BUSINESS AFFAIRS

New Book Explains Employment and Collective Bargaining Agreements in Movie/TV Business

by Lionel S. Sobel

This month's Business Affairs article is really a book review. The book is "The Motion Picture and Television Business: Contracts and Practices" by Eric B. Yeldell. And the bottom-line recommendation from this reviewer is an unqualified "Buy."

Before explaining why readers of the Entertainment Law Reporter are sure to want this two-volume treatise, let the record reflect that Mr. Yeldell and I are not related by blood or marriage, nor is he involved in any way with this publication. Moreover, the publisher of

Mr. Yeldell's book, Entertainment Business Publishing Co., is not the company that publishes the Entertainment Law Reporter, even though the names of the two publishing companies are similar. I say all this because Mr. Yeldell's "The Motion Picture and Television Business" is a book I wish I had written myself, so what follows here is pure praise. This praise is not influenced by anything other than the quality of the book itself, however. (Its publisher hasn't even purchased advertising in the Entertainment Law Reporter!)

There are of course other books that are available to entertainment lawyers. Four earlier books are especially useful to readers of this publication: Nimmer on Copyright; McCarthy's Trademarks and Unfair Competition; Entertainment Law: Legal Concepts and Business Practices by Selz and Simensky; and Lindey on Entertainment, Publishing and the Arts. Mr. Yeldell's new book is a different kind of book, however, and thus merits a place on your shelf or credenza, even if you already own some or all of its predecessors.

Nimmer on Copyright and McCarthy's Trademarks and Unfair Competition are the leading treatises in their fields. They are regularly relied on by lawyers and judges alike, and are frequently cited in judicial decisions. However, both books are law - rather than business or industry - practice oriented. And thus they are of greater use to litigators than to contract negotiators.

Selz and Simensky's Entertainment Law contains an excellent description of the business side of the entire entertainment industry: movies, television, theater, music and publishing. It contains an equally excellent analysis of those areas of substantive law (apart from copyright) that are most apt to concern entertainment lawyers (unfair competition, right of privacy, right of publicity, libel and remedies) as well as the law and practice of artist billings and credits. Though the book includes an appendix of selected forms, its orientation - like that of Nimmer and McCarthy - is towards litigation.

Lindey on Entertainment, Publishing and the Arts is, first and foremost, a forms book. As such, it is used by contract drafters rather than litigators. Its value is in its comprehensiveness; there is a form for almost everything in it. However, to properly use Lindey (or any other set of unannotated forms), it is necessary to know what form is required, and how-in actual practice, or in particular circumstances-deals may vary from the forms in the book. Lind does not purport to explain this. Indeed, to do so in all of the areas that Lindey touches would require a set of books perhaps ten times as long as its current four volumes.

Different Kind of Book

"The Motion Picture and Television Business" is a different kind of book from any of these four, and is thus useful in a different and unique way. To see how this is so, consider the following hypothetical. Suppose that a client wrote a script which an unscrupulous producer made into a movie without permission. In such a case, the lawyer's job would be to file a lawsuit (or at least make a demand, backed up by the threat of a lawsuit). And all of the law the lawyer would need to know concerning the client's rights can be found in Nimmer on Copyright (and in, as the saying goes, the authorities cited therein). Now, change the facts of this hypothetical just a little. Suppose that the client submitted his or her script to a scrupulous producer, and the producer has offered to buy the script. In this case, the lawyer's job is contract negotiation, and what the lawyer would need to know is not found in Nimmer. It is found, however, in

Mr. Yeldell's "The Motion Picture and Television Business."

Mr. Yeldell's book begins with an overview of the movie and TV industry. He describes the production process, from development and preproduction, through principal photography and post-production, and finally to distribution and exhibition. In the course of doing so, the book explains the functions of the producer, the director, the production manager, and crew members. And the book provides a fairly detailed description of the actual filmmaking process.

The book then identifies the unions whose members work in the movie and television industry, and explains the difference between above-the-line and below-the-line personnel. It introduces the basic structure of collective bargaining agreements, and it explains how, in general, they relate to the personal employment agreements of individual artists.

Collective Bargaining Agreements Explained

Mr. Yeldell then describes, in readable and textbook-like narrative fashion, the principal provisions of the collective bargaining agreements governing the employment of screenwriters, actors and directors. There are four of these agreements in all, one each for members of the Writers Guild of America, the Screen Actors Guild, the American Federation of Television and Radio Artists, and the Directors Guild of America. These chapters are especially helpful to lawyers who are not yet familiar with these collective bargaining agreements. Each of these agreements is a small to medium-sized paperback book in itself. And their meanings are opaque (at best) to the uninitiated. The individual sentences and paragraphs of these collective bargaining agreements are well-enough written and are understandable in themselves. But taken together, they provide virtually no immediate guidance to a lawyer doing a first (or even second or third) contract negotiation.

There is a perfectly good reason for this, of course. Collective bargaining agreements are not intended to be mini-textbooks. They are intended to govern employment relationships, and they grow by accretion over the years from one round of collective bargaining to the next. Structure and organization take a beating as the years pass. And the practical significance of any particular provision may not have any relationship whatsoever to its length or complexity. The WGA, SAG, AFTRA and DGA collective bargaining agreements were drafted by people who understood what the negotiators intended to accomplish and what the customary practices of the industry are. As a result, those who do not already know what the differences are between a screenwriter's (a) flat or free-lance deal, (b) term deal, or (c) week-to-week deal, or when one form of employment is usually used rather than another, will not get much help from the WGA collective bargaining agreement on which deal to seek or what its terms ought to be. The SAG and AFTRA agreements are equally obscure to the newcomer. They contain, for example, separate minimum levels of compensation for (a) day performers, (b) free-lance performers, (c) multiple picture performers, (d) contract performers (for theatrical movies) and term performers (for television), and (e) deal performers. Simply understanding when a client should (or could) be one kind of performer rather than another is understanding quite a bit. Mr. Yeldell's book explains this.

The book contains additional chapters on especially significant provisions of the collective bargaining agreements. Insofar as writers are concerned, it dissects the always intriguing "Separation of Rights" provision of the WGA agreement, as well as a writer's right to residuals and remake compensation, and the writer's very minimal creative rights. On behalf of actors, the book looks at such topics as the right to residuals and ownership of the roles and merchandising rights to the characters actors portray. Directors' residual and editing rights are explored as well. An entire chapter is devoted to screen and advertising credits for writers, actors and directors, as provided for in their collective bargaining agreements.

Personal Employment Agreements Analyzed

In the entertainment industry, collective bargaining agreements are only the foundation on which personal employment agreements are built. Thus, "The Motion Picture and Television Business" also describes the principal provisions of individual employment agreements. Following an introduction concerning California's

"Seven-Year Rule," minors' contracts, and loanout corporations, the book explains option agreements, exclusivity clauses, and the usual "boilerplate" concerning such things as representations and warranties, assignment, indemnification and the like.

One chapter deals with arbitration of disputes under the WGA, SAG, AFTRA and DGA collective bargaining agreements. And another discusses remedies for breach and what constitutes a "force majeure."

One of the most interesting chapters in the book is an analysis of profit participations. The calculation of "profits" in a movie or television deal is a sometimes complex blend of accounting and contract interpretation. To his credit, Mr. Yeldell makes plain that "profit" participation provisions are misnamed. In reality, they are not at all related to studios' "profits" for income tax or accounting purposes. Instead, "profit" participations are nothing more than contingent compensation. It is compensation that will be paid if certain defined revenue exceeds certain defined deductions, exclusions and charges.

Many "profitable" movies and television series - as "profitable" is defined for income tax purposes or under generally accepted accounting principles - do not produce "profits" for "profit participants" simply because revenue, as defined by contract, does not include all revenues actually collected, and because the deductions, exclusions and charges permitted by contract exceed the deductions that are taken for tax or general accounting purposes. The "Profit Participations" chapter of Mr. Yeldell's book explains all of this and alerts readers to the significance of particular language. Bargaining positions are suggested, though Mr. Yeldell notes that a participant's bargaining power may not be sufficient to get the language that would be most helpful.

Deal Point Outlines and Sample Agreements Included

The book concludes with outlines of the deal points that should be covered in agreements for screenwriters, actors and directors. The outlines are just that. No specific language is suggested; and they are more valuable for their skeletal form. In the midst of a telephone negotiation, there is time to scan an outline to be certain everything has been covered. There isn't time, however, to be flipping the pages of even the best 30 or 40-page sample agreement. For those who wish to see what a complete agreement looks like, or to see sample language for particular provisions, the book contains an appendix of 15 different forms.

The book does not contain everything a lawyer would need to know in order to represent all possible clients in the movie and television business. It does not discuss the terms of employment of below-the-line personnel, nor even non-union above-the-line personnel such as producers and composers. It contains nothing about soundtrack album deals. It does not explore non-studio financing. Nor does it delve into the legal complexities of distributor-exhibitor relationships. Of course, to do all these things would have doubled the book's length. And who knows, perhaps if the response to this book is what it ought to be, Mr. Yeldell will be encouraged to expand its coverage with future supplements.

"The Motion Picture and Television Business" is published by Entertainment Business Publishing Co.. 8530 Wilshire Boulevard, Suite 309, Beverly Hills, CA 90211; phone (213) 278-7244. The two volume set is $135.00 (plus $8.78 sales tax for California residents). [ELR 7:2:3]

RECENT CASES

United States Supreme Court rules that The Nation magazine's unauthorized use of excerpts from former President Ford's unpublished memoirs constituted copyright infringement

The United States Supreme Court has ruled that the unauthorized publication by The Nation magazine of excerpts from the unpublished memoirs of former President Gerald R. Ford constituted copyright infringement. In March 1979, The Nation obtained a copy of the manuscript of "A Time to Heal: The Autobiography of Gerald R. Ford." Soon after, on April 3, 1979, the magazine published an article entitled "The Ford Memoirs-Behind the Nixon Pardon." However, Time magazine had purchased the exclusive right to print prepublication excerpts from the book from the copyright holders, Harper & Row Publishers and the Reader's Digest Association. As a result of the appearance of The Nation article, which focused on Mr. Ford's comments concerning his pardon of former President Richard M. Nixon, Time canceled its prepublication agreement.

Harper & Row and the Reader's Digest sued The Nation for copyright infringement and were awarded damages of $12,500 (the balance of the $25,000 fee which would have been due from Time magazine) by a Federal District Court (ELR 4:22:3). The District Court ruled that The Nation's use of the excerpts infringed the copyright holders' right to reproduce the work, their right to license the preparation of derivative works, and their right of first distribution of the copyrighted work to the public.

But a Federal Court of Appeals reversed the District Court decision on the ground that The Nation's publication of the excerpted material was a "fair use" (ELR

5:7:4). The Court of Appeals pointed out that a considerable amount of the material used by The Nation consisted of uncopyrightable historical facts or public documents. And the publication of the remaining 300 to 400 copyrightable words was ruled a fair use pursuant to the factors set forth in section l07 of the Copyright Act. It was found that: the purpose of the article was "news reporting"; the original work was essentially factual; the "appropriated" words were insubstantial in relation to the 2250 word article; and the impact on the market for the original was minimal.

In reversing the Court of Appeals decision, Supreme Court Justice O'Connor first commented on the court's failure to give sufficient "deference to the scheme established by the Copyright Act for fostering the original words that provide the seed and substance of [the harvest of knowledge]. The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors' " By quoting Mr. Ford's original language, The Nation undertook the right of first publication, which is an important marketable subsidiary right. Thus, this use, even apart from The Nation's use of material whose copyrightability was disputed, could not have been a fair use within the meaning of the Copyright Act, stated the Court.

Justice O'Connor emphasized the significance of the "threshold decision" made by an author as to whether and in what form to release his or her work. An author might be subject to substantial damage if forced to "share," via the unwarranted application of the fair use doctrine, this first publication right. The Court viewed the unpublishednature of a work as a "key, though not necessarily determinative, factor" tending to negate a defense of fair use.

The Court rejected The Nation's argument that fair use may be made of a soon-to-be published manuscript since the author has indicated an intention to release the work for publication. For Justice O'Connor, "the obvious benefit to author and public alike of assuring authors the leisure to develop their ideas free from fear of expropriation outweighs any short term 'news value' to be gained from premature publication of the author's expression." In other words, the author's right to control the first public appearance of his or her expression overcomes a claim of fair use.

The Nation next argued that the First Amendment afforded greater latitude with respect to using excerpts from Mr. Ford's literary expression since such excerpts were essential to the reporting of the news story occasioned by the publication of the memoirs. This argument met prompt rejection, with Justice O'Connor commenting that the theory "would expand fair use to effectively destroy any expectation of copyright protection in the work of a public figure. Absent such protection there would be little incentive to create or profit in financing such memoirs and the public would be denied an important source of significant historical information. The promise of copyright would be an empty one if it could be avoided merely by dubbing the infringement a fair use 'news report' of the book." It was pointed out that First Amendment protections already are "embodied" in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and in the traditional fair use protection for scholarship and comment. No need was shown, stated Justice O'Connor, for expanding fair use to create a "public figure exception to copyright."

Upon reaching the first of the statutory fair use factorsthe character and purpose of the use - the court determined that The Nation went beyond simply reporting uncopyrightable information and attempted to exploit the "headline value" of its infringing use. The fact that the publication was of a commercial rather than non-profit nature weighed against a finding of fair use. The Nation's use had the "intended purpose" of supplanting the copyright holders' commercially valuable right of first publication, and the magazine knowingly exploited a manuscript obtained without permission.

In next analyzing the "nature of the copyrighted work" factor, the court noted that some of the most expressive elements of Mr. Ford's historical narrative/autobiography were used by The Nation. The words quoted by the magazine may have been an insubstantial portion of the manuscript, but, according to the District Court, The Nation "took what was essentially the heart of the book." Given that the verbatim quotes from the Ford manuscript amounted to at least 13% of the infringing article, and that the article was structured around the quoted excerpts, Justice O'Connor disagreed with the Court of Appeals' statement that the magazine "took a meager, indeed an infinitesimal amount of Ford's original language."

Another statutory factor focuses on the effect of the allegedly infringing use upon the potential market for, or value of the copyright work "undoubtedly the single most important element of fair use." The trial court had found an actual effect on the market for the manuscript in the cancellation by Time magazine of its planned serialization of the Ford work. And Justice O'Connor agreed that "rarely will a case of copyright infringement present such clear cut evidence of actual damage." The Nation's article directly competed with the copyright holders' proposed entry into the prepublication market. Furthermore, permitting a fair use defense in this case might impair the marketability of first serialization rights in general.

Since the copyright holders had established a prima facie case of actual damage which The Nation did not rebut, the trial court properly awarded damages and an accounting of profits, ruled Justice O'Connor, reversing the Court of Appeals judgment and remanding the matter for further proceedings consistent with the opinion of the Supreme Court.

Justice Brennan, joined by Justices White and Marshall, began his dissent by calling the court's holding a constricted reading of the fair use doctrine which would ill serve the "progress of arts and sciences and the robust public debate essential to an enlightened citizenry.."

The threshold question of copyrightability caused Justice Brennan to pause, as Justice O'Connor did not, to recall that in this case, "virtually all of the material in The Nation's article indirectly recounted Mr. Ford's factual narrative of the Nixon resignation and pardon, his latter-day reflections on some events of his presidency, and his perceptions of the personalities at the center of those events." According to Justice Brennan, no copyright could be claimed in this information "qua information." An infringement claim would have to be based on the substantial "tracking" of Mr. Ford's expression of the information. But the linguistic similarities encountered by Justice Brennan were insufficient, in his view, to constitute infringement because there are only a limited number of ways to express factual events; and The Nation article paraphrased either noncopyrightable material or "disparate isolated sentences from the original." The article did not "mimic" Mr. Ford's structure, except, conceded Justice Brennan, with respect to the manuscript's discussion of the Nixon pardon. And in this instance, the copyright holders could not claim the infringement of a chronological account of the historic episode.

Once over the copyrightability threshold, Justice Brennan surveyed the statutory factors which guide fair use determinations, after first acknowledging that assessing the "propriety" of a subsequent author's use of the copyright holders' literary form is particularly difficult with a work of history when the literary form reflects only a part of the labor necessary to create the work. Nevertheless, copyright law does not create any property interest in information and ideas. And, in Justice Brennan's judgment, the majority's fair use analysis yielded "to the temptation to find copyright violation based on a minimal use of literary form in order to provide compensation for the appropriation of information from a work of history."

The purpose of the use criteria would have justified a finding of fair use, per Justice Brennan, since The Nation's asserted purpose was news reporting. The source of the information did not make the article any less a news report.

Relying on the commercial nature of The Nation's use as a factor weighing against a finding of fair use, was inappropriate stated Justice Brennan, as was the majority's reference to The Nation's "putative bad faith" in obtaining the manuscript. No court found that the magazine possessed the manuscript illegally or in violation of the copyright holders' common law interests.

The informational nature of Mr. Ford's work meant, for Justice Brennan, that the scope of fair use indeed would be broader, as argued by The Nation, than it might be for a work of fiction. And Justice Brennan at this point argued against any categorical presumption against prepublication fair use as unwarranted and unfaithful to the intent of Congress.

In turning to the statutory factor which considers the amount and substantiality of the portion of the allegedly infringed work which was used, Justice Brennan stressed the fact that only 300 words were used from a manuscript of more than 200,000 words and, again, that the quotes were drawn from various portions of the work. The Nation did use six particular quotes concerning Mr. Ford's observations and reflections about President Nixon which were of "admittedly strong expressive content." But while this use might be considered substantial, the material used was neither "clearly excessive or inappropriate to The Nation's news reporting purpose."

The effect on the market factor was an important element in the case, agreed Justice Brennan, and the Court properly focused on the effect of The Nation's use on the manuscript's serialization potential, and not just the market for sales of Mr. Ford's book. But Justice Brennan would have upheld the Court of Appeals' finding that the evidence did not suggest that it was the limited use of Mr. Ford's expression by The Nation which led to Time's decision not to serialize the work, but rather that the cancellation was based upon the revelation of confidential, but non-copyrightable information.

Justice Brennan concluded that The Nation's limited use of literary form was not an infringement; that the Court's narrow approach to fair use would permit Harper & Row and the Reader's Digest to monopolize unprotectable information; and that the decision would allow public officials to "capture" the economic value of the information in their possession, thereby presenting a risk to the continued "robust debate of public issues." It was this debate which The Nation had sought to encourage by being the first to provide information to the public, for which action liability was improperly imposed upon the magazine, concluded Justice Brennan.

Harper & Row, Publishers, Inc. v. Nation Enterprises, Case No. 83-1632 (U.S.Sup. Ct., May 20, 1985) [ELR 7:2:6]

Writer's action for misappropriation of ideas contained in a television script raised material issues of fact, rules Federal Court of Appeals, in decision reversing grant of summary judgment on behalf of Norman Lear and Tandem Productions

During the years 1977 and 1978, Thurman Whitfield developed and copyrighted a script for a television show entitled "Boomerang." The show portrayed an interracial, crime-fighting rock band called Boomerang. In 1979, Whitfield sent a mailgram to producer Norman Lear to inform him that a script of the show was on its way; Whitfield then sent the script to Lear at Tandem Productions. Lear forwarded the mailgram to another of his companies-TAT Communications.

At about the same time, Topper Carew created a television show, known as "The Righteous Apples," which was conceived of as a situation comedy involving the interaction of six junior high school students in a multi-racial rock band. In 1978, a pilot episode for an Apples television series was filmed, but not aired. In 1980-1981, a 20-episode series of Apples was broadcast under the auspices of the Corporation for Public Broadcasting.

In 1981, Whitfield sued Lear, Carew and various Lear-controlled production entities, alleging the following causes of action under California law: breach of contract; breach of confidential or fiduciary relationship; breach of implied covenant of good faith and fair dealing; fraud and misrepresentation, misappropriation and commercial piracy; unfair competition; false designation of origin and false advertising; and restitution based on quasi-contract and unjust enrichment. Whitfield claimed that Carew had access to the Boomerang script; that the Apples series as broadcast by the Corporation for Public Broadcasting differed from Carew's original pilot script;

and that the Apples series misappropriated ideas contained in the Boomerang script.

A Federal District Court granted summary judgment to the Lear parties on the ground that Whitfield did not establish the existence of any factual questions concerning the alleged use of his work in the production of the Apples series. A Federal Court of Appeals has reversed the District Court decision.

Federal Court of Appeals Judge Winter first cited Desny v. Wilder, 46 Cal.2d 715 (1956), for the proposition that "if a producer accepts a submitted idea with full knowledge that the offeror expects payment in the event of use, California courts impose liability under a theory of implied-in-fact contract." In this case, Whitfield's script was forwarded by a Lear assistant to a creative affairs executive at TAT. Whitfield contended that the custom in the television industry is that a studio which does not review outside submissions will explicitly state this policy and return unopened any such submissions. But, according to Whitfield, if a studio or producer is notified of the submission of a script, and proceeds to review the script, the receiving party "by custom" has implicitly promised to pay for the ideas contained in the script, if used. Judge Winter observed that the communications among Whitfield and the Lear parties displayed "some of the attributes" of bargaining, including "arguably" an acknowledgment by Lear's assistant that Whitfield's ideas "were not freely appropriable." The District Court had expressed reservations as to whether the facts in the case warranted a finding that a contractual relationship was created. But Judge Winter concluded that, on the whole, the record did raise a material issue of fact as to whether the Lear parties accepted Whitfield's submission on the basis of an understanding that he expected payment if his ideas were used.

Judge Winter then took issue with the District Court's conclusion that there were no similarities between the ideas contained in the series and the Boomerang script. It was pointed out that the scripts of the episodes of Apples that actually appeared on television were not in the record and were not reviewed by the District Court. The only Apples scripts in the record were scripts for the pilots prepared before Whitfield submitted the Boomerang script to Lear. Assuming access to the Boomerang script by the Lear/Carew parties, and accepting as true Whitfield's allegations concerning the content of the televised Apples series (given the absence from the record of copies of the scripts), Judge Winter concluded that the alleged similarities between the Apples series and the Boomerang script were sufficient to allow a trier of fact to find that Whitfield's ideas were misappropriated under California law, thereby precluding summary judgment.

Whitfield v. Lear, 751 F.2d 90 (2d Cir.1984) [ELR 7:2:8]

Doctrine of copyright estoppel bars infringement claim against producers and distributors of television series "Quincy"

Marshall Houts, the author of a book drawn from the experiences of former New York City coroner Dr. Milton Helpern, was estopped from claiming that the work, entitled Where Death Delights, contains fictional elements protectable by copyright, a Federal District Court in California has ruled. Rather, the court found that the book had been held out to the public as factual, thereby precluding Houts' argument that certain fictional elements or fictionalized versions of factual elements, would remain entitled to full copyright protection. Senior District Court Judge Robert J. Kelleher therefore granted a motion for summary judgment sought by those Houts had sued for copyright infringement-the writers, producers, distributors, broadcasters and star of the television series "Quincy."

Houts argued that the "absurdity" of some of the pieces in Where Death Delights would have alerted readers to the fictionalized nature of the writing. But Judge Kelleher noted that there was no need to consider this "implicit" evidence, given the express representations by Houts and his publisher of the book's factual content. Furthermore, courts in other cases involving creative works with far more ludicrous subject matter than the stories in Where Death Delights, have found that the nature of the subject matter did not overcome an express assertion of factual content. An examination of one purported example of intrinsic absurdity was not "so ludicrous as to make a reader at least ... doubt very seriously the factuality of these unauthenticated facts and incidents," declared the court.

Judge Kelleher concluded that the question of whether the book was held out to the public as factual was not a question of fact for the jury; that there were no controverted facts which would prevent the granting of summary judgment in this case; that the court was not concerned with whether the stories in Where Death Delights indeed were true of false; and that the "single, dispositive determination [was] whether the book was presented to the public as factual."

Houts v. Universal City Studios, Inc., 603 F.Supp. 26 (C.D.Cal. 1984) [ELR 7:2:8]

Federal Court of Appeals upholds ruling that television news monitoring service infringed Atlanta television station's copyrighted news feature but reverses denial of injunctive relief

It appears that TV News Clips has exhausted its pursuit of the rugged "fitness trail" litigation, because the United States Supreme Court has refused to hear an appeal from Carol Duncan, the owner of the television monitoring service, of a Federal Court of Appeals decision holding the company liable for copyright infringement.

The starting gun was fired on March 11, 1981 when WXIA-TV, an Atlanta, Georgia television station owned by Pacific and Southern Company, broadcast a one-minute, 45 second news feature on a local junior college's new exercise program. TV News Clips, which videotapes television news programs and markets the tapes to the subjects of the news reports, sold a copy of the feature to the junior college.

Subsequently, WXIA sued News Clips for copyright infringement. The station's motion for summary judgment was denied (ELR 5:6:16), but after trial, a Federal District Court found that the news feature was protected by copyright law and that News Clips' use of the copyrighted material was not a fair use (ELR 6:4:8). However, the District Court refused to grant the station's request for injunctive relief prohibiting News Clips from copying WXIA's newscasts in the future. And the court entered judgment only for the station's lost profits, in the amount of $35.

A Federal Court of Appeals has upheld the District Court's decision, but has determined that injunctive relief was available to WXIA. Judge Johnson, after stating that the news feature was protected by copyright law, undertook an examination of the four statutory factors relevant to a fair use defense under section 107 of the Copyright Actan examination which the District Court declared unnecessary in this case. Notwithstanding the District Court's "erroneous interpretation of the law," Judge Johnson concluded that further factfinding was not required because it was possible to conclude, on the basis of the District Court's resolution of the factual issues raised, that, as a matter of law, News Clips' activities did not constitute fair use. Judge Johnson cited the "unabashedly" commercial character of News Clips' use of WXIA's work; the lack of productivity or creativity in News Clips' use; the impact of News Clips' sales on WXIA's potential market for such sales; and the fact that News Clips copied an entire feature story.

News Clips, in addition to the fair use defense, attempted to argue that the First Amendment protected its conduct in that WXIA's enforcement of its copyright might result in the destruction of a tape which could provide evidence in a defamation suit against the television station, a possibility which was "entirely imaginary" in this case. Furthermore, according to News Clips, WXIA was attempting to deny the public its right of access to broadcast material. The court acknowledged that the public has a "limited interest" in "making television broadcasting more available." WXIA did erase some of its tapes, but still granted public access to as-yet unerased tapes or to scripts of its broadcasts. Thus, News Clips' activities increased public access to broadcast material only in a very limited way.

Judge Johnson concluded by granting injunctive relief to WXIA, finding that the District Court relied on "irrelevant and insufficient grounds in its refusal to grant injunctive relief." The fact that WXIA erased some portions of its broadcasts did not establish the station's intent to abandon the copyrights on such works.

Pacific and Southern Company, Inc. v. Duncan, 744 F.2d 1490 (1lth Cir. 1984) [ELR 7:2:9]

Federal District Court in New York rules that renewal copyright in song "Rock Around The Clock" was held by deceased co-author's next of kin; summary judgment is denied for failure to adequately allege next-of-kin status

If ELR readers who "Rock Around the Clock" (and we know there are many of you) will pause for a moment, let us consider a dispute over the ownership of the renewal copyright interest in the song.

The chronology of events began in March 1953 when Max Freedman and James Myers (aka Jimmy DeKnight), the co-authors of the song, registered the copyright in the name of Myers Music, Inc. In October 1962, Max Freedman died; his will bequeathed "all of his worldly possessions" to his widow Ray Freedman. In January 1978, Ray Freedman assigned to Capano Music her rights in the copyright to the song for $2,000. In December 1980 Ray Freedman died; her will left her copyright and royalty interests to Mollie Goldstein, her sister.

On January 26, 1981, James Myers renewed the copyright in the song.

In December 1982, Daniel Waldstein, the son of Max Freedman's sister, assigned his claimed interest in the copyright to Capano (Ann Freedman Waldstein, deceased, was alleged to be Max Freedman's sole surviving next of kin).

In May 1983, the executor of Ray Freedman's estate was appointed the administrator of Max Freedman's estate; the administrator then distributed Max Freedman's interest in the copyright to Mollie Goldstein. In July 1983, Goldstein assigned her interest in the copyright to

Myers Music in exchange for a payment of $10,000 and a guarantee of at least $156,000 in royalties.

The various parties' arguments with respect to their interests was described by the court as follows:

Waldstein: upon Ray Freedman's death, the copyright interest bopped back to Max Freedman's estate and proceeded, via Ann Freedman Waldstein, to Daniel Waldstein and then to Capano.

Capano: agrees with Waldstein, but also argues, in the alternative, that the interest passed from Max Freedman to Ray Freedman and from Ray Freedman to Capano.

Myers Music and Goldstein: the interest passed from Max Freedman's estate to Ray Freedman; from Ray Freedman Is estate to Mollie Goldstein; and from Goldstein to Myers Music.

After describing all the dancers, Federal District Court Judge Robert L. Carter proceeded to the legal issues., The song's first term of protection under the Copyright

Act of 1976 lasted until December 31, 1981. But Freedman's assignment to Myers Music of his first term interest did not include an assignment of the renewal rights. Copyright renewal rights descend in accordance with the provisions of section 304(a) of the Copyright Act. Until the renewal period arrives, the renewal rights are not vested in anyone. However, when the renewal time spins by, the rights vest as follows: (1) in the author, if he/she is alive during the renewal period; (2) if the author is not living, the rights vest in the surviving spouse; (3) if the author is not survived by a spouse or children, the interests vest in the executor of the author's will; and (4) "in the absence of a will" the rights vest in the author's next of kin.

The renewal period for "Rock Around the Clock" began on January 1, 1981. Thus, the interest transferred from Ray Freedman to Capano in January 1978 did not provide Capano with any rights in the renewal copyright because Ray Freedman died before any such rights could vest in her.

The court then found that the rights did not vest in the executor or administrator of Max Freedman's estate because, as of the vesting date, no one had been named to replace the deceased Ray Freedman in the role of administrator. So, the renewal rights passed to Max Freedman's next of kin.

Judge Carter rejected the argument of Myers Music and Goldstein that Max Freedman did have a will, albeit not a living administrator or executor, and that the renewal rights therefore passed via the will to these parties. Even if the renewal interest had vested in the executor of Max Freedman's estate, declared the court, the result would have been that Max Freedman's next of kin, and not Mollie Goldstein, would succeed to the renewal interest in the copyright. An executor or administrator claims the renewal rights as a fiduciary for the benefit of the author's legatees under the will. Max Freedman, having named no residuary legatees, the administrator was obligated to act for the benefit of Freedman's surviving next of kin at the time of the vesting of the renewal rights.

Despite all this, Judge Carter refused to grant summary judgment to Capano and Waldstein because of their failure to allege with specificity that Ann Freedman Waldstein was Max Freedman's sole surviving next of kin at the time renewal rights vested (either at the beginning of the twentyeighth year; at the time the renewal application was filed; or at the beginning of the renewal term), and to allege that Daniel Waldstein succeeded to whatever rights Ann Freedman Waldstein might have inherited.

Capano Music v. Myers Music, Inc., Case No. 83 Civ.8342 (S.D.N.Y., Feb. 5, 1985) [ELR 7:2:9]

New York City wins summary judgment in breach of contract action filed by concert promoter on account of City's cancellation of Shea Stadium event, but Ticketron motion denied because its contract with promoter raised material issue of fact

Whoever said you can't fight City Hall probably tried and lost in the City of New York. In a harsh decision, a Federal District Court has granted the City of New York's motion for summary judgment against a concert promoter, on the grounds that the city officials with whom the promoter contracted did not have the authority to bind the city. However, the promoter scored a minor victory when the court denied Ticketron's motion for summary judgment on the grounds that the contents of its contract with the promoter raised a material issue of fact.

The concert promoter, Genesco Entertainment, sought to lease Shea Stadium for a country and western music concert. After extensive negotiations, the relationship between the city negotiators and Genesco deteriorated, and the event was canceled. Genesco filed suit seeking damages for the cancellation, asserting various claims against Mayor Edward Koch, the City of New York, the Department of Parks and Recreation, and Ticketron.

Genesco's complaint asserted that the City, the Department and the Mayor had breached their contract with Genesco by refusing to accept the agreed upon sums two days before the scheduled event. Genesco alleged that it had contracted with the City and the Department to pay $40,000 to the City and $35,000 to the Mets baseball team (who play their home games at the stadium).

Genesco stated that this contract had been amended twice. The first time was four days before the show, when the price was increased an additional $35,000 for the City and $40,000 for the Mets. The next day, the City informed Genesco that it would need another $46,000 (bringing the total amount to $121,000). When Genesco attempted to pay this amount the following day, the City demanded yet another $10,000 for it and an additional $50,000 for the Mets. Genesco then filed suit alleging that as a result of the City's failure to accept the $121,000, it breached their oral agreement, damaging Genesco in the amount of $10.5 million.

Genesco's complaint alleged a number of other claims, including a claim against Ticketron for negligence in handling ticket sales.

The City moved for summary judgment on the breach of contract claim arguing that the alleged oral contract was invalid and unenforceable because it failed to conform to statutory prerequisites required of contracts for the lease of Shea Stadium. In particular, the City argued that the contract was unenforceable because it had never been agreed to by the authorized officer of the Department and that it had never been approved as to form by the City's Corporation Counsel. In dismissing this cause of action, the court began its analysis by noting that a municipality's power to contract is statutorily restricted for the benefit of the public. It stated, "statutory restrictions on a municipal corporation's power to contract protect the public from the corrupt or ill-considered actions of municipal officials. To allow recovery under a contract which contravenes such restrictions gives vitality to an illegal act and grants the municipality power which it does not possess...."

The court found that none of the parties with whom Genesco claimed to have negotiated with were statutorily authorized to enter into an agreement for the lease of Shea Stadium.

Genesco argued that notwithstanding these statutory requirements, he reasonably relied on the representations made by the City officials with whom he negotiated. Genesco also argued that although the negotiating parties did not have actual authority to enter into the contract, they possessed apparent authority to do so. However, the court noted that New York courts do not recognize the doctrine of apparent authority in cases involving municipal defendants. It stated, "New York law places the burden of determining the scope of a municipal officer's authority upon those who deal with municipal government. Unlike a typical agency relationship, the authority of municipal officers is a matter of record

The court dismissed the other claims against the City on the grounds that no triable issue of fact existed.

Ticketron, however, was not as lucky. The court refused to grant Ticketron's motion for summary judgment on the grounds that there was a genuine issue of fact concerning the content of its contract with Genesco.

Genesco entered into a written contract with Ticketron for the sale of tickets prior to the time the City canceled Genesco's proposed concert. Genesco alleged that Ticketron was negligent in failing to place tickets on sale at the agreed upon time; that it gave prospective purchasers incorrect information about the date of the concert, the price and availability of tickets; and that Ticketron failed to properly monitor ticket sales or coordinate efforts to sell tickets. As a result, Genesco argued, the City received inaccurate information about the level of ticket sales and consequently canceled the concert.

Ticketron argued that summary judgment was appropriate, because the contract entered into with Genesco contained several provisions disclaiming liability for the very type of negligence that Genesco had alleged. In addition, Ticketron argued that because Genesco admitted that it never received a use permit from the City, and because this constituted a breach of contract, summary judgment was appropriate because Ticketron had been relieved of its obligations under the contract.

In rebuttal, Genesco presented an affidavit of a Genesco principal, Gene Richards, in which he stated that the Ticketron contract did not include the printed matter that formed the basis of Ticketron's affirmative defense. Richards swore that he signed only the first page of a three-page document that Ticketron contended was the contract entered into, and that the second and third pages which contained the limitation of liability clauses were neither attached to nor referred to in the one page he signed.

The court stated that Genesco's claim was "rendered suspect" by the fact that the one page Richards admitted signing referred several times to sections contained only in the second and third pages of the contract relied upon by Ticketron. Nevertheless, it stated, Richards' affidavit raised a material issue of fact concerning the content of the contract between Genesco and Ticketron. As a consequence, the court refused to grant Ticketron's motion for summary judgment.

Genesco Entertainment v. Koch, 593 F.Supp. 743 (S.D.N.Y. 1984) [ELR 7:2:10]

Federal District Court rules that New York City transit officials violated Penthouse Magazine's First Amendment rights by removing from subways magazine's advertising posters containing allegedly "offensive" caricature of Walter Mondale; but

contrary state court decision denies Penthouse's request for injunctive relief

In April 1984, Penthouse Magazine submitted to Subways Advertising, the leasing agent for advertising space in the New York City subway system, a proof of a poster advertising the magazine's June issue. The poster, as described by Federal District Court Judge Haight, featured a caricature of Walter Mondale, drawn by political cartoonist Uri Hofmekler. Mr. Mondale was depicted wearing a medallion labeled "ERA Yes" around his neck but little else, i.e., Mondale was portrayed as an almost nude male "stripper," with female hands reaching up toward his unclothed thighs.

The president of Subways agreed to accept the poster if a black banner or "snipe" were added, covering the figure's midsection from abdomen to thigh. On May 10th, employees of Subways began installing the modified posters. However, soon after, the Chairman of the Metropolitan Transit Authority, which regulates New York metropolitan area mass transportation systems, ordered the removal of all posters already installed and prohibited any further installation upon determining that the poster was "offensive to good taste" and "objectionable."

Penthouse proceeded to sue the MTA, the New York City Transit Authority, and Subways seeking damages and an injunction directing these parties to replace the posters which had been removed and enjoining the future removal of the posters. A New York trial court denied Penthouse's motion for a preliminary injunction, finding the magazine's First Amendment claims "of questionable merit" and citing an inadequate showing of irreparable harm; the trial court ruling was affirmed, without opinion, by a state appellate court.

Penthouse then filed suit in Federal District Court. Judge Haight first denied Penthouse's cause of action for breach of contract, since Subways was not the party responsible for deciding to remove or refuse to display the posters. The contract between Penthouse and Subways provided that if a governmental action or order resulted in Subway's failure to carry out its obligation to Penthouse, such failure would not constitute a breach of contract.

Judge Haight next found that the subway parties had violated Penthouse's First Amendment rights by refusing to display the magazine's poster. Subways argued that the poster was commercial speech and outside First Amendment protection because the caricature of Mondale was being used to sell the magazine, not to communicate a political message. The court, however, observed that while the accuracy or fairness of the caricature's portrayal of Mondale might be disputed, it was "as clearly political speech as the famous caricatures of Nast and Herblock."The fact that the caricature appeared as a paid commercial advertisement did not deprive it of its political content, and the poster therefore was entitled to the "full panoply of First Amendment protection."

Judge Haight also concluded that the New York subway system, while not a traditional public forum such as a park, was "an appropriate site for passive expressive activity." Certain restrictions on expressive activity which have been imposed with respect to the interiors of transit vehicles, did not apply in this case, because the posters were not displayed inside subway cars, and also because the New York City Transit Authority, over a significant period of time, has accepted and displayed advertising in its subway facilities, thereby creating a designated public forum for the expression of commercial and political speech.

The conclusion that the subway system is a public forum meant that the subway authorities could not discriminate among the advertisements to be displayed on the basis of content except to further a compelling state interest via narrowly drawn regulations. The Penthouse poster was not a nuisance, as claimed by the subway parties, even if it might provoke disagreement or offend sensibilities. "Distate for Penthouse's advertising style" was not a compelling state interest justifying the poster's rejection. And an interest in protecting children from a sexually suggestive, although not obscene poster, while potentially a compelling state interest, required some clear and reasonably objective criteria to guide government officials in conducting nonarbitrary determinations concerning the content of advertising material. The only guideline in the instant case was a statement in the Subways-Penthouse contract barring ads "offensive to good taste ... or unsatisfactory to the New York City

Transit Authority." This language was "too vague and subjective" to restrict the discretion of subway officials. Their rejection of the poster therefore violated the First Amendment and Penthouse was entitled to a declaratory judgment with respect to its constitutional claim.

Penthouse International, Ltd. v. Koch, 599 F.Supp. 1338 (S.D.N.Y. 1984); New York Law Journal, p.6, col.2 (N.Y.Cnty., June 26, 1984) [ELR 7:2:11]

Alleged oral modification of exclusive merchandising license for Kiss souvenir items was invalid under New York's Statute of Frauds, rules Federal District Court

In December 1982, the musical group Kiss granted an exclusive license to Rock Tours, Ltd. to merchandise souvenir items during the group's upcoming six month tour. When the tour ended about three months early, Rock Tours was left with an unsold inventory of T-shirts, programs, hats and posters. The company was prepared to continue its merchandising activities on behalf of the group and engaged in negotiations accordingly. But Kiss eventually declined to countersign a proposed contract which the group had submitted to Rock Tours in October 1983. Instead, the group proceeded to contract with another merchandising company to sell the "paraphernalia" for a five month tour in 1984; it was during this tour that Kiss, for the first time, appeared on stage "unmasked" a true rock event.

Rock Tours sued Kiss, alleging breach of contract. The court first entered judgment for the company for an amount due as a credit against an advance paid to the group by Rock Tours. Rock Tours also claimed that the parties had entered another contract or had agreed to a binding oral modification of the December 1982 contract, and that the company was entitled to damages for the breach of this new or modified contract.

A Federal District Court in New York has ruled that the purported oral modification was invalid under New York's Statute of Frauds. Rock Tours' conduct during 1983, such as not disposing of its inventory of Kiss merchandise, did not amount to part performance sufficient to validate the oral modification, ruled the court, nor did such conduct provide a basis for a claim of equitable estoppel. There was no evidence that both parties sought to change the 1982 contract or that they began to perform under any new contract. The behavior of the members of Kiss showed "no more than a desire to keep their options open as long as possible," stated Judge Charles L. Brieant, who pointed out that this conduct was "both a natural result and the intended benefit of a clause requiring that modifications be in writing."

The court suggested that the 1983 negotiations most likely were aimed at devising a new contract rather than modifying any existing contract, but that even under this view, a writing still was required to overcome the Statute of Frauds.

In conclusion, Judge Brieant stated that "While it may have been unfair or sharp practice to make the encouraging statements ... relied on here," there was no evidence either of a fraudulent promise which might estop the application of the Statute of Frauds, or of actionable unconscionability.

Rock Tours, Ltd. v. Kiss, Case No. 84 Civ. 0011 (S. D. N.Y., May 16, 1985) [ELR 7:2:12]

Factual dispute as to whether artist's sculptural portrayal of a bikini swimsuit is a copyrightable work of

art precludes summary judgment in suit against rock group Missing Persons

Stripped to its essentials, the question before the Ninth Circuit Court of Appeals was whether various pieces of clear vinyl, partially filled, at strategic locations with crushed bright yellow and pink aquarium rocks was a utilitarian article of clothing or a work of art. Pieces of plastic tubing allowed the vinyl to be tied around a female body so as to resemble the top and bottom of a bikini swimsuit.

Artist and fashion designer Gregory Poe claimed that he created "Aquatint No. 5" in 1978 as "an artwork in the medium of soft sculpture." Subsequently, Poe made the piece available to photographer Carla Weber who, according to Poe, planned to photograph Aquatint No. 5 and to include the photograph in her professional portfolio. Weber did photograph Aquatint No. 5, as worn by

Dale Bozzio, a member of the rock group Missing Persons. The photograph then was reproduced, allegedly without Poe's authorization, on an album cover for the group's album entitled "Missing Persons."

Poe proceeded to bring an action against Missing Persons, certain members of the group, and Capitol Records for copyright infringement and violation of section 43(a) of the Lanham Act. A Federal District Court concluded that Aquatint No. 5 was not copyrightable because the functional aspects of the piece were not "independent of the alleged sculptural/artistic aspects of the suit." But the Court of Appeals ruled that the evidence presented to the District Court raised a disputed issue of material fact as to the copyrightability of Aquatint No. 5, thereby precluding an award of summary judgment on behalf of the group and the record company.

Judge Arthur Alarcon noted that section 101 of the Copyright Act defines a "useful article" as an article "having an intrinsic utilitarian function that is not merely to portray the appearance of the article." However, Poe contended that he was attempting to create a work of art which portrayed an article of clothing. According to Judge Alarcon, the question of whether Poe also created an article of clothing which could function as a swimsuit was not established by the evidence. The District Court's determination that Poe's piece was a swimsuit apparently was based on its visual examination of a photograph of the work as displayed by a model. But the District Court's belief that Aquatint No. 5 looked like a swimsuit was found to be an insufficient ground for the denial of copyright protection. Since the uncontradicted evidence showed that "the only reason for [the] existence of Aquatint No. 5 was as a work of art," summary judgment was unwarranted and the matter was remanded for further proceedings.

According to one news report, the decision is significant because under traditional federal copyright law, clothing designs cannot be copyrighted. Hence, "designers whose garments show up in photographs - or are even copied outright - ordinarily have no legal remedies." Indeed, Poe had attempted to register the piece with the federal Copyright Office in 1982, but his application was rejected. Perhaps the last word should come from Poe's attorney, Paul D. Supnik of Beverly Hills, who has been quoted as stating "You can't put a piece of art on your body and call it clothing."

The Entertainment Law Reporter has learned that the case was recently settled, on terms that are to remain confidential.

Poe v. Missing Persons, 745 F.2d 1238 (9th Cir. 1984) [ELR 7:2:13]

Art gallery's repurchase agreement did not transform sale of paintings into investment contract subject to securities regulations, rules Federal Court of Appeals

Upon contemplating an action brought by Christopher Stenger for the alleged violation of securities laws by the R. H. Love Galleries in connection with the sale of certain paintings, Federal Court of Appeals Judge Pell initially declared that the case might be termed "one of first Impressionism." Stenger stated that when he purchased 12 paintings from Love for $1,500,000, three documents accompanied the paintings-an Authentication and Appraisal, an Inventory and Record, and a

Guaranteed Repurchase Allowance, which allowed Stenger to return a painting to the gallery within five years and have the full amount of the purchase price credited toward the purchase price of one or two works of art having equal or greater value. Stenger alleged that the three documents transformed the sale of the paintings into a sale of securities.

A Federal District Court ruled that Stenger had failed to allege the existence of a securities transaction or a violation of federal warranty law, and this ruling has been affirmed on appeal. Judge Pell, in agreeing with the District Court that the sale of the paintings with the documents did not constitute an investment contract, noted that Stenger's complaint did not show a pooling of funds or sharing of profits with other investors. Furthermore, the "fortunes" of Stenger and the gallery with respect to any appreciation or loss in the value of the paintings were unrelated.

Stenger was free to sell the paintings through any means he chose, and Love was not entitled to share in any profit; however, Love would receive a commission if Stenger sold his paintings through the gallery even if a painting were sold at a loss. In all, there was an absence of a common enterprise, and the application of securities laws was unwarranted, the appellate court ruled.

Stenger v. R.H. Love Galleries, Inc., 741 F.2d 144 (7th Cir. 1984) [ELR 7:2:13]

New York artist obtains preliminary injunction barring building owner and lessee from interfering with his completion of a mural on building wall

A New York trial court has granted an artist identified only as Newmann a preliminary injunction barring

Delmar Realty Co. and Muidallap Corporation from interfering with the completion and integrity of Newmann's almost completed mural on the south wall of the Palladium Theatre Building on East 14th Street in New York City.

In 1982, Newmann entered into a written agreement with Delmar whereby Newmann was granted permission to create a mural on the south wall of Delmar's building. The mural was to be displayed until March 1988.

In March 1983, Delmar entered into a 15-year lease with Muidallap. Muidallap, in accordance with its obligation under the lease to improve the leased premises, proposed to alter the facade of the building and, in so doing, to paint over Newmann's mural.

In granting injunctive relief, State Supreme Court Justice Wilk first noted that Newmann would suffer irreparable harm if injunctive relief were not granted since the artist, in reliance upon his agreement with Delmar, had expended considerable time and effort in producing the mural. The Delmar-Muidallap lease did not specifically require Muidallap to alter the south wall of the building; therefore, an injunction would not impede Muidallap in carrying out its "improvement" obligation. And the court reminded Delmar that the company had promised Newmann that it would use its best efforts to insure the completion and preservation of the mural.

Muidallap argued that Newmann's interest in the wall was that of a licensee, revocable upon the execution of Muidallap's lease with Delmar. Justice Wilk, however, characterized Newmann's interest as an easement in gross rather than a license; and he found that injunctive relief would be appropriate even if Newmann's interest in the property were construed as a license, for only equitable relief would protect the integrity of Newmann's work in progress and his reputation as an artist.

The failure to record the Newmann-Delmar agreement did not preclude the granting of relief to Newmann, since it appeared that Muidallap had actual or constructive knowledge of the artist's interest in the property. The mural was hardly hidden.

After concluding that Newmann was entitled to a preliminary injunction, Judge Wilk discussed Newmann's claim under Article 228 of New York's General Business Law, the Artist's Authorship Rights Act. According to the court, the Act derived from the European concept of "droit moral" which recognizes that artists "have personal as well as economic rights in the works they create," and attempts to protect artists from having their works displayed in an altered or modified form. Since Muidallap had denied Newman access to the south wall of the building, the artist's work remained on display in an unfinished state. Muidallap violated "the spirit and letter" of the Act, stated the court, and pending the resolution of Newmann's claims, the court enjoined Delmar and Muidallap from denying Newmann reasonable access to the south wall to complete his work.

Newmann v. Delmar Realty Co., Inc., New York Law Journal, p.12, col. 6 (N.Y.Cnty., June 11, 1984) [ELR 7:2:14]

Television producer's complaint against National Enquirer for false light invasion of privacy did not have to plead special damages, rules California appellate court

On the basis of a footnote in a 1969 California Supreme Court opinion (Kapellas v. Kofman, 1 Cal.3d 20), invasion of privacy claims based upon the knowing or reckless exposure of a party to false publicity have been characterized by various courts as "in substance equivalent to ... (a) libel claim." And in an action for libel based upon a publication that is defamatory only by reference to extrinsic facts not appearing on the face of the article, section 45a of the California Civil Code requires the pleading of special damages caused by the libel. But a California appellate court has found that the special damages restriction on libel claims did not require the dismissal of television producer Arthur Fellows' false light invasion of privacy claim against the National Enquirer.

Fellows' action concerned an article in the August 17, 1982 edition of the Enquirer. The article reported on Fellows' alleged social activities with actress Angie Dickinson. Fellows demanded the correction of the article, stated that he and Dickinson had never dated, that he was not "the new man in her life," and that the article falsely depicted him, to those with knowledge of his marriage to Phyllis Fellows, as engaging in improper and immoral conduct. When the Enquirer rejected Fellows' demand for correction, he brought an action against the publication for libel and for invasion of privacy. Fellows claimed that he had suffered injury to his reputation, shame, mortification and hurt feelings, and also that he had incurred special damages to his business as a producer and damage to his business relationships in the film industry.

After proceedings in the trial court, Fellows eventually narrowed the causes of action in his complaint to the intentional infliction of emotional distress and invasion of privacy by false light publicity. The trial court sustained the Enquirer's demurrer to the complaint without leave to amend. The court cited as controlling authority the abovementioned decision in Kapellas v. Kofman; thus, in the absence of proof of special damages, Fellows' complaint was dismissed.

The appellate court reversed the trial court ruling, and, since the issue before it was one of first impression, proceeded to conduct a lengthy review of the development of the right of privacy in California law. The cause of action originally was based on the publicizing of true "but discrediting events ... in an individual's past." A claim now may be based on offensive publicity that falsely attributes "characteristics, thoughts or behavior" to an individual. Viewed as a whole, declared appellate court Judge Lucas, the case law establishes that the tort of invasion of privacy by false light publicity "possesses a status and quality independent of libel." The most important distinction between the torts is that "...an action for libel primarily protects and compensates for damage to the plaintiff's reputation, whereas the tort of false light publicity, like the other branches of invasion of privacy, protects the plaintiff from and compensates him for injury to his peace of mind and feelings."

This "critical" distinction, according to the court, meant that although Fellows' since-abandoned libel claim, which had alleged damage to his reputation, was barred by section 45a, his action for invasion of privacy, seeking redress for injury to his peace of mind, was not subject to or barred by the statute. The extension of section 45a to a false light claim would be unwarranted, stated Judge Lucas, since an individual's reputation is not the interest involved in invasion of privacy claims.

The Enquirer contended that Fellows may have suffered damage to his "reputation for moral rectitude and fidelity to his wife," as alleged in the libel cause of action, but that such damage would have occurred only in the eyes of those who knew he was married. But Judge Lucas pointed out that Fellows may have suffered the alleged injury to his privacy, peace of mind, and feelings due to the publication of the article, despite the absence of any reputational injury.

Furthermore, applying section 45a's special damages requirement would "shift the focus" of the invasion of privacy cause of action to elements which are not traditionally considered in such an action. The prime elements of the tort are publicity and falsehood - whether defamatory or not. "Innocent publishers" still will be protected by decisions under the First Amendment, which bar false light actions based on reports of matters in the public interest unless the reports are both false and published with knowledge of or reckless disregard for the falsity.

Fellows did allege that the Enquirer published its statement with the "high degree of fault" required by Time, Inc., v. Hill (385 U.S. 374 (1967); and the court noted that Fellows will be required to prove that allegation in order to recover damages since a report of a celebrity's "romantic activities" might qualify as a matter of public interest.

In conclusion, Judge Lucas stated that the court's decision would not conflict with its recent rulings in Strick v. Superior Ct.(ELR 5:4:14) and in Flynn v. Higham (ELR 6:1:10). In Strick a party whose cause of action for libel was time-barred was not allowed to proceed with an "equivalent" claim; the court declined to "undercut" the legislative policies of the statute of limitations, and the Uniform Single Publication Act, both of which statutes apply to invasion of privacy as well as libel claims. And in Flynn, the court correctly applied the rule that invasion of privacy and libel claims are personal to the individual named by a publication, stated Judge Lucas.

Fellows' case therefore was remanded for further proceedings only as to the invasion of privacy claim.

Fellows v. National Enquirer, Inc., 211 Cal.Rptr.809 (1985) [ELR 7:2:14]

Tom Selleck's father not required to plead special damages in libel action against weekly magazine; false attribution to Selleck of statements about his son amounted to libel per se, rules California appellate court

As in Fellows v. National Enquirer (ELR 7:2:14), Robert Selleck's action against Globe International for damages of $1,000,000 for libel and false light invasion of privacy initially was dismissed by a trial court.

Selleck, the father of actor Tom Selleck, based his action on statements appearing in the December 14, 1982 issue of a weekly magazine known as the Globe. The front page of the issue carried the headline "Tom Selleck's Love Secrets - by His Father." The accompanying article was entitled "Why Tom Selleck Can Never Be a

Happy Lover." A photograph of Robert Selleck was included in the article, and the caption read "His Father Reveals All." The Globe then attributed to Robert Selleck a description of Tom Selleck as "a shy guy so ill at ease with women that he finds it difficult to sustain a lasting relationship," as well as other statements concerning the actor's romantic attitudes.

Robert Selleck alleged that he never gave an interview to a Globe reporter and never "revealed" to any other person information as to his son's "love secrets." Thus, Selleck claimed, the Globe article was libelous on its face in that it falsely attributed to Selleck statements which he did not make, thereby subjecting him to hatred, contempt, ridicule and humiliation, and injuring him in his reputation, profession and business. In addition to claiming general damages, Selleck alleged that he sustained special damages due to the publication of the article, including loss of reputation and loss of business earnings.

Selleck's cause of action for invasion of privacy incorporated the allegations of the libel claim and went on to aver that the Globe had knowledge of or acted in reckless disregard of the false light in which Selleck would be placed by the publication of the article. This cause of action did not separately allege special damages.

The trial court sustained the Globe's demurrer to the complaint on the ground that the article was not libelous on its face; that special damages were not adequately pleaded; and that the false light invasion of privacy claim also failed to state a cause of action. Selleck was given 30 days to amend the complaint, but did not do so; judgment therefore was entered dismissing the action.

The appellate court first cited the statutory rule that a defamatory publication not libelous on its face is not actionable unless a party alleges that he or she has incurred special damages (California Civil Code section 45a). Selleck contended that the libel claim stated a cause of action on its face, eliminating the need to allege special damages. Presiding Judge Lillie agreed, pointing out that the content of the Globe article in conjunction with the quoted headline and caption "clearly and naturally convey[ed] the impression that [Selleck] granted an interview [to the Globe] in which he divulged ... matters ... revealed ... in confidence..." At least some readers of the article might reasonably conclude that Robert Selleck violated his son's confidence by revealing to the public purportedly confidential information. Readers also might infer that Robert Selleck was paid to divulge his son's "secrets," imputing to the father "a Judas-like betrayal of his son."

It was observed that "Falsely ascribing statements to a person which would have the same damaging effect as a defamatory statement about him is libel ... Falsely charging a person with a violation of confidence reposed in him is libel per se." The Globe article, including the headline and caption and the circumstances of its publication, was reasonably susceptible of a defamatory meaning on its face and therefore was libelous per se, ruled the court.

After rejecting the Globe's argument that its article expressed a protected opinion that Robert Selleck made certain statements about his son, the court ruled that the demurrer to the libel cause of action was improperly sustained.

In turning to the false light invasion of privacy claim, Judge Lillie pointed out that the California Supreme Court has not expressly declared that the requirements of section 45a apply to false light claims. But even if a special damage requirement were imposed in this case, the requirement would have been met because the challenged article was reasonably susceptible of a defamatory meaning on its face. Since Selleck's claim for false light invasion of privacy was based on facts alleged in the libel claim, he was not required to plead special damages in order to state a cause of action for false light invasion of privacy, and the demurrer as to this cause of action was improperly sustained on the special damages argument, ruled the appellate court.

Nevertheless, Judge Lillie dismissed the invasion of privacy claim as surplusage since Selleck's libel claim would likely provide him with a complete remedy for any damages he might have incurred due to the publication of the article including damages for injury to his feelings.

It should be pointed out that in a footnote, the court distinguished the Fellows decision, since the false light in which Robert Selleck allegedly was placed was apparent, in the court's view, on the face of the Globe article. Thus, there was "even less reason here to apply section 45a's requirement of special damages to the false light claim than there was in Fellows."

Selleck v. Globe International, Inc. 212 Cal.Rptr. 838 (1985) [ELR 7:2:15]

Federal Court of Appeals reverses decision denying summary judgment to ABC in libel action arising from "20/20" broadcast on Iowa insurance agents

The May 14, 1981 telecast of ABC's program "20/20" contained a report on allegedly fraudulent practices engaged in by certain Iowa insurance agents when selling medical and hospital insurance policies to senior citizens. An ABC crew had videotaped a meeting between two senior citizen "decoy" insurance customers and insurance agent Garo Lauderback. During his presentation, Lauderback made some "admittedly false" statements about the insurance polcies available to the couple. The 20/20 report, which included portions of the Lauderback tape, mentioned that Lauderback was "under a formal investigation." Lauderback sued ABC for libel, contending that the broadcast, on the whole, characterized him as a crook and a liar.

A Federal District Court denied ABC's motion for summary judgment, finding that material factual issues remained to be resolved and that there was insufficient support for holding that the 20/20 report was a privileged communication. But a Federal Court of Appeals has reversed the District Court decision on the ground that ABC's statements about Lauderback were protected expressions of opinion. The appellate court rejected Lauderback's argument that ABC's comments about him were "clothed as opinion" but were based on undisaverage viewer of the 20/20 broadcast would not conclude that Lauderback had been indicted or convicted of a crime. The broadcast's portrayal of Lauderback as a "less than honest or scrupulous insurance agent" reflected ABC's belief that Lauderback may have engaged in unethical dealings-there was no specific accusation of felonious conduct. And, concluded the court, "no undisclosed facts existed which were necessary for the viewers to be able to independently evaluate the opinions expressed."

Lauderback v. American Broadcasting Companies, Inc., 741 F.2d 193 (8th Cir. 1984) [ELR 7:2:16]

New York appellate court denies summary judgment to newspaper in defamation action involving allegedly unauthorized publication of group photograph

A New York appellate court has upheld a trial court ruling denying summary judgment to Westchester Rockland Newspapers in a defamation action involving the allegedly unauthorized use of a teenager's photograph.

Howard Zucker had accompanied, purportedly as an observer, a group of young people who were attending the "Scared Straight" program at the Rahway State Prison in New Jersey. Westchester Rockland Newspapers published a photograph of "the youths on the bus," along with an article stating that the participants in the outing had been "involved with the law." Zucker declared that he never had been so involved, and that the publication of the article and the group photograph, in which he allegedly was identifiable, defamed him.

The court pointed out that an individual may recover damages for defamation based upon an article which is "arguably within the sphere of legitimate public concern" but first must establish that the publisher acted in a "grossly irresponsible manner." Westchester Rockland's reporter acknowledged that he had been told by one of the youth officers connected with the trip that the youths were not to be identified. And a youth officer testified that he had instructed the reporter not to take photographs or to mention names in his article. In all, the question of whether the newspaper had acted with gross irresponsibility was ruled an issue of fact to be decided by the jury.

A cause of action on behalf of Zucker's parents was dismissed since the parents were neither mentioned by name or otherwise identified in the article.

A dissenting judge would have granted the newspaper's motion for summary judgment, because "on no view of the evidence" could it be shown that the newspaper acted in a grossly irresponsible manner. The dissent pointed out that the complained-of statements were literally true; that the reporter reasonably relied upon a youth officer's description of the background of the voyagers; and that no triable issue of fact was raised as to whether the publisher's newsgathering procedures were "reasonably calculated to produce accurate reporting."

Zucker v. County of Rockland, New York Law Journal, p. 12, col. 2 (N.Y. App., May 23, 1985) [ELR 7:2:16]

California trial court's rejection of libel claim against McGraw-Hill and the Los Angeles Olympic Organizing Committee is reversed on appeal

Robert O'Connor, formerly an attorney for the Eastman Kodak Company, is entitled to bring an action for libel against McGraw-Hill, Inc., and the Los Angeles Olympic Organizing Committee, a California appellate court has ruled. O'Connor's claim arose in connection with an article published in the February 1, 1982 edition of Business Week Magazine. The article, which included a description of Kodak's unsuccessful negotiations to become an "official sponsor" of the 1984 Los Angeles Olympic Games, did not mention O'Connor's name, but did refer to the uncooperative behavior of a Kodak attorney. O'Connor claimed that he was the Kodak attorney referred to in the article, and that shortly after the article appeared, he was fired from his job.

In reversing the trial court ruling on behalf of McGrawHill and the LAOOC with respect to the libel and slander claims, the appellate court noted that O'Connor was not a public figure and was not involved in a public debate. Moreover, the question of whether the Business Week statement was a statement of fact or an expression of opinion was an issue to be determined by the trier of fact. The court also reinstated O'Connor's causes of action for invasion of privacy and interference with economic advantage.

O'Connor v. McGraw-Hill, 206 Cal.Rptr. 33 (Cal.App. 1984) [ELR 7:2:17]

Teddy bear manufacturer's failure to establish existence of common law trademark in heart embellished stuffed animal leads to dismissal of trademark infringement and unfair competition action

Placing an ordinary red heart on the left breast of an ordinary stuffed teddy bear may be adorable, but it is not sufficiently distinctive to constitute a common law trademark, a Federal District Court has ruled. In dismissing Colleen A. Wiley's action for trademark infringement, unfair competition, and false designation of origin against toy manufacturer R. Dakin and Company, and against the creators, licensees and distributors of the ubiquitous Care Bears, Federal District Court Judge Walter Jay Skinner pointed out that the Wiley Bear's heart adornment was not inherently distinctive in origin or in its placement on the creature.

Wiley also failed to establish that trademark rights were acquired via the public recognition of a secondary meaning in the product and symbol together. Wiley had sold about 6,000 bears since 1979; only a very small proportion of the bears were sold outside of Massachusetts; and there was no evidence of any significant effort, via advertising, to generate a secondary meaning for the heart design. On the other hand, R. Dakin sold over 200,000 of its allegedly similar bear since 1983, and sales of American Greetings' Care Bears totalled over $250 million in 1983, with an advertising budget for related products of about $9.2 million. Thus, due to the absence of a protectible trademark, the court granted Dakin and American Greetings' motions for summary judgment.

Wiley v. American Greeting Corp., 597 F.Supp. 736 (D.Mass. 1984) [ELR 7:2:17]

California appellate court refuses to exercise jurisdiction over racehorse owner's claim for lost winnings allegedly caused by competing jockey's interference

A racehorse owner's claim for lost winnings allegedly caused by a competing jockey's interference with the owner's horse during a race should have been brought before the California Horse Racing Board, a California appellate court has ruled.

As described by Judge Pickard, on October 24, 1982, Harlan Youst's horse, Bat Champ, participated in the eighth race at Hollywood Park, in Inglewood, California. During the race, Gerald Longo purportedly drove his horse, The Thilly Brudder, into Bat Champ's path and whipped Bat Champ with his whip, thereby causing Bat Champ to break stride. Bat Champ finished the race in fifth place. The Horse Racing Board, via the track stewards, subsequently disqualified The Thilly Brudder.

Youst filed a complaint for damages against Longo, asserting causes of action for negligent and intentional interference with Bat Champ, and for Longo's alleged participation in a conspiracy to interfere with Bat Champ's progress in the race. The trial court sustained Longo's demurrer to the complaint, finding that Youst had failed to state facts sufficient to constitute a cause of action.

On appeal, Judge Pickard countered Youst's argument that the state legislature did not vest exclusive jurisdiction over the regulation of racing in the California Horse Racing Board by pointing out that the rules of the Board grant the stewards the authority to determine cases involving claims for compensatory and punitive damages for interference with a horse's progress. Since Youst failed to avail himself of the administrative procedure and "broad remedial powers" vested in the Board and the track stewards, judicial relief was foreclosed.

Youst's third cause of action for the intentional tort of civil conspiracy was found to be "fatally defective" in that he did not establish that a civil wrong was committed by Longo. Again, any allegedly improper conduct on the part of Longo was governed by the Horse Racing Board and was not subject to the jurisdiction of the trial court.

While concurring, with certain reservations, in the court's ruling on the first two causes of action, Judge Johnson (in a lengthy dissent) focused on Youst's claim that Longo participated in a conspiracy with unknown "Does" to cause Bat Champ to lose a race which involved a total purse of $100,000-$50,000 of which was destined for the winner of the race. Judge Johnson would have allowed Youst to amend his complaint to more clearly set forth his charge that there existed an agreement between Longo and the unnamed parties to intentionally deprive Youst of a prospective economic advantage - i.e., the opportunity to win one of the substantial financial prizes awarded to the win, place and show horses in the race. Furthermore, according to Judge Johnson, if the co-conspirators included individuals who were not under the jurisdiction of the Horse Racing Board, such as a bookie, the claim then might not be within the exclusive jurisdiction of the Board. In all, stated the dissent, a tort remedy was not only appropriate "but nearly essential" given the circumstances of the case-in particular, the possibility that non-licensees of the Board may have attempted to manipulate the outcome of a horse race through unlawful means - and the likelihood that such a remedy could be granted "without diminishing the independence - or the joy - of sports competition."

Youst v. Longo, 161 Cal.App.3d 196 (1984) [ELR 7:2:17]

Arbitrator's ruling that assignment editor position at Cleveland television station was non-supervisory is upheld by Federal Court of Appeals

A Federal Court of Appeals has ordered the enforcement of an arbitrator's determination that the position of assignment editor at Cleveland, Ohio television station WJKWTV was not supervisory under section 2(11) of the National Labor Relations Act.

The grievance at issue arose from a request by the Cleveland local of the American Federation of Television and Radio Artists that Storer Broadcasting Company, the owner of WJKW, discharge Richard D. Patrick, the station's producer/assignment editor, for failing to belong to AFTRA. According to the union, the assignment editor position was a bargaining unit position until 1980 when Storer attempted to substitute non-union individuals. The arbitrator agreed that the position was reserved for a union member, and that Patrick should be given an opportunity to join AFTRA or be subject to discharge.

A Federal District Court, on considering AFTRA's complaint for the enforcement of the award, first remanded the matter to the arbitrator for further findings, and subsequently ruled that the arbitrator erroneously determined that the station's assignment editors were not supervisors.

In reversing the District Court's judgment, the Court of Appeals cited the arbitrator's findings that reporting assignments generally were predetermined by a management committee and that assignment editors exercised independent decision-making authority only on breaking stories-with even these decisions subject to prior approval or producer countermand. Thus, the occasional story assignment decision, according to the arbitrator, did not require "the exercise of independent judgment or the formulation or development of company policy." Furthermore, the assignment editors did not possess "the power to hire, transfer, discharge, reward, promote, discipline or any of the other authorities enumerated in Section 2(11)..." The arbitrator also noted that the fact that Storer may have placed a management employee on the assignment desk "in violation of the established past practice" did not make a nonsupervisory position a supervisory one.

The court concluded that the arbitrator's decision was substantially supported by the evidence and that the District Court should not have "second-guessed" the arbitrator's interpretation of employee status in this case. However, the arbitrator's ruling did exceed his authority to the extent that the union was entitled, under the collective bargaining agreement, to have Patrick removed from the assignment editor position only, and not from his supervisory producing duties. The matter therefore was remanded to the District Court for the enforcement of the arbitrator's award as amended.

American Federation of Television and Radio Artists, Cleveland Local, AFL- CIO v. Store r Broadcasting Company, 745 F.2d 392 (6th Cir. 1984) [ELR 7:2:18]

Briefly Noted:

Cable Television.

Group W Cable is not obligated to pay for the removal and reinstallation of its cable television lines in an apartment building undergoing extensive renovation work, a New York trial court has ruled. The owner of the apartment building sought a preliminary injunction which would have required Group W to relocate its equipment to the interior of the building. But Justice Burton S.. Sherman has denied injunctive relief on the grounds that there exists a triable issue of fact as to whether it was necessary to remove the cable lines to do the rehabilitation work involved; that the owner has an adequate remedy at law; and that the benefits of the removal or relocation of the television cables would inure to the owner, rather than to Group W or its subscribers. The owner therefore had to bear the cost of relocating the cable television lines.

Levine v. Group W Cable, Inc., New York Law Journal, p. 12, col. 2 (N.Y.Cnty., March 22, 1985) [ELR 7:2:19]

Cable Television.

An Arizona statute expressly granting counties and incorporated municipalities the authority to regulate and license cable television systems barred Catalina Cablevision Associates' antitrust action against the City of

Tucson, a Federal Court of Appeals has ruled. Tucson's award of a non-exclusive license for cable television service to a competitor of Catalina was held to be exempt from challenge under federal antitrust laws pursuant to the doctrine of state action immunity. The requirements for state action immunity were met, because Arizona's statutory scheme with respect to the municipal licensing of cable television systems clearly reflected "an affirmative state policy to displace competition with regulation..." And the state legislature "necessarily contemplated that cities would limit the number of cable providers despite the anticompetitive effects..." thereby validating Tucson's initial issuance of a single non-exclusive license.

Catalina Cablevision Associates v. City of Tucson, 745 F.2d 1266 (9th Cir. 1984) [ELR 7:2:19]

First Amendment.

A teacher-coach's letter to education officials concerning controversial athletic policies was a communication protected by the First Amendment even though the letter included some details which were not of general public interest, a Federal Court of Appeals has ruled. The court therefore upheld a jury award to Jerry L. Anderson of $10,000 in damages for physical and emotional distress and $75,000 in costs and attorney's fees. Also upheld was the District Court order permanently enjoining the enforcement of a School Board policy which required employees to send proposals through proper channels, insofar as this "channels" policy was applied to matters of public concern. The matter was remanded to the District Court only with respect to a possibly erroneous calculation of attorney's fees.

Anderson v. Central Point School District No. 6, 746 F.2d 505 (9th Cir. 1984) [ELR 7:2:19]

Advertising.

A Federal District Court in New York has denied a request for a preliminary injunction made by a movie producer against publisher of USA Today to enjoin the paper from publishing any publicity in connection with a contest for Michael Jackson concert tickets, unless the producer was listed as a sponsor with equal billing to other sponsors. Miami Gold Productions, Inc., producer of the movie "Cry of the City," alleged breach of contract and false advertising when Gannett Company, Inc. withdrew Miami Gold's participation as a sponsor in its contest for Michael Jackson's Victory Concert Tour tickets because of an unfavorable news segment broadcast on television linking Michael Franzese (president of the company) with the Mafia, and Gary Zimmerman (executive producer of the movie) with criminal acts. Miami Gold contended it would be irreparably harmed by loss of the goodwill it would derive as co-sponsor of the contest; and Gannett argued it would be seriously harmed by listing the movie producer as a co-sponsor. The court concluded that Miami Gold had not shown entitlement to a preliminary injunction. Miami Gold failed to show it would suffer irreparable harm if the injunction was not granted, but rather could be fully compensated by an award of damages if it established a breach of contract. Further, it failed to show either likelihood of success on the merits or a fair question for litigation with the balance of hardships tipping decidedly in its favor. The court found that because of First Amendment considerations it would be doubtful Miami Gold would be successful in obtaining injunctive relief.

Miami Gold Productions, Inc. v. Gannett Company, Inc., 593 F.Supp. 672 (S.D.N.Y. 1984) [ELR 7:2:19]

Art.

In a custody battle over the possession of 43 items of art, a Federal District Court in New York has found that Robert Owen Lehman is the exclusive owner of 40 of the items. The three remaining items were purchased on the joint charge account of Lehman and his former wife and therefore were jointly owned, ruled Judge Sprizzo, who then determined that Lehman was entitled to one-half of the value of those items at the time of trial unless he received possession and sole ownership of them. The court also found that Lehman is entitled to a writ of replevin with respect to those objects owned by Lehman but in his former wife's possession at the time the lawsuit began, and that he is entitled to recover the value of any objects for which his former wife could not account, as of the time and place of their conversion.

Lehman v. Lehman, 591 F.Supp. 1523 (S.D.N.Y. 1984) [ELR 7:2:19]

Previously Reported:

The following cases, which were reported in previous issues of the Entertainment Law Reporter, have been published: Wood v. National Basketball Association, 602 F.Supp. 525 (6:10:7); Cream Records, Inc. v. Jos. Schlitz Brewing Co., 754 F.2d 826 (6:11:8); United States v. Capitol Service, Inc., 756 F.2d 502 (7:1:11); Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396 (7:1:12). [ELR 7:2:19]

IN THE NEWS

Los Angeles court denies Donna Reed's request for injunctive relief in connection with her services on the television series "Dallas"

Deep in the heart of Los Angeles, Superior Court Judge John L. Cole has ruled that actress Donna Reed was not entitled to a preliminary injunction which would have required the producer of the television series "Dallas" either to use Reed in the role of Miss Ellie, eliminate the character, or stop filming scenes involving the character.

Judge Cole found it unlikely that Reed would prevail in her breach of contract action against Lorimar Productions and CBS-an action in which the actress seeks $2.5

million in general damages and $5 million in punitive damages.

Reed signed a contract with Lorimar and CBS in 1984 to play the role of Miss Ellie for one year. (Reed subsequently also was signed for the 1985-86 and 1986-87 broadcast years.) Reed replaced Barbara Bel Geddes, who, after an absence for illness, now has resumed playing the Miss Ellie character. Reed apparently did not have a specific "pay or play" provision in her contract. But (according to news accounts) the court found that the contractually-specified payments to Reed of about $17,000 per episode during the next two years would be "adequate" to compensate for lost screen exposure. [July 1985] [ELR 7:2:20]

WASHINGTON MONITOR

United States Department of Defense adopts regulations concerning public performance and duplication of copyrighted sound and video recordings by military personnel

The Department of Defense has issued a directive regarding the use of copyrighted sound and video recordings by individual military personnel. The directive does not regulate the procurement or use of copyrighted work for authorized official purposes.

The regulation states that permission or licenses from copyright owners should be obtained for the public performance of copyrighted sound and video recordings. General principles for determining whether a performance is "public" are set forth.

The regulation further states that the Department will not facilitate or permit unlicensed public performances or unlawful reproduction for private or personal use of copyrighted sound or video recordings, using government facilities or government duplicating and playback equipment, and that the various components of the Department of Defense shall establish procedures to comply with the directive.

DOD Directive 5535.4; 32 CFR Part 142; 49 Fed-Reg49450 (Dec. 20, 1984) [ELR 7:2:20]

DEPARTMENTS

In the Law Reviews:

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Political Speech or Obscenity? by Debra M. Zigelbaum, 7 Communications and the Law 3 (1985) (published by Meckler Publishing, 11 Ferry Lane West, Westport, CT 06880)

Privacy Invasion Tort: Straddling the Fence by Deckle McLean, 7 Communications and the Law 15 (1985) (published by Meckler Publishing, 11 Ferry Lane West, Westport, CT 06880)

Unauthorized Use of Deceased's Persona by Valerie B. Donovan, 7 Communications and the Law 31 (1985) (published by Meckler Publishing, 11 Ferry Lane West, Westport, CT 06880)

Book Review: Voices and Values: Television Stations in the Community by Arnold D. Kolikoff, 7 Communications and the Law 65 (1985) (published by Meckler Publishing, 11 Ferry Lane West, Westport, CT 06880)

Interactive Cable Television: Privacy Legislation by David A. Bode, 19 Gonzaga Law Review 709 (1983-84)

Champions of Confusion in Trademark Law: Champion Products, Inc. v. University of Pittsburgh by Cynthia B. Jones, 4 The Journal of Law and Commerce 493 (1984)

(published by University of Pittsburgh School of Law, 3900 Forbes Ave., Pittsburgh, PA 15260)

Community Television of Southern California v. Gottfried: Defining the Role of the Television Industry in Serving the Needs ofthe Hearing Impaired by Thomas W. Fothergill, 19 New England Law Review 899 (1984) [ELR 7:2:21]