000
$ 287,314	total royalties

Deductions:

$ 88,400	recording costs
+ 7,500	advance
+ 0	excess mechanicals
+ 30,000	reserve for returns
$125,900	total deductions

Royalties payable to Artiste:

$ 287,314	royalties earned
- 125,900	deductions
$ 161,414	royalties payable

In this example, XYZ is contractually justified in withholding $30,000 in reserves no matter how the amount "otherwise payable" is calculated. If it is calculated by first subtracting all allowable deductions, the amount otherwise payable would be $161,381; and $30,000 is far less than 50% of that figure.

Thus, by virtue of five small changes, Artiste's royalties leap from a mere $7.36 to $161,414 - a serious, spendable amount, by almost anyone's standards.

Lionel Sobel is editor of the Entertainment Law Reporter and a professor at Loyola Law School in Los Angeles.

[ELR 6:12:3]

RECENT CASES

Warren Beatty obtains arbitration order barring ABC from telecasting networkedited version of film "Reds"

Arbitrator Edward Mosk has ordered ABC not to proceed with a scheduled two-part telecast of the motion picture "Reds," except in the version and at the length which the film was released theatrically in the United States. While ABC was entitled to delete about 30 to 33 seconds for broadcast standard cuts and about 48 seconds of blank leader - cuts to which Warren Beatty, the producer, director and star of the film did not object - ABC's plan to cut about six minutes and 25 seconds from the film for time format purposes was found to violate Beatty's contractual right of final cut on the film.

After an expedited hearing before the Producers Arbitration Tribunal of the Directors Guild of America, Mr. Mosk issued a 29-page opinion in which he first reviewed the relevant portions of the various production financing and licensing agreements for Reds, including the April 1979 agreement between JRS Productions, Inc. (a loanout corporation for Beatty) and Paramount Pictures Corporation. This agreement provided that JRS would have the "final cut" of the film with respect to "its worldwide exhibition"; that Beatty would undertake to make any changes necessary to meet television network continuity broadcast standards; and that Paramount would use its best efforts to obtain the exhibition of the film on television without any reduction in length from the version delivered to the company by JRS. Paramount released "Reds" theatrically in 1981.

The network television rights to "Reds" were licensed by Paramount to ABC, by an agreement dated July 15,

1982, for a license fee of $6.5 million covering three network broadcasts over a period of four and one-half years. The license agreement, in addition to providing that the film would be edited to conform to ABC's broadcast standards and practices policies, also granted ABC the right to edit the film "for purposes of time segment requirements...." In his decision, Mr. Mosk pointed out that during the television licensing negotiations, Beatty expressed his concern to Paramount that the network television showing of "Reds" would occasion changes in the film which Beatty was likely to find objectionable. Subsequently, in connection with a Paramount-Beatty negotiation on a separate project, Barry Diller, the Chief Executive Officer of Paramount, purportedly orally agreed that in the event that Beatty was not satisfied with the version of "Reds" which ABC planned to present, Paramount would re-acquire the television rights from ABC. Beatty continued to voice

concern over time segment cuts as the air date of "Reds" approached, and ultimately brought his complaint to the attention of the Guild tribunal.

In turning to the legal issues raised by the parties, Mr. Mosk initially found that the April 1979 agreement did indeed give Beatty final cutting rights on "Reds," including "the right to prevent Paramount from allowing a television network to abridge the picture for any reason other than censorship reasons." Thus, when Paramount granted ABC the right to edit for time cuts, the company "exceeded the rights granted to it by Beatty," and thus the grant was invalid. Paramount's claim that the company maintained an "unwavering policy" never to enter into an agreement which would restrict its right to make a network television deal was not supported by the evidence, declared Mr. Mosk.

Mr. Mosk then found that there was sufficient evidence to establish the existence of a valid and binding

repurchase agreement whereby Paramount would be obligated to "buy back" the network television rights from ABC if the parties could not reach any other satisfactory arrangement as to the airing of "Reds." The consideration provided by Beatty for this agreement - certain assurances as to his conduct in connection with a "Dick Tracy" film project - was adequate and of continued benefit to Paramount, noted Mr. Mosk.

Mr. Mosk declined to consider the quality of ABC's editing of "Reds," and even refused to view the theatrical and ABC-cut versions of the film. He also rejected ABC's laches agreement; declared that he possessed jurisdiction over the parties pursuant to the applicable collective bargaining agreements, which make cutting rights under personal service contracts arbitrable; and stated that ABC was subject to the jurisdiction of the arbitration proceeding even if the company was "wearing its exhibitor's hat rather than its producer's hat." Mr.

Mosk pointed out that in the licensing agreement with Paramount, ABC had agreed to comply with the applicable provisions of the collective bargaining agreement between the Directors Guild and the Association of Motion Picture and Television Producers - the agreement that includes the arbitration provision.

Paramount contended that according to the collective bargaining agreement between the Guild and the Alliance, the agreement to which Paramount was a signatory, Mr. Mosk did not have "the power to delay or prevent the exhibition of any motion picture under commitments existing on the date of the filing of the grievance." However, even assuming that ABC, a nonsignatory, was entitled to the benefit of this constraint, Mr. Mosk observed that ABC was planning to exhibit an abridged film, without a license to do so. Hence, "an injunction against the broadcast or exhibition of an abridgement would not be an injunction against the

exhibition of the motion picture for which commitments existed as of the date of the filing," i.e., the unabridged "Reds," stated Mosk. Accordingly, Mr. Mosk, citing Gilliam v. American Broadcasting Companies, Inc., 538 F.2d 14 (2d Cir. 1976), known as the "Monty Python" case, ordered ABC not to telecast its time-cut version of Reds; and Paramount was ordered to offer to ABC the opportunity to cancel its network television exhibition license.

As a result of the arbitration decision, ABC chose not to broadcast "Reds," rather than restore the time-cut material. Also, two days after the issuance of the order, the Directors Guild announced the appointment of Warren Beatty to the Guild's Creative Rights Committee. The Directors Guild also announced that in its next round of negotiations with producers, it will seek to achieve for all directors of feature films the right to have their films exhibited on television in the same version as released

theatrically, allowing cuts only for network standards and practices.

In the Matter of the Arbitration between Directors Guild of America, Inc., Warren Beatty and JRS Productions, Inc., and Paramount Pictures Corporation and American Broadcasting Companies, Inc., Case No. 0173 8 (April 15, 1985) [ELR 6:12:8]

John Belushi's widow is denied temporary restraining order barring the distribution of the book "Wired" despite "likelihood of success" on photo copyright infringement claim

Judith Jacklin Belushi was not entitled to a temporary restraining order barring the distribution of the book Wired: The Short Life & Fast Times of John Belushi, a

Federal District Court has ruled. Belushi, the widow of the book's subject, claimed that Bob Woodward, the author of Wired, and publisher Simon & Schuster infringed her copyrighted photograph entitled "John and Nena." The request for injunctive relief concerned the as-yet undistributed 30,000 copies of the first printing of the book which remained in the control of Simon & Schuster after about 145,000 copies of the book already had been distributed to bookstores.

The court noted that while Belushi had demonstrated a likelihood of success on the merits of her infringement claim, the remaining criteria for injunctive relief were not met. Belushi did not show that the alleged infringement would cause irreparable injury. Furthermore, the disruption of the publisher's "carefully orchestrated and costly plans" for marketing the book might result in the loss of substantial sales. The harm to Woodward and Simon & Schuster therefore far outweighed any hardship

to Belushi. The court also observed that Belushi, at the time, did not have a book on the market competing with Wired, and that legal remedies might adequately compensate for any infringement. The public interest in promoting "free expression and robust debate" was an additional consideration in the court's denial of the motion for the temporary restraining order.

Belushi v. Woodward, 598 F.Supp. 36 (D.D.C. 1984) [ELR 6:12:9]

Creator of cartoon character Ziggy is granted summary judgment in copyright infringement action by author of books featuring another Ziggy, due to lack of access and substantial similarity

The Ziggy cartoon character, for all his woes, did not infringe author Thomas Pelligrino's copyrighted works "Gobble-Glunk of Whipple Gulch" and "Ziggy Meets the Mystical Children from Dreamland," a Federal District Court in South Dakota has ruled.

Pelligrino's books, which recounted adventures as whimsical as their titles, were copyrighted in 1969 and in 1973, respectively. One of the characters in the Gobble-Glunk book was a little boy named Ziggy; but neither Pelligrino book contained a drawing of the lad.

Tom Wilson claimed that he created the Ziggy character prior to 1965. A booklet copyrighted by Wilson in 1968 contained a character with no name but with the same short squat adult figure as the Ziggy of Wilson's cartoon strip, a cartoon strip which now appears in 315 newspapers.

Judge Bogue, in a Memorandum Opinion, found that Wilson did not have access to Pelligrino's works.

Pelligrino claimed that he had distributed about 10,000 copies of his books since 1969. Wilson denied seeing any of the copies, and Pelligrino did not dispute Wilson's denial or set forth any facts showing that Wilson did have access to his works.

Judge Bogue stated that the access issue would dispose of Pelligrino's action. However, the judge proceeded to discuss the issue of substantial similarity anyway. The only similarity found by the court was the use of the name Ziggy. The characters otherwise differed as to age, physical characteristics and imagined encounters. Summary judgment on behalf of Wilson and his publisher therefore was warranted on Pelligrino's copyright infringement claim, and also on his claim of fraudulent trademark and unfair competition.

Pelligrino v. American Greetings Corporation, 592 F.Supp. 459 (D.S.D. 1984) [ELR 6:12:9]

Artist's claim of copyright interest in "Strawberry Shortcake" cartoon character must go to trial, rules Federal District Court in Ohio

A Federal District Court in Ohio has preserved for a jury the sticky dispute involving the creation of the character "Strawberry Shortcake." Artist Barbi Sargent claimed that in 1977 she created original works of art entitled "Strawberry Girl" and that American Greeting Corp. infringed her copyrighted paintings and sketches by manufacturing and marketing various, and voluminous, products that display the character Strawberry Shortcake. American Greetings contended that in 1977, the company created a series of detailed line drawings of a character named Strawberry Shortcake and assigned Sargent to produce color finishes pursuant to its

instructions. Sargent purportedly agreed that the rights to the material she worked on in connection with this assignment were to belong to American Greetings.

Judge Lambros first discussed American Greetings' assertion that Sargent's artwork was not copyrightable because she presumably copied the Strawberry Shortcake character from artwork provided to her by the company, and the contribution of color finishes would not constitute copyrightable subject matter. The standard of originality necessary to support a copyright in a derivative work is set forth in the Copyright Act of 1976's definition of a derivative work as a "work consisting of editorial revisions,...or other modifications which, as a whole, represent an original work of authorship...." American Greetings described Sargent's artwork as "no more original ... than is a colored-in 'paint-by-numbers' canvas," calling the addition of color to the preexisting pencil line drawings a "trivial variation" in the works. But

the court pointed out that the color finish work of two other artists had been rejected before American Greetings approached Sargent. In all, the question of whether or not the color work was original or was a trivial variation from the drawings was a factual question for resolution by a jury, concluded Judge Lambros.

American Greetings then advanced a "work made for hire" claim as a further ground for summary judgment. Judge Lambros, citing Roth v. Pritikin (ELR 5:4:11), determined that the Copyright Act of 1909 would govern the resolution of the work made for hire issue in this action. American Greetings argued that under the Act, Sargent either was an employee, or an independent contractor who did not expressly reserve a copyright interest in the artwork. The court again chose to leave for trial such material questions of fact as the "precise nature" of the parties' business relationship and whether

the parties intended Sargent's artwork to be considered a work made for hire.

Judge Lambros approved Sargent's pursuit of pendent claims for breach of a confidential relationship and misappropriation, finding that these claims were distinct from "the exclusive rights within the general scope of copyright" as specified by section 106 of the Copyright Act of 1976 and were not preempted by the Act.

Judge Lambros concluded by issuing several rulings with respect to the various forms of relief sought by the parties, including the rejection of Sargent's effort to place American Greetings' licensing income from Strawberry Shortcake in escrow.

Sargent v. American Greetings Corp., 588 F.Supp. 912 (N.D. Ohio 1984) [ELR 6:12:9]

Damage award is upheld in copyright infringement action involving unicorn statuettes; supervisory activities of copyright owner over artisans who actually fabricated statuettes satisfied Copyright Act's "work made for hire" requirements

A Federal Court of Appeals has affirmed a District Court judgment in favor of Aldon Accessories Ltd. for $104,400 plus interest, for copyright infringement. (The court had denied a motion for a new trial by Spiegel, Inc., the alleged infringer, on the condition that Aldon agree to remit $20,000 from the jury verdict of $124,400.)

In 1980, Aldon, a wholesale seller of figurines and decorative items, filed certificates of copyright registration for a porcelain unicorn figure and for three different sizes of brass unicorn statuettes which were derived from the porcelain piece. Marketing efforts for these

items was well underway in 1980 and 1981. However, in mid-1981, Aldon learned that Spiegel was selling, via its catalog, brass unicorns which were apparently identical to Aldon's statuettes.

Spiegel argued that the trial judge erroneously instructed the jury as to the "work made for hire" classification under which Aldon had registered its products. Chief Judge Feinberg initially agreed that the statuettes, which were fabricated by artisans in Japan and Taiwan under the supervision of Aldon principal, Arthur Ginsberg, might not be considered works made for hire under the requirements of the Copyright Act of 1976. But the 1909 Copyright Act provided that "if an employer supervised and directed the work, an employer-employee relationship could be found even though the employee was not a regular or formal employee." The court declared that nothing in the 1976 Act indicated that Congress intended to disregard this aspect of the

prior law. The relevant legislative history also provided support for the view that the new Act had adopted "one of the basic principles of the present law: that in the case of works made for hire the employer is considered the author of the work." The Act did change prior work for hire law dealing with "works prepared on special order or commission."

In this case, Ginsberg actually was the "artistic creator" of the pieces, because he did much more than communicate a general concept or idea to the Japanese or Taiwanese artisans, and the jury finding of an employer/employee relationship with these artisans thus was supported by ample evidence.

The court also rejected Spiegel's challenge to the judge's instruction on the question of similarity.

Aldon Accessories Ltd. v. Spiegel, Inc., 738 F.2d 548 (2d Cir. 1984) [ELR 6:12:10]

Milwaukee Brewers' allocation of 95 percent of teams purchase price to value of player contracts is upheld

On March 8,1970, the Milwaukee Brewers Baseball Club agreed to purchase the Seattle Pilots baseball team for $10,800,000. The contract between the Brewers and the Pilots allocated $100,000 of the purchase price to equipment and supplies, $500,000 to the value of the franchise, including league membership, and $10,200,000 to the 149 player contracts. Allan Selig, one of the organizers of the Brewers, then amortized the $10.2 million player contract allocation over the players' five-year useful lives.

In 1979, the Internal Revenue Service disallowed the $10.2 million allocation, attributed zero value to the

player contracts, and assessed a deficiency against Selig in the amount of $141,000. A Federal District Court held that Selig had proved by a preponderance of the evidence that his allocation was reasonable.

In attempting to determine the value of the player contracts, the District Court chose to rely on the "club market" the market in which entire clubs are bought and sold - rather than the "player" or "free agent" market. Evidence as to this club market value included evidence of the cost of player development, appraisals of the club's roster, the amount of insurance on the roster, and the value of the club's franchise.

The government argued that $10.2 million was a disproportionate amount of the purchase price to allocate to player contracts and advocated an expert's calculation of $6 million as the value of the player contracts. The Court of Appeals has upheld the District Court, however. In doing so, the appeals court cited the

distinctiveness of the club market and the timing of the appraisals (which were conducted in 197O), among other evidence which was found sufficient to support the judgment.

Selig v. United States, 740 F.2d 572 (7th Cir. 1984) [ELR 6:12:10]

North American Soccer League must prove fact as well as amount of damages on remand because Federal Court of Appeals ruling that NFL's "cross-ownership" ban violated federal antitrust laws did not constitute a holding of antitrust injury and causation, Federal District Court rules

The courtroom battle between the North American Soccer League and the National Football League will continue, after this brief opinion. On remand from a Federal Court of Appeals ruling that the NFL's "cross-ownership" ban violated federal antitrust laws, a Federal District Court has ruled that the NASL must still prove the "issue" of damages and not merely the "measure" of damages. This was so, the District Court held, because the appellate court's ruling did not constitute a holding of antitrust injury-in-fact and causation.

The background to this decision is that in 1978 the NFL proposed to amend its constitution and by-laws to include a cross-ownership rule. The rule would have prohibited the owners of teams in the NFL from owning a team in any other major league sport. NFL owners who already owned teams in other leagues would have had to sell those teams. At one time, four NFL team owners also owned NASL teams. Fearing that it might

lose those owners, the NASL filed an antitrust action against the NFL alleging that the proposed ban constituted an unlawful conspiracy to deprive the NASL of necessary competitive resources - sports entrepreneurial know-how and capital - by eliminating a fertile source of that resource, namely, NFL team owners.

Shortly after the case was filed, the NASL won a preliminary injunction barring the NFL from adopting the rule pending trial. (ELR 1:2:5) But the NFL won at trial. (ELR 3:4:3) The Court of Appeals then reversed, holding that the NFL cross-ownership ban was an unreasonable restraint of trade in violation of federal antitrust laws because it would deprive NASL of a "significant segment" of the market for potential professional sports team owners. The appellate court remanded the case to the trial court with instructions that a permanent injunction be entered prohibiting the ban and for consideration of the NASL's claims for damages. (ELR 3:20:3) The

U.S. Supreme Court declined to hear the NFL's appeal from that decision. (ELR 4:19:3) Subsequently, the case returned to the trial court in accordance with the appellate court order.

On remand, several preliminary questions have arisen with respect to NASL's claims for damages, the most important being a dispute between the parties as to the effect, if any, of the appellate court's decision on the issues of "fact of injury" and "causation." NASL's position was that "the remand by the Second Circuit to this Court to 'consider the issue of damages' is necessarily limited to a determination of the measure of damages, rather than a re-examination of whether any injury has in fact been caused by the crossownership ban." This must be so, NASL contended, because "the Court of Appeals has already found antitrust liabiltiy under Section 4 of the Clayton Act - a determination which includes, as an

indispensable element, a judicial finding of fact of injury and causation."

In response, the NFL contended that nothing in the appellate court's decision "excludes consideration of whether any damages have in fact been sustained," in that "until the NASL proves the fact of antitrust injury, there could be nothing whatever to measure."

In rejecting NASL's position, Federal District Court Judge Haight first noted that he previously had held "that section 1 of the Sherman Act ... did not apply because the NFL is a single economic entity that cannot combine or conspire with itself." This being so, Judge Haight never reached the rule of reason or damages issues.

The District Court pointed out that "the Court of Appeals reversed this Court on the threshold applicability of section 1 of the Sherman Act,. . . and proceeded to decide the rule of reason in favor of the NASL 'on its

own.'" The appellate court's order stated, in part, that "because the district court's decision made it unnecessary to consider the issue of damages, we remand for consideration of that issue." Judge Haight stated that "I see nothing in this which intimates a view, let alone a holding, by the Second Circuit in respect of injury in fact or causation." The appellate court held, Judge Haight stated, that section 1 of the Sherman Act does apply to the NFL, and that the NFL violated that section under the rule of mason. "Whether or not the Sherman Act section 1 violation actually 'injured the NASL in its business or property' is a different question - the Clayton Act section 4 question," Judge Haight emphasized. The appellate court said "not a word about section 4 of the Clayton Act." "It remanded the case here 'to consider the issue of damages' - not the 'measure,' nor the 'proper amount,' but the 'issue.'" Judge Haight concluded that in

regards to the section 4 Clayton Act issues he "writes upon a clean slate."

Despite the foregoing, Judge Haight pointed out that "it does not, follow that the Court of Appeal's decision has no impact on damages." Since the appellate court branded the NFL "an antitrust wrongdoer," the NFL will have the burden of proof on causation, Judge Haight stated.

North American Soccer League v. National Football League, 1984-2 CCH Trade Cases para. 66,147 (S.D.N.Y. 1984) [ELR 6:12:11]

Chicago Bears season ticket holders during strike-shortened 1982 football season cannot recover pre-judgment interest or interest earned on funds held

by Bears because Bears did not wrongfully withhold ticket holders' funds, Illinois appellate court rules

The Chicago Bears football club has added another victory to its 1982 season record. But this time the credit must go to the Bears' lawyers because the victory occurred in a legal action brought against the Bears by its own season ticket holders for the 1982 strike-shortened football season. In affirming a lower court decision dismissing the action against the Bears, an Illinois appellate court has ruled that the ticket holders are not entitled to recover prejudgment interest or any profit the Bears may have made from the use of the ticket holders' money, because the Bears did not wrongfully withhold those funds.

Prior to the beginning of the 1982 football season, the plaintiffs bought season tickets entitling them to admission to all Chicago Bears home games. However, four of

the home games were not played because of a players strike. These four games were not officially canceled, however, until the strike was settled on November 16, 1982. The Bears offered season ticket holders the option of a refund for the four games or a credit towards the purchase of 1983 season tickets. The plaintiffs chose the latter option. The Bears began paying refunds to those who requested them on December 10, 1982.

The plaintiffs then filed suit on behalf of themselves and all Bears season ticket holders to recover prejudgment interest and interest earned on the funds held by the Bears. The Bears answered by denying any unjust enrichment and moved for summary judgment. The Illinois trial court granted the Bears' motion.

The plaintiffs' argument on appeal was that the Bears profited at the ticket holders' expense by retaining and using money that should have been refunded when the games were canceled, and therefore, the Bears were

unjustly enriched and the plaintiffs should be entitled to recover prejudgment interest as well as any profits the Bears might have made from the use of the plaintiffs' money.

Justice Stamos first noted that the record did "not reveal that the Wears were under any contractual obligation to their season ticket holders to present games on dates certain." Justice Stamos further noted that "any obligation on the part of the Bears to present games would not have been discharged by the players' strike, but rather would have been suspended until settlement of the strike." Justice Stamos found that "in any event, the record shows that when the four home games finally were officially canceled on November 16, the day of the settlement of the players' strike, the Bears promptly offered and began paying refunds to their season ticket holders." The appellate court concluded that in light of these facts it could "not say that the trial court erred in

its determination that the Bears did not wrongfully withhold plaintiffs' funds," and therefore, the plaintiffs were not entitled to recover any profits the Bears may have received on the funds.

The appellate court next considered whether the plaintiffs were entitled to receive prejudgment interest. The plaintiffs conceded that there was no statutory authority in Illinois for an award of prejudgment interest, but argued that the court was empowered to make such an award if warranted by equitable considerations. Justice Stamos stated that "while equity may award prejudgment interest even though not within the precise terms of the statute..., such an award must be justified by unique factual circumstances." After reviewing the few cases in which the Illinois courts had permitted such a recovery, Justice Stamos concluded that this case lacked the unique factual circumstances of those cases, namely bad conduct on the part of the defendant.

Richman v. Chicago Bears Football Club, 468 N.E.2d 497 (Ill.App. 1984) [ELR 6:12:12]

Advertisers, not television viewers, are the consumers who determine likelihood of confusion and therefore District Court finds no trademark infringement in suit by USA Network against station KUSA-TV

USA Network, a national sports oriented cable channel, sought a preliminary injunction against a Denver based broadcast television station which had applied to change its call letters to KUSA-TV. USA Network filed a complaint against KUSA-TV for trademark infringement, false designation of origin and included pendent state claims for unfair competition and misappropriation.

A Federal District Court in Colorado has denied the preliminary injunction. Judge John P. Moore recognized that both the USA Network and the television station KUSA-TV derive nearly all of their revenues from the sale of air time to advertisers. Judge Moore also recognized that the test for measuring the likelihood of confusion must be applied to the relevant purchasing public, not to a hypothetical purchasing public. Accordingly, because the primary product sold by both the USA Network and the television station KUSA-TV is advertising time, the court held that the relevant public to which the confusion test should be applied is composed of advertisers, not viewers.

Judge Moore also pointed out that the change of its call bilily that advertisers would be confused between the national USA Network and the local KUSA-TV. According to the court, media buyers are highly specialized professionals, and in most advertising agencies the

department which purchases cable time is different than the department which purchases time on local television.

Judge Moore also pointed out that the change of its call letters by KUSA-TV would not confuse the Neilsen ratings which are closely followed by advertisers. The A.C. Neilsen Company obtains ratings information from meters attached to viewers' television sets. These meters simply record which channel is being watched by a particular viewer at a particular time. When a viewer is watching the USA Network, the meter will record only that information. The Neilsen meters will make no reference to the local KUSA-TV unless a viewer is actually watching KUSA-TV. Advertisers study the Neilsen ratings closely before purchasing time spots and therefore are fully aware of the ratings of programs before they make advertising purchasing decisions.

Thus, for these reasons, the court concluded that there is no likelihood that advertisers will be confused. As a

result, the application for the preliminary injunction sought by the USA Network was denied.

USA Network v. Gannet Co., Inc., 584 F.Supp. 195 (D.Col. 1984) [ELR 6:12:12]

Artist obtains injunction against unauthorized distribution of his works by former agent

Wildlife artist John A. Ruthven and his company Wildlife Internationale, Inc., have obtained an injunction barring B. Russell Clements from reproducing or distributing copies of Ruthven's works, "Tufted Titmice," "Indigo Buntings," and "Towhee."

In 1967, Ruthven granted Clements' company, DeSales Lid., Inc., certain rights to reproduce and sell prints of Ruthven paintings. In 197l, DeSales was adjudicated

bankrupt, and Ruthven eventually purchased from the trustee in bankruptcy the reproduction rights previously granted to DeSales.

In 1982, when Clements began promoting the sale of Ruthven's works, the artist brought an action alleging causes of action for copyright and trademark infringement, unfair competition under federal and state law, and conversion.

Federal District Court Judge Rubin first rejected Clements' jurisdictional defense based on Ruthven's alleged failure to record his acquisition of the copyright interests at issue. Judge Rubin pointed out that while Ruthven may have become the legal owner of the reproduction and distribution rights in the copyrighted works by virtue of his reacquisition of those rights from the trustee in bankruptcy, Ruthven had retained his beneficial ownership in all of his copyrights throughout the period of his relationship with Clements. Hence, the

recordation of an instrument of transfer was not required.

Judge Rubin also found that the reproduction and sale by Clements of copies of the three works, as well as the sale of proofs and overruns of 22 other copyrighted works, would infringe Ruthven's copyrights. Clements argued that he acquired the proofs and overruns pursuant to a DeSales company policy whereby he was entitled to retain approximately 50 prints each of certain subjects for his own use. But this "policy" was not set forth in any of the RuthvenDeSales contracts, and it was "beyond dispute" that Ruthven never granted any distribution rights to Clements.

Clements' distribution of advertising brochures containing reproductions of the three major works at issue also was enjoined.

With respect to the trademark infringement causes of action, the court noted that a cover letter accompanying

a mailing by Clements stated that the Ruthven prints being offered for sale represented "the very highest quality printing of any fine art prints on the market today." However, some of the prints were of significantly low quality, and the court held that Clements' representatives to the contrary violated section 43(a) of the Lanham Act. The mailing and the offering for sale of low quality prints also violated section 43(a) by intimating that the prints reflected "the artistic standards now associated with Ruthven and that Ruthven approved of their quality." This false impression, coupled with a likelihood of confusion on the part of the public, was sufficient to warrant injunctive relief. A likelihood of confusion existed because the complained-of prints bore reproductions of Ruthven's signature without any indication that the prints did not meet with his approval. The fact that Ruthven, some ten years earlier, may have approved of the prints was "irrelevant"' declared the court.

Wildlife Internationale, Inc. v. Clements, 591 F.Supp. 1542 (S.D. Ohio 1984) [ELR 6:12:13]

Author of "The Devil's Book of Verse" is entitled to proceed against parent company of publisher on claims arising from company's order to publisher to cease distribution of "blasphemous" book

When author Richard Conniff presented a book of poetry, limericks and epigrams, entitled "The Devil's Book of Verse," to his publisher, Dodd, Mead & Co., the company informed Conniff that Thomas Nelson, Inc., the parent company of Dodd, Mead, considered portions of the book to be "blasphemous" Conniff refused to remove the objectionable material, and Dodd, Mead ceased its promotion and distribution of the book. Sam

Moore, the president of Thomas Nelson, stated to the press that he had ordered Dodd, Mead to cease selling the Conniff book because "he did not want his companies to publish trash." Coniff responded by suing Thomas Nelson and Moore for tortious interference with contractual relations, intentional infliction of emotional distress, prima facie tort and defamation.

Federal District Court Judge Goettel first dismissed the complaint against Moore on the basis of a lack of personal jurisdiction. Moore's only contact with New York was by acts carried out as a fiduciary of a corporation. Conniff had not demonstrated that Moore lost the protection of this "fiduciary shield" (by showing that Moore's actions were not in the best interest of Thomas Nelson) or that Thomas Nelson was a mere shell for Moore.

In turning to Conniffs claim of tortious interference with contractual relations, the court declined to grant

Thomas Nelson's motion to dismiss that cause of action and found that the claim presented a factual issue to be determined at trial. Although a parent company may supervise contracts made by a subsidiary, the parent may not use illegal means to interfere with the contract or act with malice in its supervisory role. Conniff had adequately alleged the presence of malice on the part of Thomas Nelson, and this issue therefore must be determined at trial, declared Judge Goettel.

Thomas Nelson's motion to dismiss Conniff's cause of action for intentional infliction of emotional distress also was denied, since a trier of fact might find that the company's conduct was "extreme and outrageous" these being the requisite elements of the cause of action.

Conniffs prima facie tort claim was dismissed for its failure to plead special damages fully and with sufficient particularity.

Conniffs defamation claim, however, was not dismissed because Moore's statement that Thomas Nelson would not publish "trash" is susceptible of a defamatory meaning. Judge Goettel declined, at this stage of the proceeding, to rule on the "interesting and close question" of whether Moore's statement was an opinion protected by the First Amendment. The privilege of fair comment was not available to Thomas Nelson, because the publisher could not compare itself to a critic commenting on and evaluating a writer's book. Judge Goettel concluded by stating that even if Conniff was a public figure, as Thomas Nelson argued, he had alleged the presence of malice and therefore would be entitled to an opportunity at trial to present proof on this issue.

Conniff v. Dodd, Mead & Co., 593 F.Supp. 266 (S.D.N.Y. 1984) [ELR 6:12:13]

Summary judgment granted to author in libel action brought by four sisters whose maiden name was the same as that of fictitious character in case history of schizophrenic patient

The Eskolsky sisters, as devoted as they may be, did not establish a cause of action for libel against author Susan Sheehan and publisher Houghton Mifflin Company, a New York trial court has ruled.

Sheehan's book, "Is There No Place on Earth For Me?," described the illness and treatment of a schizophrenic woman identified by the fictitious name "Sylvia Frumkin." The book contained a brief reference to Sylvia Frumkin's maternal grandmother who bore the fictitious maiden surname "Eskolsky." This reference was the basis for the action by the four sisters, whose maiden name was Eskolsky, in which they claimed that someone might mistakenly confuse them with the

characters in the book and conclude that the sisters suffered from schizophrenia.

Judge Saxe determined that the complained-of reference was not "of and concerning" the sisters. The alleged associations between the four sisters and any character in the book was not, sufficient to establish the requisite identification. It was pointed out that the book contained an explicit disclaimer stating that the names of the characters were fictionalized. Furthermore, the characters were distinguishable by difference in age, occupation, place of birth, etc. And "Mona Eskolsky," the maiden name of Mona Eskolsky Brafman, appeared only once in the book. In all, no reader knowing the Eskolsky sisters could reasonably conclude that the book was "of and concerning" them, the court concluded.

In granting Sheehan and Houghton Mifflin's motion for summary judgment, Judge Saxe also stated (citing

Springer v. Viking Press, ELR 5:8:18), that it was not significant that two of the sisters had attended school with Sheehan some 30 years ago. Also, even if the names of the characters in the book were somehow identifiable with the Eskolsky sisters, there had been no showing that the book defamed them for "an individual has no cause of action for any statement dishonoring his family name, even though such a statement may indirectly damage the individual's own reputation ... unless the defamatory statement also contains some 'direct reference' to the individual plaintiff." The challenged passages in Sheehan's book, however, could not reasonably be read as stating that the Eskolsky sisters were prone to schizophrenia.

The court concluded by noting that the Eskolskys also failed to establish that Sheehan and Houghton Mifflin acted in a "grossly irresponsible" manner.

Branfman v. Houghton Mifflin, 11 Med.L.Rptr. 1354 (N.Y. Cnty. 1984) [ELR 6:12:14]

Court-appointed prosecutors lacked authority to appeal dismissal of contempt action against CBS based on network's failure to produce script of "60 Minutes" segment for pre-broadcast inspection

CBS's January 16, 1983 broadcast of the television program "60 Minutes" occasioned a whirlwind of judicial proceedings. A segment of the program involved a homicide investigation by New Orleans police which resulted in the prosecution of seven New Orleans police officers. The officers attempted to enjoin CBS from broadcasting the "60 Minutes" segment in the Dallas area where their trial was scheduled to take place.

CBS refused to turn over to a Federal District Court, prior to the broadcast, a copy of the script for the segment. The court then ordered CBS to produce the script for its inspection and enjoined the network from broadcasting the segment at issue. The Court of Appeals stayed the injunction on the ground that the evidence presented "was too speculative on the impact of the program on the Dallas metropoli tan area jury pool...."

After the program was broadcast, the District Court requested the United States Attorney for the Eastern District of Louisiana to institute contempt proceedings against CBS for refusing to produce the script for its inspection. The United States Justice Department, however, determined that a contempt proceeding against CBS would not be "an appropriate exercise of the Department's discretion..." citing the substantiality of CBS's First Amendment defense. Nevertheless, the District Court appointed private prosecutors to seek an

order requiring CBS to show cause why it should not be held in contempt. The application for the order to show cause was denied with a ruling (by a "designated" judge from the Western District of Louisiana) that the production order was unconstitutional (ELR 6:2:17).

The private prosecutors appealed the dismissal of the contempt proceeding which had been initiated by the Eastern District.

A Federal Court of Appeals has held that the private prosecutors lacked the authority to pursue the contempt action since the dismissal of the proceedings served to revoke their appointment. The court therefore had no jurisdiction over the appeal and it was dismissed.

United States v. McKenzie, 735 F.2d 9O7 (5th Cir. 1984) [ELR 6:12:14]

Pittsburgh officials enjoined from using nonjudicial methods to prevent the distribution of an allegedly offensive issue of Hustler Magazine

In April 1984, police officers in Pittsburgh were sent to local newsstands to determine whether the May 1984 issue of Hustler Magazine was being offered for sale. Upon receiving confirmation that the magazine was being sold, Pittsburgh Mayor Richard S. Caligiuri released a letter to local media organizations addressed "To all magazine and newsdealers." In the letter, the Mayor stated, in part: "I ... am outraged that a publisher would distribute so offensive and distasteful a magazine.... I urge every business person who sells Hustler to immediately remove the socalled Easter edition from their shelves and send all copies to the publisher or distributor.... Your cooperation will eliminate the need for the City to engage in a massive sweep of all newsstands and

stores and the initiation of criminal proceedings ... against all those who persist in selling this magazine."

After the letter appeared, police officers were sent again to the newsstands. The officers reported that they did not find a single copy of the magazine in question.

The American Civil Liberties Union and three Pittsburgh residents filed an action against the City seeking injunctive and declaratory relief. The ACLU claimed that the Mayor's conduct amounted to an unconstitutional prior restraint on First Amendment freedoms and requested that the court enjoin the City from prohibiting the exhibition, distribution and sale of the May 1984 issue of Hustler.

Federal District Court Judge Simmons first ruled that the ACLU possessed standing to seek judicial review of the city's conduct. The city had claimed that since no vendors were named parties in the action, the ACLU could not demonstrate the type of "concrete and

particularized injury" which is necessary to confer standing. But Judge Simmons pointed out that the organization had a protected independent right under the First Amendment to receive information. Vendors may not wish to challenge a municipality's attempts to limit their right to distribute protected information since vendors are subject to state and local licensing. Thus, an abridgement of a First Amendment right might go "unchecked" unless potential recipients of the information assert their tangible interest in opposing the suppression of free speech.

The city also argued that a prior restraint of free speech did not occur because the Mayor did not seize or order the seizure of Hustler. Judge Simmons rejected this argument, finding that the record demonstrated that the Mayor "deliberately" attempted to suppress a publication which had not been judicially determined to be obscene. The court stated: "The evidence in this case

conclusively establishes that the acts of the City officials directly and designedly stopped circulation of Hustler magazine throughout the City of Pittsburgh." The vendors would have violated no law if they had continued to sell the May 1984 issue of the magazine. But the Mayor's letter and police surveillance conveyed to the vendors that punishment would result if the magazine was not withdrawn, and effected a "constructive seizure" of the target issue.

The court then found that the prior restraint violated the First Amendment. The city's conduct did not amount to a time, place or manner regulation and this was neither a captive audience case or a temporary hold on First Amendment rights pending necessary judicial proceedings. Furthermore, the requisite procedural safeguards, as set forth in Pennsylvania's obscenity statute, were not employed. Rather, the Mayor's actions were a "dramatic and devastating" suppression of free speech, particularly

in the absence of any adjudication on the issue of obscenity.

Cautioning that the case before it was not an obscenity case, the court found that permanent injunctive and declaratory relief was appropriate to prevent the city from engaging in the "informal system of censorship,' lacking concernfor due process of law, that was utilized in this case.

American Civil Liberties Union v. City of Pittsburgh, 586 F.Supp. 417 (W.D.Pa. 1984) [ELR 6:12:15]

Briefly Noted:

Trademark Infringement.

A New York trial court has refused to dismiss an action for common law trademark infringement and unfair business practices brought by the publisher of a magazine known as "Adult Cinema Review" against the publisher of the magazine "Cinema Blue." Both magazines present reviews and news concerning adult or X-rated movies. Adult Cinema argued that its magazine title had acquired a secondary meaning, affording the publication trademark rights which were entitled to protection via a permanent injunction against Cinema Blue's use of the allegedly infringing title. Adult Cinema also sought $15 million in compensatory damages in a "palming off" cause of action. The court stated that the issue of whether or not the tide Adult Cinema Review has acquired a secondary meaning will have to be determined by a jury. A third cause of action alleging that Cinema Blue's activities diluted the strength and uniqueness of the Adult Cinema Review trade name evolved from

New York's Anti-dilution Statute, noted the court. But since Adult Cinema was seeking monetary damages which are not available under the statute, this cause of action was dismissed.

Adult Cinema Review, Inc. v. Hudson Communications, Inc., New York Law Journal, p.17, col. 4, (N.Y.Cnty. Sup. Ct., Nov. 13, 1984) [ELR 6:12:15]

Copyright.

A Federal District Court in Ohio has granted summary judgment to Broadcast Music, Inc., against Samuel Abdalla, the owner of the Aquanaut Club, for performing or permitting the performance of BMI's music without its permission. The court also has denied Abdallas's motion for partial summary judgment in which he requested that

the court deny injunctive relief, limit damages to either actual damages and profits or statutory damages, and deny or limit plaintiffs attorney's fees. BMI alleged that on two different occasions a dozen of its musical compositions were performed publicly and for profit at Abdallas club by means of mechanical reproduction. Abdalla's only defense was that he had no personal knowledge or recollection as to whether those performances occurred. The court held that Abdallas's assertion was insufficient to create an issue of fact, and thus an affidavit of a witness stating that the music was performed must be taken as true. The court further held that Abdalla could not escape his responsibilities under the copyright laws by arguing that as solely the proprietor of the club he lacked knowledge or control over what was played. It is merely because of his position as the club owner that he may be held liable. On the issue of damages, the court awarded $250 per violation, totalling

$3,000 for the twelve acts of copyright infringement; an injunction restraining Abdalla's further infringement of BMI's copyrights; and attorney's fees upon submission of an itemized list of time and expenses incurred by BMI's counsel.

Broadcast Music, Inc. v. Abdalla, Case No. C-2-81-847 (S.D. Ohio 1984) [ELR 6:12:16]

Copyright.

Expressing "genuine reluctance" to referee a dispute between Larry Flynt/Hustler Magazine and Robert Guccione/Penthouse International, a Federal District Court in New York nevertheless has granted Hustler's motion for Partial summary judgment with respect to Penthouse's copyright infringement claim. The claim

arose from the publication, in the November 1983 issue of Hustler, of an article entitled "What a Ham." The article included a picture of its subject, Guccione, embracing a "substantially nude woman." The picture of Guccione previously appeared in the September 1983 issue of Penthouse. Judge Sweet determined that the defense of fair use was available to Hustler, because Hustler did not attempt to "palm off" Penthouse's Photograph as its own; because the photograph was neither a "substantial creative effort by Penthouse nor a substantial taking by Hustler; and because Penthouse had not shown that the value of its September 1983 issue was diminished because of the alleged copyright violation. The court also dismissed Penthouse's causes of action for invasion of privacy and the violation of sections 50/51 of New York's Civil Rights Law, but denied Hustler's motion to dismiss Penthouse's cause of action for libel.

Guccione v. Flynt, 1984 CCH Copyright Law Decisions, para. 25,669 (S.D.N.Y. 1984) [ELR 6:12:16]

Loft Law.

A Federal District Court in New York has dismissed a complaint brought by Mapama Corp., the owner of a building in the Soho area of Manhattan, against the artists residing in two units in the building, and against the New York City Department of Cultural Affairs. The Department is responsible for certifying artists under New York's Multiple Dwelling Law. Mapama contended that the certification process did not provide the company with notice of the artists' applications for certification or with an opportunity to contest the applications. The company therefore filed an action under 42 U.S.C.

section 1983 seeking declaratory and injunctive relief, arguing that its property rights were being adversely affected without due process as guaranteed by the Fourteenth Amendment. According to Mapama, the certification of the artists "triggered" the application to its building of various sections of the Multiple Dwelling Law, which are known as the Loft Law. The Loft Law was designed "to legalize certain of those residences and to bring them up to safe residential standards" and to establish a system whereby rents would be regulated and adjusted to help defray the costs of the required improvements. Mapama contended that the statutory obligations imposed on the use of the building impaired its property rights. Chief Judge Motley, in dismissing the complaint, pointed out that the certification of an artist's status is irrelevant to the question of whether a building is covered by the Loft Law. The owner obligations and tenant protections to which Mapama adverted in its

complaint are applied to all "interim multiple dwellings," and the certification of a building's occupant as an artist is not a precondition to the building's being designated an interim multiple dwelling.

Mapama Corporation v. New York City Department of Cultural Affairs, 593 F.Supp. 296 (S.D.N.Y. 1984) [ELR 6:12:16]

Tax.

Wallace Berrie & Co., a wholesale distributor of souvenir and novelty items, was not liable for a use tax on its purchase of display racks, a California Court of Appeal has ruled. Berrie provided the cardboard display racks "free" to its customers with their purchase of a minimum number of resale articles. While no separate

charge was made for the racks, Berrie generally recovered at least 50 percent of its cost for the racks via the sales price of the resale articles. The California Equalization Board and the trial court upheld the imposition of a use tax on the racks as measured by their cost to Berrie. The appellate court, however, pointed out that "premiums" are exempt from the use tax. The Board had argued that premiums are items delivered along with purchased goods, but of no economic use to the purchaser "such as the child's whistle in a package of breakfast food." But the appellate court expressed the view that there was no valid distinction between premiums and "merchandising aids," and that the regulation cited by the Board did not support the imposition of a use tax rather than a sales tax on the delivery of the cardboard racks. Judgment therefore was entered for Berrie in the amount of about $39,000 representing a

refund of the taxes and interest paid by the company under protest.

Wallace Berrie & Co. v. Board of Equalization, 157 Cal.App.3d 117 (1984) [ELR 6:12:16]

First Amendment.

The constitutionality of a Los Angeles ordinance prohibiting the posting of signs on public property has been upheld by the United States Supreme Court. The ordinance was challenged by a group supporting Roland Vincent's candidacy for election to the Los Angeles City Council. Taxpayers for Vincent contracted with a political sign service company to display the candidate's campaign posters on utility poles at various locations in the city. The posters were attached to the cross-arms

supporting the poles. When Los Angeles city employees removed the signs, Taxpayers filed an action in Federal District Court alleging the abridgement of the group's First Amendment right to freedom of speech. The District Court found that the sign prohibition was adequately supported by aesthetic, economic and safety considerations and was a reasonable regulation as to the time, place and manner of expression. A Federal Court of Appeals, however, ruled that the ordinance was unconstitutional on its face in that the city's asserted interests were insufficient to justify a total ban on sign posting. United States Supreme Court Justice Stevens, writing for the majority in the 6-3 ruling, reversed the judgment of the Court of Appeals. In doing so, Justice Stevens emphasized the viewpoint neutral text of the ordinance; the city's valid and substantial interest (unrelated to the suppression of ideas) in improving its appearance (reaffirming the majority conclusion in

Metromedia Inc. v. City of San Diego, ELR 4:12:6); the fact that the ordinance curtailed no more speech than necessary to accomplish its purpose; and the availability of "ample" alternative modes of communication. Justice Brennan, in a lengthy dissent, which even extended to the spelling of "aesthetics;' stated the view that the city of Los Angeles should have been required to present tangible proof of the legitimacy and substantiality of its interest in eliminating "visual clutter" in order to justify its restriction of Taxpayer's ability to communicate with the voting public. Justice Brennan expressed concem with upholding a total ban on a medium of communication on the basis of furtherance of a city's aesthetic objectives in the absence of such a showing and in the absence of strict judicial scrutiny, particularly when a means less restrictive of speech might have been available to achieve the asserted governmental interest.

Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent, 52 USLW 4594 (1984) [ELR 6:12:17]

First Amendment.

When Hustler Magazine was sued by the relatives of a young man who died engaged in the practice of "auto-erotic asphyxiation," as described in an article in the magazine, a Federal District Court denied the relatives' claims based on strict liability and negligence (ELR 5:10:14). The court also noted that the First Amendment would preclude imposing liability on a publication for a reader's reaction to an article, absent incitement which, in this case, had not been adequately alleged. The court then apparently did grant the relatives leave to amend their complaint with respect to the "incitement" claim.

The complaint, as so amended, has been found sufficient to withstand Hustler's motion to dismiss, according to a District Court ruling, which also rejected Hustler's claim that even if incitement was adequately pleaded, the legal test for incitement was not met. The question of whether the evidence supports the incitement cause of action will depend upon determinations to be made by the trier of fact, noted the court.

Herceg v. Hustler Magazine, Inc., 583 F.Supp. 1566 (S.D.Tex. 1984) [ELR 6:12:17]

First Amendment.

A California appellate court has ruled unconstitutional an ordinance of the City of Alameda which imposed a business license tax of three percent of annual gross

receipts upon "every person conducting a television subscription service business" and upon businesses providing emergency communications systems of alarms. The city had sought to recover the business license fee from Premier Communications Network, Inc., a multipoint distribution service doing business in the Alameda area under the name Home Box Office. Premier claimed that the tax violated First Amendment guarantees of free speech and press and moved to enjoin the enforcement of the ordinance. The court declared that the challenged tax was "differentially burdensome" to television subscription services in that the two businesses subject to the challenged ordinance were not only taxed differently from the majority of the businesses in the city, but also were taxed in a more burdensome manner. The city failed to show that the tax burden was necessary to achieve an overriding governmental interest. The generation of revenue, standing alone, would not justify the

special treatment of a disseminator of protected speech, particularly when the asserted goal could have been met by a generally applicable tax on businesses. The enforcement of the ordinance with respect to Premier therefore was enjoined.

City of Alameda v. Premier Communications Network, Inc., 156 Cal.App.3d 148 (1984) [ELR 6:12:17]

Previously Reported:

The United States Supreme Court has refused to review a Federal Court of Appeals decision holding that the city of Burbank and former City Councilman Jim Richman violated the First Amendment rights of Cinevision Corp. The city had hired Cinevision in 1975 to present concerts at the municipally-owned Starlight Bowl.

But in 1979, the city canceled six proposed concerts, including performances by Jackson Browne, Todd Rundgren and Blue Oyster Cult. Cinevision argued that the cancellations were improperly based on the content of the performers' music; the company was awarded approximately $145,000 in damages and attorneys fees by a Federal District court jury in 1982. A Federal Court of Appeals upheld the jury award against the city and a $5,000 award against Richman (ELR 6:11:6). In its decision, the court stated that rock music is a form of "expression" protected by the First Amendment's free speech guarantees. [May 1985] [ELR 6:12:17]

IN THE NEWS

Dramatists Guild and New York theater producers approve revised licensing agreement

The Dramatists Guild and the League of New York Theaters and Producers have approved a revised standard contract, known as the Approved Production Contract, for licensing the production of plays and musicals.

According to news reports, playwrights have agreed to reduce their weekly royalty payments, and henceforth will receive five percent of the weekly box office receipts of a production until recoupment of production costs. Thereafter, the royalty rate increases to ten percent of the weekly receipts. The royalty figures for the authors of musicals are 4.5 percent of the weekly receipts until recoupment, with an increase to six percent.

In retum for the playwrights' concession with respect to weekly royalties, playwrights now will be entitled to an option fee of $5,000 for the first six months of the option and $2,500 for the second six months (representing an increase from the prior option payment of $2,000 per

year). The first year option fee for authors of musicals has been increased to $18,000, dropping to $8,000 in the second year, and $900 per month for a third year. Options are renewable for a second year at the same rates, provided that "an element of the production" is set. And the option fee will not be recoverable by the producer from royalties.

Playwrights also will receive increased advances: three percent of the total capitalization for plays, up to a ceiling of $35,000, and two percent of the capitalization for musicals, up to a cap of $60,000. (These advances are recoupable from royalties.)

Additional payments to writers will be derived from: a guarantee of the full five percent pre-recoupment royalty during all pre-Broadway tryout engagements and during previews on Broadway; and a guaranteed weekly minimum of $1,000 per week. The basic guaranteed royalty for authors of musicals is $3,000 a week; during pre-

Broadway and previews, the authors will receive a total fee of $4,500. The playwrights have agreed to the payment of the $1,000 guaranteed minimum for the first three weeks after the Broadway opening of a production; after the three weeks, the five percent royalty payment commences, when applicable. However, there is no three week minimum royalty period with musicals; the 4.5 percent royalty applies in profitable weeks and the $3,000 minimum in no-profit weeks.

It appears that the revised contract should eliminate the practice of seeking to have playwrights defer or waive royalties in losing weeks, particularly since a "royalty adjustment formula" has been established for specified situations, including the possibility of close-to-break-even weeks and of a production achieving super-hit status.

A revised subsidiary rights provision will give producers a greater share of film, television and cassette sales

(media rights) but allocates to writers a greater portion of foreign, stock and amateur rights. The media rights with respect to musicals will be split 50-50.

The revised contract also includes provisions concerning payments to producers for the Broadway revival of a work, and calls for the maintenance of a Theatrical Conciliation Council to mediate disputes. [May 1985] [ELR 6:12:18]

Arbitrator awards Cicely Tyson $607,000 in dispute over her dismissal from "The Corn is Green"

An arbitrator has ordered the Elizabeth Theater Group, a partnership of Zev Bufman and Elizabeth Taylor, to pay Cicely Tyson $607,079 in connection with her services in the Broadway production "The Corn is Green."

Bufman had dismissed Tyson from the show in September 1983 when the actress' delayed retum from a trip caused her to miss a performance. However, a grievance committee composed of members of the League of New York Theaters and Producers and members of Actors' Equity ruled that Tyson was improperly dismissed and her contract breached.

The arbitrator, in agreeing with the grievance committee's ruling, awarded Tyson the balance due on her pay-or-play contract, which also included the guarantee of a television production of the show. [May 1985] [ELR 6:12:18]

Three record companies agree to settlement in price-fixing action brought by record wholesalers

Capitol EMI, Polygram Records and RCA have entered settlement agreements with a group of Chicago-area record wholesalers who claimed that several major record companies conspired to fix the prices of records and tapes. The alleged conspiracy occurred from January 1971 through December 1982.

CBS and MCA previously settled with the wholesalers, stating, as did Capitol, Polygram and RCA, that the settlements did not constitute an admission of wrongdoing or liability with respect to the wholesalers' charges. [May 1985] [ELR 6:12:18]

Motown Records is awarded $250,000 in damages from Pickwick International for breach of distribution agreement

Motown Record Corporation has been awarded $250,000 in damages from Pickwick International in accordance with a Federal District Court jury's finding that Pickwick breached its distribution agreement with Motown when Pickwick, without notice, closed its independent distribution division. [May 1985] [ELR 6:12:18]

California Supreme Court refuses to hear pre-trial appeal of director John Landis and four others in connection with charges arising from helicopter-crash deaths during filming of "The Twilight Zone"

The California Supreme Court has refused to hear a pretrial appeal brought by director John Landis and four other individuals charged with involuntary manslaughter in connection with the 1982 helicopter crash during the

filming of the movie "The Twilight Zone." Actor Vic Morrow and two children were killed in the crash.

The Los Angeles County Grand Jury indicted Landis and the other parties on involuntary manslaughter charges two years ago; various proceedings ensued (ELR 5:2:17; 6:1:20), including an appeal to the California Court of Appeals, which, in March 1985, refused to dismiss the charges, occasioning the appeal to the California Supreme Court. [May 1985] [ELR 6:12:19]

WASHINGTON MONITOR

Federal Communications Commission denies Action for Children's Television petition concerning programming based on toy-derived characters such as "Pac Man" and "The Smurfs"

The Federal Communications Commission has voted to dismiss a petition filed by Action for Children's Television and by the National Association for Better Broadcasting which contended that the airing of children's shows featuring toys such as "Pac Man," "The Smurfs," and "Strawberry Shortcake," violate the obligation of broadcasters to operate in the public interest.

According to the consumer groups, the complained-of shows amount to program-length commercials for the featured toys, thereby conflicting with various Commission policies, such as the requirement of separation of program and commercial content in children's television.

The Commission, in addition to rejecting ACT's petition, also refused to prohibit arrangements between toy manufacturers and broadcasters that allow television stations to share in the profits from sales of toys featured in television shows. Action for Children's Television had complained that Telepictures Corp. is marketing a new

syndicated animated children's series "Thunder Cats" by offering television stations a share of nationwide sales of toys based on the program's characters. The Commission called such a profitsharing arrangement "an innovative technique to fund children's programming. Such financing is advantageous to the continuation and growth of children's television offerings, which is clearly in the public interest' One dissenting commissioner (and undoubtedly many besieged parents) found the profit-sharing arrangement "very troublesome." [May 1985] [ELR 6:12:19]

Federal Trade Commission refuses to restrict alcoholic beverage advertising

The Federal Trade Commission has rejected a petition filed by the Center for Science in the Public Interest and

28 other consumer groups seeking to limit the advertising of alcoholic beverages.

The consumer groups argued that many advertisements portray alcoholic beverage consumption in a manner appealing to young people, and proposed rules banning alcoholic beverage advertisements aimed at, or reaching, large numbers of children. The groups also sought rules requiring health warnings on printed advertisements, and the broadcasting of public service announcements to discourage excessive drinking.

But the Commission concluded that it had "no reliable basis on which to conclude that alcohol advertising significantly affects alcohol abuse," and declined to initiate a rulemaking proceeding.

A dissenting commissioner, in the 4-1 vote, would have had the Commission conduct factual inquiries with respect to certain "questionable" advertisements which

allegedly encourage excessive drinking and drinking by young people. [May 1985] [ELR 6:12:19]

Federal Communications Commission finds that radio station's broadcasting of racial and religious slurs does not warrant denial of license renewal

The Federal Communications Commission has voted not to deny, without further proceedings, the license renewal application of radio station KTTL-FM in Dodge City, Kansas, even though in 1982 and 1983 the station broadcast material attacking a variety of racial and religious groups.

Several public interest groups argued that the broadcasts violated the fairness doctrine. But the Commission ruled that KTTI's programming was protected by the First Amendment. FCC Chairman Mark Fowler stated

that the broadcasts were "speech that makes some angry; it is not speech that has incited anyone to violence."

An administrative law judge now will decide whether listeners in the Dodge City community will be best served by KTTL's current licensees or by a competing applicant for the broadcast license. [May 1985] [ELR 6:12:20]

Federal Communications Commission deregulates rates for basic-tier cable service in communities served by three local television stations

The Federal Communications Commission has ruled that cable operators will be entitled to determine their rates for basic-tier service in those communities that have at least three local television stations providing competitive signals.

The National League of Cities had asked the FCC to require the presence of at least five local competing signals before cable rates could be deregulated. But the Commission determined that effective competition for a cable system in any franchise market would be three or more broadcast signals, either network originated, independent or Public Broadcast Service originated, so long as each signal is "significantly viewed" in a community or overlaps at least half the homes in an area.

Cities will be given an opportunity to challenge a cable operator's claim that there are three broadcast signals in a particular area, according to the FCC. But the effect of the ruling appears to be that basic cable rates have been deregulated for more than 90% of the country's cable subscribers. [May 1985] [ELR 6:12:20]

Patent and Trademark Office rules that broadcast station call letters may be registered as service marks

The appeal board of the Department of Commerce's Patent and Trademark Office has determined that WSM(AM) Nashville may register its call letters as a service mark. The station's request initially was rejected on the ground that broadcasters do not own their call letters, because the Federal Communications Commission, which approves call letters, also retains the power to revoke licenses and call letters. But the appeal board distinguished between the right to broadcast granted by the FCC and the right to register a service mark, which derives from adoption and use. [May 1985] [ELR 6:12:20]

DEPARTMENTS

Book Notes:

1984 Entertainment, Publishing and the Arts Handbook, Michael Meyer and John David Viera, Editors

This is the second in an annual series of entertainment law anthologies published by Clark Boardman Company, Ltd. The 373-page, paper-bound volume contains short articles by more than two dozen authors and covers a wide range of topics. Following an overview of recent developments, the book is divided into parts that deal with Books, Motion Pictures, Television and Radio, Music, Advertising, Copyright, Libel, Managers and Agents, Immigration, Taxes and Securities. Most of the pieces are original contributions, though some were previously published or delivered orally.

The Handbook is included as part of the regular up-keep service for Clark Boardman's four-volume form-book, Lindey on Entertainment, Publishing and the Arts. The Handbook also is available separately for $39.50 directly from Clark Boardman Company, Ltd. 435 Hudson St., New York, N.Y. 10014; phone (800) 221-9428, or (212) 929-7500. [ELR 6:12:21]

Counseling Clients in the Entertainment Industry 1985, Martin E. Silfen, Editor

This handbook was published by the Practicing Law Institute to accompany its annual entertainment law program, held this year in Los Angeles in March and in New York in April. The 1985 handbook is a relatively short (by PLI standards) 400 pages, and was designed to supplement the two-volume set distributed by PLI in

1984 (noted at ELR 6:4:21). The 1985 volume is for the most part a collection of valuable forms dealing with personal management, sound recordings, music publishing, and videos. The most extensive set of forms is a collection dealing with theatrical stage productions. Peter Dekom contributed an excellent article, written especially for the PLI program, entitled "The Financing of Motion Pictures"

Counseling Clients in the Entertainment Industry 1985 is available directly from the Practicing Law Institute, 810 Seventh Avenue, New York, N.Y. 10019; phone (212) 765-5700. It is Course Handbook Number 197, Order No. G4-3762. [ELR 6:12:21]

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Obscene Parody: The Judicial Exception to Fair Use Analysis by Steven L. Schooner, 14 The Journal of Arts Management and Law 69 (1984) (published by Heldref

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New York Times v. Sullivan: A Retrospective Examination by Bruce L. Ottley, John Bruce Lewis and Younghee Jin Ottley, 33 Depaul Law Review 741 (1984)

Harper & Row, Publishers v. Nation Enterprises: Emasculating the Fair Use Accommodation of Competing Copyright and First Amendment Interests, 79 Northwestern University Law Review 587 (1984)

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[ELR 6:12:22]