BUSINESS AFFAIRS

The Motion Picture Industry's Film Rating System

by Jack Valenti

The motion picture industry's voluntary, nationwide, film rating system is now 17 years old. It came into being on November 1, 1968, jointly sponsored by the Motion Picture Association of America, the National Association of Theater Owners and the International Film Importers and Distributors of America. It replaced the antiquated production code system, with its rigid restrictions, instituted by the industry in the 1930s.

Despite the passage of 17 years, the objective of the rating system remains as simple and straightforward today as it was in 1968: to give advance information to parents so that they can make judgments about the films they choose their children to see or not see. That is the sole reason for the rating system. No more, no less.

The rating system evolved because the motion picture industry, in all its aspects - production, distribution and exhibition - recognized that it had a responsibility to the parents and children of America - to provide pertinent, understandable information about its films. This time-tested system is the industry's way of meeting that obligation.

Parental Responsibility

The motion picture industry has a responsibility to America's children, but so do our nation's parents. The rating system can send up a flare vivid enough to cause parents to make inquiry to find out more about the films their children want to see.

But, if parents don't take that extra step, if they don't take the time to learn more about the film, the rating system has little value, if any. Simply put, the rating system is not a surrogate parent.

It is the responsibility of parents to guide their children in the lives they lead, the character they build, the books they read, and the movies they attend.

If parents abandon that responsibility, no government, no agency, no commission and no rating system is going to salvage the future of their children.

Obviously, parental responsibility is linked irretrievably to our motion picture rating system. It is a joint venture between our industry and our nation's parents.

Responsibility to Filmmakers

The responsibilities of the sponsors of the motion picture rating system extend beyond their obligations to parents and children. The sponsors have an obligation to make certain that the system does not inhibit the freedom of filmmakers to tell their stories in their own way, free of outside interference.

Unlike the discarded Production Code Administration, the current rating program does not "approve or disapprove" the content of a film. It classifies motion pictures. We do not censor films. We abhor censorship. We do not command a filmmaker to edit one millimeter of film. If a filmmaker desires a different rating, he might voluntarily choose to edit it. But that decision belongs to him alone-not to the rating system.

How the System Works

The rating system is open to everyone - MPAA member films and non-member films alike. To date 37% of the more than 7000 films rated are being distributed by MPAA companies or their subsidiaries. The remainder, about 62%, come from non-MPAA companies.

The ratings are decided by a rating board located in Los Angeles. It consists of seven persons, including a chairman.

I, and I alone appoint the chairman. I do so in my capacity as chairman of the rating system's Policy Review Committee - the group comprised of representatives of MPAA, NATO and independent producers which decides the rules and procedures to be followed by the rating system. The rating board chairman in turn selects the members of the board.

There are no special qualifications for board membership except that one must love movies, possess mature judgment, and most importantly, have been a part of the parenting experience. Board members must be able to view a film as most parents might, deciding whether their younger children ought to see a particular film.

The board members view each film in its entirety, and after a group discussion they vote on the rating. We do not allow anyone to sit in on meetings and discussions of the rating board. These discussions and the ballots that are cast detailing rating reasons are confidential, primarily because the members discuss and comment on each film in detail. Confidentiality encourages members to express their views in total candor.

The rating is decided by a majority vote.

Disgruntled producers have three options.

First, they may disagree with the rating but decide to accept it nonetheless.

Second, they may edit the film to bring it within a less restrictive rating category. It is not uncommon for a film to be revised by the producer and then resubmitted to the rating board several times in hopes of attaining a different rating.

Third, producers may accept the rating and appeal it to the rating system Appeals Board - the final arbiter of movie ratings.

Appeals Board

The Appeals Board consists of 22 members: 9 representatives from MPAA member companies, 8 from the National Association of Theater Owners, and 4 from independent producers. I serve as a member and its chairman.

The Appeals Board meets in New York in quasi-judicial session to view the film in question. Following the screening the producer or his designee tells the Appeals Board members why he believes the rating board was incorrect, and a member of the rating board, usually the chairman, defends the rating. The two advocates then leave the room. In their absence, the Appeals Board members discuss the film and vote by secret ballot. A two-thirds vote is necessary to overturn the rating board.

Since 1968, 190 ratings have been appealed. The Appeals Board has sustained the rating board 101 times (53%); the decision by the rating board has been overturned 89 times (47%).

What the Ratings Mean

The rating board does not judge the quality or artistic value of a film, its story, the director or its stars. It leaves that to the critics and the audience.

It does give some cautionary information to parents to help them judge the suitability of a specific film. To that end, from the outset the rating system has divided the rating classifications into 2 broad divisions - those that are unrestricted and those that are restricted as to children.

Today, with the adoption of PG-13 in July 1984, there are 5 categories-three unrestricted (G, PG, PG-13) and two restricted (R, X).

In fitting a film into a particular rating category, the raters use no computerized formula. Rather, they assess each film in light of a number of criteria, including but not limited to, language, sex, violence and nudity. Drug use and various other content areas that will concern parents also contribute to rating decisions. A "G" rating means "General Audiences-All ages admitted."

This is a film which contains nothing which, in the view of the Rating Board, would be offensive to parents if even their youngest children view it. The G rating is not a "certificate of approval," nor does it signify a children's film. Some profoundly significant films are rated G (including, for example, "A Man for All Seasons").

Some snippets of language may go beyond polite conversation but they are common every-day expressions. No stronger words are present in G-rated films. The violence is at an absolute minimum. Nudity and sex scenes are not present.

"PG" means "Parental Guidance Suggested; some material may not be suitable for children."

This is a film which needs to be examined or inquired about by parents before they let their children attend. The label PG plainly states that parents may consider some material unsuitable for their children, but parents must make this decision.

Parents are warned against sending their children, unseen without inquiry, to PG-rated movies.

There may be some profanity in these films. There may be violence, but it is not deemed so strong that everyone under 17 need be restricted unless accompanied by a parent.

There is no explicit sex in a PG-rated film, although there may be some indication of sensuality. Brief nudity may appear in PG-rated films, but not anything beyond that.

The PG rating, suggesting parental guidance, is thus an alert for special examination of a film by parents before deciding on its viewing by their children.

Obviously the line is difficult to draw. In our pluralistic society it is not easy to make subjective judgments without incurring some disagreement. So long as parents know they must exercise parental responsibility, the PG rating serves as a meaningful guide and as a warning.

"PG-13" means "Parents are strongly cautioned to give special guidance for attendance of children under 13.

Some material may be inappropriate for young children."

PG-13 is thus an even stronger. Warning to parents to determine for themselves whether their younger children should attend because they, as parents, might consider some material not suited for their younger children. Parents are alerted by the rating to be very careful about the attendance of their under-teenage children.

A PG-13 film is one which in the view of the Rating Board leaps beyond the boundaries of the PG rating, but does not quite fit within the restricted R category. In effect, the PG-13 cautions parents with more stringency than usual to give special attention to this film before they allow their 12-yearolds and younger to attend.

If nudity is extensive and largely sexually oriented, the film will not be found in the PG-13 category. If violence is rough or persistent, the film goes into the R (restricted) rating. A film's single use of one of the harsher sexuallyderived words, though only as an expletive, shall require the Rating Board initially to issue that film at least a PG-13 rating. But more than one such expletive must lead the Rating Board to issue a film an initial R rating, as must even one of these words used in a sexual context.

PG-13 places larger responsibilities on parents for their children's moviegoing. PG-13 is designed to make these parental decisions easier for those films between PG and R.

"R" means "Restricted, under 17s require accompanying parent or guardian."

This film contains some adult-type material respecting language, violence, nudity, sexuality, drug use, or other content. Parents are advised in advance that the film contains adult-type material and they take their children with this advisory clearly in mind.

The language may be rough, the violence may be hard, and while explicit sex is not to be found in R-rated films, nudity and lovemaking may be involved.

The R rating is thus strong in its advance advisory to parents as to the adult content of the film.

"X" means "No one under 17 admitted."

This is patently an adult film and no children are allowed to attend. Among the reasons for not admitting children to X-rated films are the accumulation of brutal or sexually connected language, or of explicit sex or excessive and sadistic violence.

As of September 30, 1985, the rating board has rated a total of
7036 feature films as follows:

Rating	Number	Percentage
G	900	12.9
PG	2523	35.9

PG-13	60	00.8
R	3190	45.2
X	363	05.2

(PG-13 was introduced July 1984.)
The Rating System and the Law of Obscenity

The ratings are strictly advisory. Ratings, particularly the X, are not a determination that a motion picture is obscene or otherwise unprotected by the Constitution. Serious films by lauded and skilled filmmakers have been rated X. The rating board does not attempt to mark films as obscene or pornographic; that job is left to the courts.

Nonetheless, over the years both state and local governments have attempted to incorporate our ratings into legislation or official government policies affecting access to motion pictures. MPAA has opposed such governmental reliance on our ratings. Federal courts have agreed with us.

For example, in Swopes v. Lubbers, 560 F.Supp 1328 (W.D. Mich. 1983), the court wrote that "it is well established that the Motion Picture ratings may not be used as a standard for a determination of constitutional status ... (whether a work is obscene or not). The standards by which the movie industry rates its films do not correspond to the Miller v. California ... criteria for determining whether an item merits constitutional protection or not."

Legal Status of Rating Symbols

The G, PG, PG-13, and R rating symbols are certification of the MPAA. That means they cannot be used by any company which has not officially submitted its film to the rating board and received a particular rating. The rating may only be displayed on versions of the film identical to the one rated by the board.

The X symbol is not a protected certification mark of MPAA. It may be self-applied. In fact, the vast number of X ratings are self-applied. Only 5.2% of the films rated since 1968 have received an X.

MPAA closely monitors the use of its ratings to protect against unauthorized use of the G, PG, PG-13 and R symbols. We demand that violators cease and desist and will take legal action where necessary to protect the integrity of the rating system.

The Advertising Administration

The sponsors of the rating system recognize that their obligation to America's parents and children would be unfulfilled if steps were not taken to protect children from potentially offensive motion picture advertisements. To that end, all advertisements and publicity material must be submitted to the Advertising Administration of the MPAA for approval prior to the public release of a rated film. This includes but is not limited to newspaper, magazine, radio and television ads as well as previews of coming attractions. The appropriate rating symbol and definition must then appear on all approved advertisements.

We are especially concerned that children not be exposed to previews containing unsuitable material. Thus our advertising rules insure that children will not view a preview having a more restrictive rating than does the feature film they are attending. In other words, anyone attending a G, PG, or PG-13 film will see only a "sanitized" preview-one that most parents will not find offensive.

Parents' Views of the Rating System

Any system that humans construct, be it political, economic or social, will be flawed. The rating system is no exception. It is not perfect. There will be mistakes; no group can rate movies for 17 years without making some honest errors of judgment. The significant fact is that after rating more than 7000 films, only a precious few have evoked public controversy.

The true test of the rating system's worth lies in how the public judges it. It passes that test with flying colors.

Since 1969, the Opinion Research Corporation (ORC) of Princeton, New Jersey has surveyed approximately 2500 people each year. It asks the question: "Do you find the movie rating system very useful, fairly useful, or not useful in helping parents decide their children's moviegoing habits?"

Over the years, 72% of those for whom the system is especially designed - parents with children under 18 -

have said they find the rating system "very useful to fairly useful." This is an all-time high favorable percentage.

This high favorable opinion given the rating system has been consistent throughout the 16 years of nationwide polling by ORC.

What conclusions can be drawn from this annual sampling of the American public?

Parents, those for whom the rating system was designed and to whom its cautionary warnings are directed, find the rating system useful to them in helping them guide their childrens' movie-going. It is this usefulness, this service to parents, which has given such endurance to the voluntary rating system.

The Rating System and the New Technologies

In recent years the reach of the rating system has expanded.

Last year 14 major home video companies announced that the MPAA ratings given to films for theatrical release will automatically appear in a uniform and distinctive manner on all video cassettes and discs as well as all cassette and disc packaging for all home video versions identical to rated theatrical versions. This agreement formalized and made uniform the procedures already employed by most home video companies since the beginning of the industry.

Subsequently, the 1984 agreement was adopted by virtually all home video manufacturers. Thus it is now commonplace for ratings to be used in the home entertainment industry in a uniform manner employing the distinctive letter-symbol designs already familiar from the theatrical arena.

This means that if a dealer replaces the original packaging with a blank one - as is common in the rental business - the rating will still appear prominently on the disc or cassette itself.

The home video industry's use of the ratings extends beyond the inclusion of the ratings on packaging and the disc and cassettes themselves:

(1) Synopses are available to both retailers and consumers in catalogs listing all films on video cassettes and discs and their MPAA rating, if any.

(2) Approximately a dozen monthly newsletters are published providing an industry-wide listing of upcoming video releases and their MPAA ratings, if any. These newsletters are provided to retailers who in turn give them to consumers free of charge.

(3) Individual home video companies publish brochures announcing their new releases and the MPAA

rating, if any, assigned to each release. These brochures are available to dealers and consumers.

Also important is the availability of MPAA ratings to cable viewers throughout the country.

Local newspapers are carrying the ratings in their television listings with increasing frequency. Just this past summer, for example, the Washington Post added to its weekly listings the ratings for movies by pay-tv services such as HBO. Magazines, such as TV Guide do the same. And, cable viewers who subscribe to pay-tv services routinely receive monthly program guides carrying our ratings.

Conclusion

On November 1, 1985, the motion picture rating system was 17 years old. It has endured because:

-it has been nurtured by widespread support and observance throughout the film industry; and

-it has served parents well, and has continued to receive the approval by landslide majorities of the moviegoing public.

It is fair to say that the rating system has become a recognized and accepted part of the American national scene.

Jack Valenti is President and Chief Executive Officer of the Motion Picture Association of America, Inc., and is Chairman of the Alliance of Motion Picture and Television Producers, Inc. This article is based on testimony given by Mr. Valenti before the Attorney General's Commission on Pornography in Los Angeles in October 1985.
[ELR 7:6:3]

RECENT CASES

Federal District Court grants summary judgment to MGM/UA in Sean Connery's action alleging that contractual percentage-of-the-profits clause violated federal securities laws

The Central District of California might not be thought of as a typically James Bondian romantic and exotic locale, but it did provide the setting for actor Sean Connery's encounter with the vagaries of the Securities Exchange Act of 1934 and the Securities Act of 1933.

Connery initiated the action by claiming that MGM/UA Entertainment violated the federal securities laws in connection with the compensation due the actor for his performances in several James Bond films. The compensation packages entered into by Connery (or Inforex, the loan-out corporation providing Connery's services) and MGM/UA usually contained a percentage of the profits clause. Thus, in addition to agreeing to pay a guaranteed amount for Connery's services, MGM/UA proposed to pay "one percent (1%) of all gross monies in excess of Four Million Dollars ($4,000,000) received by distributors with respect to the distribution and exploitation of any motion picture in the United States with respect to which Connery's services are rendered."

MGM/UA argued that percentage of the profits clauses are not securities within the meaning of the applicable statutes. According to the "seminal decision" in this area, the definition of a security under the federal securities laws requires, in part that the profit from an investment activity comes "solely from the efforts of others."

Federal District Court Judge David V. Kenyon pointed out that Sean Connery's participation as the lead actor in several James Bond films was not such a minimum effort by Connery as to warrant characterizing the contractual payment guarantees as an investment subject to securities regulation. Judge Kenyon rejected the argument that Connery's services were distinguishable from the managerial or entrepreneurial efforts at issue in prior cases. Rather, the actor had "an undeniably significant role in the venture, not only in its artistic success, but also in its commercial success."

Judge Kenyon pointed out that not all actors whose employment contracts contain percentage of the profits clauses will be denied the coverage of the federal securities laws. But Connery's work was described as being as significant to the success of the James Bond films as the production, distribution or marketing of the films.

The court did deny MGM/UA's motion to dismiss the action on statute of limitations grounds, and the distributor's motion to dismiss Connery's claim, under California law, for the breach of an implied covenant of good faith and fair dealing-a claim based on the distributor's alleged failure to make the required profit participation payments.

Inforex Corporation v. MGM/UA Entertainment Company, 608 F.Supp. 129 (C.D.Ca. 1984) [ELR 7:6:7]

MGM Grand Hotel's revue "Hallelujah Hollywood" infringed copyrighted musical play "Kismet," rules Federal Court of Appeals; damage award based on MGM Grand's profits is remanded for recalculation

Stuffed toy bears and the musical enchantment of ancient Baghdad - two seemingly unrelated topics except that the "Jeopardy" category is: "copyright infringement cases in which a Federal Court of Appeals in California discussed deductions for overhead costs when calculating damages based upon an infringer's profits."

Ancient Baghdad was the setting of the dramatic play "Kismet" written by Edward Knoblock in 1911. Knoblock's copyright expired in 1967 and the play "the tale of a day in the life of a poetic beggar named Hajj and his daughter Marsinah" entered the public domain.

In 1952, Edwin Lester acquired the right to produce a musical stage version of the play. Luther Davis and Charles Lederer wrote a libretto for the work. Robert Wright and George Forrest wrote the music and lyrics for the musical adaptation, and assigned to Frank Music Corporation the right to copyright all portions of the musical score written for Kismet.

In 1954, Lederer, Wright and Frank entered into a license agreement with Loew's, Inc. (a predecessor of MetroGoldwyn-Mayer, Inc.) granting the company the right to produce a musical motion picture based on the play Kismet. And in 1965, the Kismet parties granted to

ASCAP the right to license certain uses of the musical score of the play.

After a long and illustrious career, Hajj and Marsinah found themselves joining Siegfried and Roy in the modern mecca of Las Vegas where the MGM Grand Hotel in 1974 premiered a musical revue entitled "Hallelujah Hollywood." The revue featured ten acts; four of the acts were presented as "tributes" to MGM motion pictures. One of the tributes, entitled "Kismet" was an eleven and one-half minute piece which contained no dialogue but used about six minutes of music from the play Kismet. The Kismet sequence was used in about 1700 performances of the Hallelujah Hollywood show.

In response to the Kismet parties' action for copyright infringement, unfair competition and breach of contract, the hotel cited its blanket license agreement with ASCAP. Under the license, the MGM Grand had the right to perform publicly non-dramatic renditions of the separate musical compositions in the ASCAP repertory. The license excluded "dramatico-musical works, or songs accompanied ... by visual representations of the work from which the music is taken. . ."

A Federal District Court concluded that the Kismet sequence was nondramatic but contained visual representations of the play, and therefore exceeded the scope of the ASCAP license. The court awarded $22,000 in damages to the Kismet parties as a share of the MGM Grand's profits.

Federal Court of Appeals Judge Fletcher, in reviewing the District Court decision, first declared that there was no reason to consider whether the Kismet sequence was nondramatic. However, Judge Fletcher agreed with the District Court that the Kismet tribute was accompanied by visual representations of the play; that MGM's use was excluded from the ASCAP license; and that the hotel infringed the Kismet parties' copyright. The significant visual representations consisted of the performance of the copyrighted songs by singers identified as characters from Kismet and dressed in costumes designed to recreate Baghdad, and the use of locale, scenery, props and dance music similar to those used in Kismet.

MGM argued that many of the visual representations, such as swarming bazaars or an oriental palace, could have been derived from Knoblock's 1911 play rather than from the musical play, and thus were not protectable by copyright. Other elements of the sequence, such as the choreography and character names, also were not subject to copyright protection, observed MGM.

Judge Fletcher pointed out that Donn Arden, the producer of the MGM show, created the Kismet sequence as a tribute to the MGM musical film which was derived from the 1953-1954 play,and that Arden did not base the sequence on the 1911 play. The issue of whether the visual representations were copyrightable was found not to be relevant in determining whether the scope of the ASCAP license was exceeded, because the license agreement did not refer to "copyrightable" visual representation accompanying the use of a licensed work.

Damages were available to the Kismet parties under the Copyright Act of 1909, which provides for the recovery of actual damages, infringers profits or statutory "in lieu" damages. The District Court had declined to award actual damages, because the court was not convinced that the market value of the Kismet copyrights was diminished by MGM's infringement; this finding was not clearly erroneous, stated Judge Fletcher. There was no disinterested testimony to support the Kismet parties' claim that the MGM Grand revue had destroyed the opportunity to present a Las Vegas production of the musical play.

In using MGM's profits to determine damages, the District Court first found that the gross revenue earned by the MGM Grand from Hallelujah Hollywood during the relevant time period was $24,191,690. The court deducted direct costs and overhead to arrive at a net profit of $2,489,646; $22,000 then was awarded to the Kismet parties.

Judge Fletcher, upon arriving at the profits bazaar, did not succumb to the lure of the Kismet parties' argument that MGM's infringement was conscious and deliberate, thereby precluding a deduction for overhead costs. MGM plausibly, although wrongly believed that its use of the Kismet work was covered by the ASCAP license.

A more effective claim was that MGM failed to show that each item of claimed overhead expense, such as general and administrative costs or sales and advertising, assisted in the production of the infringing work. Rather, MGM allocated a portion of these costs to the production of Hallelujah Hollywood based on a ratio of the revenues from that production as compared to the MGM Grand's total revenue. The allocation formula used by MGM was found acceptable by the District Court and the Court of Appeals. But Judge Fletcher emphatically stated that MGM had not adequately shown that the claimed overhead expenses actually contributed to the production of Hallelujah Hollywood-a showing the court had also found lacking in Kamar International, Inc. v. Russ Berrie & Co. (aka the stuffed toy bear case, see below). Evidence of total overhead costs allocated on a reasonable basis did not provide a sufficient ground for the deduction of overhead costs and the District Court's contrary finding was held to be clearly erroneous.

Judge Fletcher next held, in ruling on a question of first impression for the court, that under the 1909 Copyright Act, a copyright proprietor may recover indirect profits.

Since Hallelujah Hollywood had a promotional value to the MGM Grand, profits from MGM's hotel and gaming operations as well as direct profits from the revue itself would be recoverable if ascertainable.

It remained for the court to apportion direct and indirect profits. The District Court had determined that the profits of the Kismet sequence attributable to the infringement amounted to $22,000. For Judge Fletcher, this amount, apparently arrived at without a reasoned explanation by the District Court, was "grossly inadequate," given the nature of the infringement, the character of the infringed property, the success of the revue and the magnitude of MGM's profits. The award to the Kismet parties amounted to less than one percent of MGM Grand's profits from the show, or about $13 for each of the 1700 infringing performances.

Therefore, on remand, the District Court was advised to reconsider its apportionment of profits. Mercifully, Judge Fletcher stated that if the District Court is unable to derive a reasonable, nonspeculative formula to apportion indirect profits or if the amount of profits under a reasonable formula is insufficient to carry out the compensatory and deterrent purposes of the Copyright Act, then the District Court may elect to award statutory damages.

The court concluded with several additional observations concerning damage awards, such as noting that the infringers of a copyright may be jointly and severally liable for a party's actual damages but that each infringer is liable for his/her/its illegal profit made by another. Thus, if Donn Arden is found liable for a proportionate amount of royalties, if any, that he earned from the revue, then the MGM Grand would be entitled to deduct such royalties as costs in arriving at its own profits.

The District Court also was asked to determine whether MGM, Inc. should be held liable for any part of the damages award, and whether attorney fees would be available to the Kismet parties, whose unfair competition and breach of contract claims were rejected by the Court of Appeals.

In concurring, Judge Reinhardt stated that in his view sufficient testimony was presented as to the harmful effect of the revue on the Las Vegas market value of the musical play Kismet, and that the District Court clearly erred in finding that the Kismet parties did not establish any damage attributable to the infringement.

Frank Music Corporation v. Metro-Goldwyn-Mayer, Inc., 772 F.2d 505 (9th Cir. 1985) [ELR 7:6:7]

Recalculation of damages is ordered in copyright infringement action involving distribution of stuffed animal toys

Before succumbing to the charm of a stray stuffed animal toy, be forewarned that the litigious nature of these creatures, already well-documented in this publication, has been confirmed by another judicial expedition into the wild kingdom of calculating copyright infringement damages.

The hardly endangered species at issue in a 1977 copyright infringement action filed by Kamar International against Russ Berrie and Company were plush-covered teddy bears, polar bears, hugging bears, hugging monkeys, dogs and tigers.

A Federal District Court issued a preliminary injunction forbidding Russ Berrie to sell or dispose of any copies of these animals. Subsequently, however, the District Court entered judgment in favor of Russ Berrie, holding that the animal designs were in the public domain and that Kamar had faded to prove the substantial similarity of Russ Berrie's designs.

A Federal Court of Appeals reversed and remanded the matter on both the validity and infringement of Kamar's copyrights (ELR 3:12:7).

On remand, the District Court held that Russ Berrie, although not acting willfully, had infringed Kamar's nine valid copyrights; the court initially calculated total statutory damages at $305,760. When Russ Berrie moved to amend the judgment, the District Court decided to award damages based upon Russ Berrie's profits of about $118,000 (with no deduction for overhead costs) rather than utilizing the statutory measure of damages.

Called upon once again to give chase, the Federal Court of Appeals first discussed whether Russ Berrie would be subject to statutory damages beyond the normal maximum limit for the company's alleged sale of infringing stuffed animal toys after the service of process in the action. The District Court erred in applying the statutory damage limits of section 101(b) of the Copyright Act of 1909, concluded Federal Court of Appeals Judge Wallace, and must consider, on remand, whether Russ Berrie's sales after the service of process would permit the recovery of damages exceeding the statutory limit. Judge Wallace did affirm the District Court's holding that Russ Berrie's sales of stuffed animals after the first judgment in the action did not constitute infringements after notice since Russ Berrie was entitled to rely on the judgment at that time.

Judge Wallace next affirmed the District Court's finding that Russ Berrie's infringements were not deliberate; therefore, the court did not abuse its discretion in not awarding attorneys fees to Kamar.

The Court of Appeals then turned to the issue of whether overhead costs might be deducted from Russ Berrie's net profits of about $118,000. The District

Court had suggested that since the sales of the infringing goods amounted to only a small percentage of Russ Berrie's total sales, the court would not allow a deduction for overhead. But there was no case support for applying this rule in a copyright infringement claim, as opposed to a trademark infringement case, stated the court. Therefore, on remand, if the District Court bases its infringement award upon Russ Berrie's profits, rather than ordering statutory damages, the court will have to determine, as to each category of the company's fixed overhead, whether the expense was caused by the production or sale of the allegedly infringing goods. this method of calculating profits would best serve the goals of deterring infringement and appropriately compensating the copyright holder, concluded Judge Wallace.

Kamar International, Inc. v. Russ Berrie and Company, Inc., 752 F.2d 1326 (9th Cir. 1984) [ELR 7:6:9]

Dismissal of right of publicity claim against creators of film "Raging Bull" is upheld

A Federal Court of Appeals in Ohio has upheld a District Court decision dismissing an action brought by Louise Reeves against United Artists and the creators of the film "Raging Bull" (ELR 6:3:7).

Reeves, the widow of boxer J.R. "Jimmy" Reeves, claimed that the re-creation in the film of a 1941 fight between Reeves and Jake LaMotta constituted the appropriation of Reeves' "name, identity, likeness, character, ability, achievement and performance."

The District Court found that Ohio recognizes the right of publicity as part of the state's law of invasion of privacy, but that the right is not descendible under Ohio law. The Federal Court of Appeals, in aper curiam decision, agreed and affirmed the District Court order granting summary judgment to the United Artists parties.

Reeves v. United Artists Corporation, 765 F.2d 79 (6th Cir. 1985) [ELR 7:6:9]

Federal District Court in Virginia refuses to confirm American Federation of Musicians arbitration decision on behalf of performer Willie Nelson

A Federal District Court in Virginia has vacated an arbitration decision rendered by the executive board of the American Federation of Musicians in a contract dispute between concert promoter Donald Taylor and performer/AFM member Willie Nelson.

The court pointed out that the AFM contract pursuant to which the arbitration was held was a form contract prepared by the union; that any promoter seeking to engage an AFM member had to sign the union's contract; and that the only forum permitted for arbitration at the time of the TaylorNelson dispute was the International Executive Board of the AFM. Taylor's requests for alternate arbitrators, dates and sites were refused.

Federal District Court Judge James C. Turk cited two cases in which the AFM's arbitration provision was found to be unconscionable, Graham v. Scissortail, Inc. (ELR 2:21:3) and Chimes v. Oritani Motor Hotel, Inc. (ELR 6: 11: 10) and concluded that the evident partiality stemming from the AFM's pervasive control over the entire arbitration procedure precluded the confirmation of the arbitration award. Judge Turk stated that "The integrity of arbitration as a neutral forum for the resolution of disputes was nowhere to be found in the procedure to which Taylor was subject."

Taylor v. Nelson, 615 F.Supp. 533 (W.D.Va. 1985) [ELR 7:6:9]

Peter Gennaro was not entitled to pre injunction to prevent hiring of another choreographer for Broadway production of "Singin' in the Rain" rules Federal District Court

A Federal District Court has denied choreographer Peter Gennaro's motion for a preliminary injunction to prevent the hiring of another choreographer for the Broadway production of "Singin' in the Rain."

Gennaro alleged that a January 1983 letter embodied an option agreement whereby Gennaro was to choreograph any "first class" American production of the show. The London production of "Singin' in the Rain" successfully opened in June 1983. In September 1984, Gennaro learned that an American production of the play was being planned. Gennaro then advised Maurice Rosenfield, the holder of the adaptation rights to the work, that he was electing to exercise his option to choreograph the American production. Upon being notified that his services had not as yet been requested by Rosenfield, Gennaro filed his lawsuit for breach of contract and defamation.

Federal District Court Judge Goettel first discussed Gennaro's claim that injunctive relief was necessary to prevent the erosion of Gennaro's professional skills which might occur if the producers denied him the opportunity to choreograph the show. It was pointed out that Gennaro is a choreographer with a "first class reputation" who already had worked on the London production of "Singin' in the Rain." Consequently, choreographing the Broadway production was less than a unique opportunity for Gennaro to develop his professional skills.

The court also rejected Gennaro's argument that his reputation would be irreparably harmed if injunctive relief were denied. The apparent "replacement" of Gennaro as the choreographer for the American production of the show was characterized by the court as "one bad review" which could not significantly tarnish Gennaro's well-established reputation.

Gennaro also did not demonstrate a likelihood of success on the merits of the case, stated the court. Without ruling on whether English or New York law governed the contractual issues, Judge Goettel declared that the question of whether the January 20 letter was intended to be a binding contract was a question to be left to the factfinder. Gennaro contended that the letter contained the essential terms of a contract, in that it specified his fee and royalty payments. Furthermore, Gennaro had made it known that he would not choreograph the London production unless he received an option to choreograph a major American production of the play.

The producing parties, however, adverted to certain conduct of the parties after January 1983 as an indication that the letter was not binding and also cited the letter's reference to the necessity for further documentation of the agreement.

In all, too many factual questions existed to justify a conclusion that Gennaro was likely to succeed on the merits of his claim. And since the balance of hardships did not weigh in Gennaro's favor, the motion for preliminary injunctive relief was denied.

Gennaro v. Rosenfield, 600 F.Supp. 485 (S.D.N.Y. 1984) [ELR 7:6:10]

Dispute over television rights to Sherlock Holmes stories is found amenable to jurisdiction in New York

A Federal District Court in New York has asserted jurisdiction over Lorindy Pictures International, a Florida-based television program producer and Lorindy's majority shareholder, Seymour Weintraub, a California resident, in an action brought by Granada Television International alleging tortious conduct with respect to certain Sherlock Holmes stories written by Sir Arthur Conan Doyle.

Granada Television International, a subsidiary of the British company, Granada Television Limited, produced a series of dramatizations of several Sherlock Holmes stories. Granada apparently believed that the stories which were dramatized were in the public domain in the United Kingdom and in the United States. However, Dame Jean Conan Doyle, the sole surviving child of Sir Arthur, was the holder of all copyrights (to the extent they existed) in all of the Sherlock Holmes works. And in 1981, Dame Jean had entered an agreement with Lorindy whereby Lorindy acquired the exclusive licensing rights to the stories.

Lorindy subsequently notified Granada that Lorindy would consider any United States distribution of Granada's Sherlock Holmes series a violation of United States copyright and trademark laws.

Granada claimed that Lorindy committed a business tort by knowingly claiming an interest in copyrights which do not exist. Lorindy agreed to assume the existence of such a tort for purposes of the company's motion to dismiss the case on the ground that the court lacked in personam jurisdiction over the Lorindy parties.

After oral argument, the court ruled that jurisdiction was available over Dame Jean who was doing business in New York through her agent. The court also ruled that Lorindy and Weintraub were not doing business in New York within the meaning of the applicable state statute. However, jurisdiction was found proper because Weintraub met the statutory requirement of engaging in a "persistent course of conduct in the state," and because Lorindy derived substantial revenue from interstate and international commerce and should have foreseen that its effort to prevent the distribution of the Granada series would have an effect on Granada's business in New York.

Granada Television International, Ltd. v. Lorindy Pictures International, Inc., 606 F.Supp. 68 (S.D.N.Y. 1984) [ELR 7:6:10]

Federal Court of Appeals reverses order granting summary judgment to motion picture distributors in antitrust action brought by National Independent Theater Exhibitors in connection with proposed on-screen theater advertising

In 1977, the National Independent Theater Exhibitors began a project to raise capital to finance the production of films. Under the trade association proposal, member theaters would show several minutes of on-screen advertising before screening a feature film and would contribute the revenues generated by this advertising to a film fund. Advisors then would select films which the fund would finance. NITE members who participated in the advertising program were to receive a discount on the rental of the fund-supported films. The film fund was organized as a separate legal entity, and entered a contract with Cinemavision, a sales representative. Eventually, independent exhibitors representing 4000 screens agreed to display advertisements and to contribute the advertising revenue from about 2000 of the screens to the fund. NITE anticipated receiving about $42 million in revenue from the 2000 screens.

The reaction of the major motion picture distributors to the NITE advertising program was less than enthusiastic. A committee of the Motion Picture Association of America voted to urge theaters not to exhibit on-screen advertising. Twentieth-Century Fox issued a statement that it would require all future exhibitors of its films to pay it a percentage of any revenues the exhibitors might derive from on-screen advertising. In November 1977, Warner Brothers mailed out bid solicitations for "Superman;" the bid letter stated that theaters exhibiting on-screen advertising would not be considered eligible for licensing the film. Many exhibitors withdrew from the NITE program and in 1978, Cinemavision went out of business.

NITE, James Patterson (the president of the association), and the film fund brought an antitrust action against eight major film distributors alleging that the distributors had conspired to prevent a potential competitor from entering the marketplace in violation of sections 1 and 2 of the Sherman Act.

A Federal District Court granted summary judgment to the distributors on the ground that the NITE parties lacked standing to prosecute their antitrust claims because they were not within the "target area" of the alleged antitrust violations.

A Federal Court of Appeals has vacated the District Court order granting summary judgment as to the film fund and remanded for further proceedings the fund's antitrust claims against the distributors. The court stated that the NITE parties had raised a material question of fact as to whether the distributor's allegedly illegal threats to boycott or to otherwise penalize exhibitors planning to participate in the film fund plan, may have caused the exhibitors to withdraw from the advertising program, thereby causing Cinemavision's failure and the resulting injury, in terms of lost contributions, to the film fund.

The Court of Appeals did affirm the District Court's conclusion that Patterson lacked standing to pursue his antitrust claims since there was no evidence that any of the distributors' allegedly illegal conduct was directed against Patterson individually.

National Independent Theater Ehibitors Inc. v. Buena Vista Distribution Company, 748 F.2d 602 (11th Cir. 1984) [ELR 7:6:11]

John McEnroe wins dismissal of $6 million tort lawsuit against him by tennis fan following an "exchange" between McEnroe and the fan during the 1983 U.S. Open Championship

Tennis star John McEnroe has just won an important, multi-million dollar match - one that was played not on a clay or grass court, but in a wood-paneled courtroom in Nassau County, New York. Though the match was an outgrowth of McEnroe's skill as a tennis player, the contest was not a game. Instead, it was a $6 million tort lawsuit. McEnroe's opponent was inspired to bring the case by a courtside "exchange" that occurred between the two men during the 1983 U.S. Open Championship.

The exact nature of this "exchange" was so wonderfully described by Judge Becker of the New York Supreme Court that the Entertainment Law Reporter is taking the unprecedented (for it) step of publishing the entire decision - a decision that is destined to become a "classic" in its own right among torts, as well as sports, lawyers.

(Full Text)

Its disciples consider tennis to be a cosmopolitan game. Played and watched by men and women a cut above the average "jock" and "fan" of other big time sports. The facts giving rise to this action make it eminently clear however that a fair amount of "Roller Derby etiquette" has found its way to center court.

Defendant, John McEnroe, is a professional tennis player. The best player in the world today, he is not noted for his court decorum. Plaintiff, Christopher Schneider, teaches and coaches basketball at a local high school for girls. A tennis fan, he has friends with access to prime seats. On August 30, 1983 Schneider was seated courtside at Flushing Meadows Tennis Center when John McEnroe played Trey Waltke during a preliminary round of the 1983 U.S. Open Championship.

The match was being televised nationally and internationally by the Columbia Broadcasting Company. It was closer than might ordinarily be expected with the unranked Waltke leading 2 sets to 1. With the possibility of being present at a David/Goliath upset, the crowd was very much into the game. Schneider, never a McEnroe fan or apologist (see p. 32 E/B/T held 4/18/84), was actively rooting for Waltke. His proximity to the court and intensity of favoritism made McEnroe acutely aware of his presence and preference.

At one point in the fourth set McEnroe double-faulted on a crucial point. When Schneider vigorously applauded that error, McEnroe turned toward him and asked, "Don't you have anything better to do than cheer for my opponent all afternoon?" When Schneider responded, "No." McEnroe screamed, "Well, you're a fuckin' asshole."

Play and plaintiffs support of Waltke continued. Following another lost point, McEnroe again demanded to know of Schneider, "Are you going to cheer for my opponent all afternoon?" The result was predictable. Schneider answered, "Yes." McEnroe called him a "fuckin' asshole." As with the previous incident the exchange took place with McEnroe at the base line some 20' from Schneider's box.

Once again the match resumed. Shortly thereafter Schneider evidenced his approval when McEnroe lost a point. Discarding the question/answer/retort, modality, McEnroe left his position and strided towards Schneider. As he approached he is alleged to have shouted, "You are sick, you are sick, you are ill, you are ill. I want to fight you, fight me now, meet me later. I am going to get you." Upon completing the tirade, McEnroe turned and started back to his side of the court.

Before reaching the service line, McEnroe, still visibly upset, wheeled and started back towards Schneider. When he was three to four feet from the seats, he started to turn to his right. As he did so, he swung his left arm in an upward movement in what might be described as a left-handed bowler's follow-through or 1/2 of a two-handed obscene gesture. As McEnroe's arm completed 3/4 of its upward movement, an amount of rosin was released from his left hand. Completing his turn, McEnroe returned to his position and resumed play.

Schneider's wife, who had seats 8 to 10 rows behind him, requested that they leave immediately after the incident but Schneider refused, opting to watch as McEnroe went on to defeat Waltke 3 sets to 2. There were no more incidents between plaintiff and defendant.

What happened next was predictable. Since not everyone is accused of being an anus with copulative capabilities by the world's #1 ranked tennis player, nor are they the object of his imitation of an irate "Tinkerbell" sprinkling pixie dust, Schneider became newsworthy. He was interviewed during and after the match by local, national and international media persons. He also received a good deal of publicity a week later when he instituted the within action seeking $6,000,000 in damages for "grievous physical and mental injuries."

Before me at the present time is a motion by defendant John McEnroe for an order dismissing the complaint on the law (CPLR sec. 3211(a)(7)) and the facts (CPLR sec. 3212).

It is counsel for plaintiff's contention that the complaint can be upheld on any one of three legal theories. Intentional infliction of emotional distress. Assault. Battery. He is mistaken.

To establish willful tort of intentional infliction of mental distress plaintiff must allege and prove defendant was guilty of conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community" (Restatement, Torts 2d, sec. 46(1) Comment d, cited with approval Fischer v. Maloney, 43 NY2d 553, 557; see also Halio v. Lurie, 15 AD2d 62). Defendant's childlike petulance, ill manners and a certain unimaginative redundancy in matters vulgar is not conduct which justifies such a characterization. Shabby, yes; actionable, no (see Brink's Inc. v. City of New York, 553 F.Supp 1123).

Likewise, it is clear that an assault is not present. In order to recover on such a theory plaintiff must establish that defendant intentionally placed him "in apprehension of imminent harmful or offensive contact" (see Restatement, Torts 2d, sec. 21; Masters v. Becker, 22 AD2d 118). Neither the complaint nor Schneider's testimony at his EBT indicates he had any misdoubts concerning his physical safety during the various incidents. Clearly, plaintiff accepted Mr. McEnroe's verbal intemperance for what it was - an adult substitute for "holding one's breath until turning blue." Since an action for assault cannot he premised on threats or mere words alone (Carroll v. N. Y Prop. Ins. Underwriting Assoc., 88 AD2d 527; Prince v. Ridge, 32 Misc 666) the complaint cannot be sustained on such grounds.

In order to set forth a cause of action on a theory of battery plaintiff must establish he sustained injuries as a result of an intentional bodily contact which was harmful or offensive in nature (see Masters v. Becker, supra; McGovern v. Weis, 263 AD 367). At best, plaintiff, here, has established only one of prerequisite elements.

In support of this motion defendant has submitted a series of still photographs taken from the videotape of the match. Those photographs would appear to lead to the conclusion that the rosin released by McEnroe did not reach Schneider, who was wearing a visor and sunglasses, or the other fans seated near him. However, in opposition to the motion, Schneider has stated under oath that a speck or specks of the substance did get into his eye. Since it is not my function to assess credibility (see S. J. Capelin Assoc. Inc. v. Globe Mfg., 34 NY2d 338; Penato v. George, 52 AD2d 939), I have assumed for the purpose of this determination that Mr. Schneider has established a minimal contact.

Having assumed an intentional contact, the question becomes whether such contact was "harmful" or "offensive"; harmful being defined as "conduct which causes pain or illness" (see Restatement, Torts 2d, sec. 15, 1 Harper & James, The Law of Torts 213 sec. 3.2) and "offensive" as that which "offends a reasonable sense of personal dignity (Restatement, Torts 2d, sec. 19, Prosser on Torts (4th Ed) 32 sec. 9.1, 1 Harper & James, The Law of Torts 213 sec. 3.2).

It is clear that the contact alleged here is neither "harmful" nor "offensive."

There is absolutely no evidence that Mr. Schneider sustained any injury as a result of the purported sprinkling with rosin. Plaintiff has not been treated by a physician for any of the physical or psychological injuries he says he sustained. Moreover, he made no complaints with respect to an eye injury after the incident. Even on this motion the best that can be said is there was minimal discomfort until the speck was rubbed from the eye.

Likewise, it cannot be said that being hit by a speck of rosin is in and of itself "offensive" in that it would offend a "reasonable" sense of dignity or that it caused great mental distress. What Mr. Schneider claims caused him great humiliation and emotional upset is not having rosin thrown at him but rather being the object of McEnroe's childish challenges and bad taste epithets. I have previously held that such conduct is not actionable. I will not give it retroactive viability merely because plaintiff now says he got rosin in his eye.

To this point I have considered this matter only in its legal context. I have refrained from approaching it with a real world perspective. Viewed thus, it is clear that what plaintiff is attempting to accomplish is to have this Court reward him for doing an excellent job of "bench jockeying" and getting McEnroe to "blow his cool." In my opinion the Court's time might well be better spent.

Accordingly, the motion to dismiss is granted and the Clerk is directed to enter judgment in favor of defendant dismissing the complaint with prejudice and without costs.

Schneider v. McEnroe, Case No. 25911/83, New York Supreme Court, Nassau County, Special Term, Part 1, (September 6, 1985) [ELR 7:6:11]

Federal District Court allows journalist to proceed with breach of contract and misrepresentation claims against ABC, while granting summary judgment to ABC on other claims in connection with article on former President Carter's finances

Freelance journalist Peter Peckarsky was allowed to proceed with his breach of contract and misrepresentation claims against American Broadcasting Company in connection with his copyrighted 1978 article "The Selling of the President," but a Federal District Court in Washington, D.C. granted summary judgment to the ABC parties on Peckarsky's causes of action for copyright infringement, unfair trade practices, unfair competition, civil RICO, and trade secret conversion.

Peckarsky's article discussed alleged irregularities in then-President Jimmy Carter's personal finances. The journalist reached an oral agreement with an ABC News representative whereby ABC was to have the exclusive right to the information contained in the article for a period of three weeks in August 1978. Peckarsky was paid a consulting fee for his assistance in investigating the allegations in the article and also was paid $2000 when television reports were broadcast concerning alleged discrepancies in President Carter's tax valuations of farm equipment. However, Peckarsky claimed that ABC did not provide him with an agreed-upon on-air credit in the television reports, and did not pay him for five additional broadcasts which contained references to the material in his article.

The court declared that several unresolved questions of material fact remained to be determined as to the alleged agreement concerning on-air credit for Peckarsky and as to his non-payment claims. The presence of such disputed factual questions also precluded summary judgment on Peckarsky's claims of fraudulent and negligent misrepresentation.

Summary judgment was available to ABC on the copyright claim, ruled the court, because any references to Peckarsky's article in the challenged ABC broadcasts "were entirely incidental to the publication of ideas and news reports of benefit to the public." And the unfair competition and unfair trade practices claims were within the preemption provision of the Copyright Act.

The court concluded by finding that Peckarsky failed to demonstrate the two predicate criminal acts necessary to establish a pattern of racketeering activity under the Racketeer Influenced and Corrupt Organization Act, and that the information contained in Peckarsky's article did not constitute a trade secret.

Recently, a jury, although ruling in favor of ABC on Peckarsky's breach of contract claim, awarded the journalist $150,000 in compensatory damages and $50,000 in punitive damages on his fraudulent misrepresentation claim (ELR 7:3:17).

Peckarsky v. American Broadcasting Company, Inc., 603 F.Supp. 688 (D.D.C. 1984) [ELR 7:6:13]

Federal Court of Appeals affirms order granting summary judgment to writer Jack Anderson as to the majority of allegedly defamatory statements in magazine article concerning the Liberty Lobby while ordering remand for determination of actual malice as to remaining statements

The October 1981 issue of The Investigator magazine, published by Jack Anderson, contained three articles about the activities of Willis Carto, a leader of the Liberty Lobby. The organization claimed, in its libel action against the magazine, that the articles conveyed the message that Carto was "racist, fascist, anti-Semitic and a neo-Nazi," and that the Liberty Lobby was established to pursue Carto's goals.

A Federal District Court granted summary judgment on behalf of the magazine.

On appeal, the publishers contended that the order granting summary judgment should be affirmed because Carto and the Liberty Lobby were "libel proof." It was argued that the reputations of Willis Carto and the organization were "irreparably strained" by prior accounts of their activities, such that Carto and the Liberty Lobby no longer held reputations which could be damaged by The Investigator pieces.

Federal Court of Appeals Judge Scalia declined to adopt, for the law of libel, "the principle that 10,000 repetitions are as good as the truth." The court also rejected the magazine's claim that the unchallenged portions of the articles attributed to Carto and the Liberty Lobby worse characteristics than those challenged in the complaint, with the result that the challenged statements could not do any incremental damage to the reputations of Carto and the Liberty Lobby.

Judge Scalia then considered the significance of a letter purportedly sent to Jack Anderson in which the Liberty Lobby warned the writer that the planned articles were defamatory and demanded that they not be printed. The letter was found not to be, in and of itself, sufficient evidence of malice to overcome Anderson's motion for summary judgment. The statements in the letter were general allegations of falsity and did not refer to specific verifiable facts contradicting the allegations in the articles "so directly" as to cause a reasonable person to conduct further inquiry, stated the court.

Judge Scalia next concluded that a public figure need not establish with "convincing clarity" the existence of actual malice at the summary judgment stage of a libel action. This holding was based, in part, on the ground that such an increased proof requirement might result in a premature evaluation of the weight of only a minimum amount of the evidence in a case.

The statements challenged by the Liberty Lobby then were reviewed by the court. Several of the allegedly defamatory allegations amounted to charges of journalistic inaccuracies and were not actionable, stated the court; other allegations were nonactionable as constitutionally protected opinion. Summary judgment also was available to the magazine parties for those statements which were based on reports previously published in reputable sources. Judge Scalia therefore affirmed the District Court order entering summary judgment in favor of the magazine parties on 21 of the challenged 30 statements. However, the court concluded that a jury could reasonably find that the nine remaining statements were defamatory, false and made with actual malice; the claims based on these statements were remanded to the District Court for further proceedings.

Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563 (D.C.Cir. 1984) [ELR 7:6:13]

Federal District Court in Oklahoma grants NCAA limited rights in connection with broadcasting of college football games

In 1982, a Federal District Court in Oklahoma ruled that the right to telecast college football games is the property of the institutions participating in the games. The court, accordingly, enjoined the National Collegiate Athletic Association from attempting to enforce the provisions of its contracts with several broadcasters for the televising of college football games during the 1982-1985 seasons. After various rulings (ELR 6:4:3; 5:3:9; 4:11:2), the NCAA once again appeared before the District Court, this time seeking to modify the injunction.

Federal District Court Judge Burciaga first declined to delete the reference, in the 1982 ruling, to the NCAAs violation of sections 1 and 2 of the Sherman Act. Judge Burciaga also refused to amend that part of the injunction barring the NCAA from enforcing the proscribed contracts and "from making any other contract of similar kind or nature in the future." It "should be clear to everyone," stated the court, that the quoted language in the judgment prohibits the NCAA from engaging in activities which were found to be illegal by the District Court, by a Federal Court of Appeals and by the United States Supreme Court.

The NCAA did succeed, in part, in its motion to add to the judgment a paragraph whereby the NCAA would not be prohibited from: restricting the televising of its members football games on Friday evenings; imposing sanctions restricting the televising of a member's football games for violating non-television rules and regulations; and arranging for, selling, or participating in the sale of the television rights of its own championship games in which its members participate. The court emphasized that the injunction was not intended to prohibit the NCAA from "openly and competitively" participating in the college television market, but rather to prevent "the illegal activity pursued by the NCAA and the illegal manner in which it pursued its own interests."

Board of Regents of the University of Oklahoma v. National Collegiate Athletic Association, 601 F.Supp. 307 (W. D.Okla. 1984) [ELR 7:6:14]

New York Magazine's use of professional model's photograph in feature item did not violate New York Civil Rights Law

The New York Court of Appeals has seen through a professional model's argument that a New York magazine "Best Bets" item was an advertisement in disguise, and has ruled that the magazine's use of a photograph of the model did not violate sections 50/51 of the New York Civil Rights Law.

In August 1981, Tony Stephano participated in a photo session for an article on men's fall fashions. Two of the photographs were used to illustrate an article in the September 7, 1981 issue of New York magazine. Another photograph, which showed Stephano wearing a bomber jacket, appeared in the August 31, 1981 issue of the magazine in the Best Bets column - a column containing information about new products and services. The text accompanying the photograph described the bomber jacket and provided purchasing information.

Stephano contended that the magazine used his photograph for trade and advertising purposes without his consent, claiming that although a direct advertising fee is not paid by parties whose goods or services are included in Best Bets, the magazine obtains benefits from featured designers or retailers in an indirect manner.

The trial court granted summary judgment to New York's publisher on the ground that the bomber jacket item was included in the magazine for a newsworthy purpose. The fact that the item included information concerning the availability of the jacket at stores which might advertise in the magazine was not sufficient to warrant a conclusion that the piece was published for trade or advertising purposes.

An appellate court reversed the trial court decision, finding that a reasonable person could conclude that the

Best Bets item had a commercial purpose in that it was included in the magazine to increase circulation (ELR 6:1:11). Furthermore, according to the court, the item might be considered an advertisement in disguise since many of the magazine's advertisers were mentioned in the text of the piece.

In reversing the appellate court decision and granting summary judgment to the magazine, Judge Wachtler first rejected any claim based on an independent common law right of publicity. It was then noted that courts consistently have refused to apply sections 50151 when the challenged publication concerns newsworthy events or matters of public interest. The newsworthy exception extends to developments in fashion, stated Judge Wachtler, and in this case, displaying the jacket as worn by a model did not detract from the newsworthiness of the photograph. The fact that the magazine may have included the item in Best Bets primarily to increase the circulation of the magazine also did not mean that Stephano's photograph was used for trade purposes within the meaning of the statute-it is the content of the article which determines newsworthiness, declared the court.

Stephano argued that the Best Bets item was an advertisement in disguise because the text contained information which would most often be included in an advertisement, and because the stores mentioned in the item previously had advertised in the magazine. These circumstances were ruled insufficient to raise a jury question as to whether the Best Bets feature was published for advertising purposes.

Judge Wachtler concluded by cautioning that the court's ruling should not be read as suggesting that a publisher "who has employed a professional model to pose for pictures to be used in an article may avoid the agreed fee, or otherwise ignore contractual arrangements, if the model's pictures are used to illustrate a newsworthy article. . ." Stephano, however, was not seeking to enforce a contract or to recover damages for breach of contract.

Stephano v. News Group Publications, Inc., 485 N.Y.S.2d 220 (N.Y. 1984) [ELR 7:6:14]

Federal Court of Appeals reverses jury verdict in news anchor Christine Craft's fraud action against Metromedia

The Federal Court of Appeals opinion reversing a jury verdict in television newsperson Christine Craft's fraud action against Metromedia, Inc., the owner of KMBC-TV in Kansas City, Missouri, has been published.

The Craft-Metromedia litigation, as reported in the Entertainment Law Reporter at 7:3:17, 5:11:19, 5:9:18 and 5:7:2, involved Craft's claims that she was fraudulently induced into accepting employment as a co-anchor at KMBC and that her subsequent reassignment from co-anchor to news reporter was based upon the discriminatory application of an appearance standard.

After the first trial in the matter, a Federal District Court entered judgment for Metromedia on Craft's Tide VII sex discrimination and Equal Pay Act claims, and granted Metromedia a new trial on the fraud claim. The District Court jury had awarded Craft $375,000 in actual damages and $125,000 in punitive damages. But the court found that the verdict was "excessive." On retrial, the jury again awarded damages to Craft on the fraud cause of action in the amount of $225,000 actual and $100,000 punitive damages.

The Federal Court of Appeals reversed the entry of judgment against Metromedia on the fraud claim, and upheld the District Court's refusal to grant Craft a new trial on the Title VII and Equal Pay Act claims. Craft had testified, with respect to the reason for her reassignment, that a station representative told her that she was "too old, too unattractive, and not deferential enough to men" or that the audience perceived her in this manner. However, Federal Court of Appeals Judge Gibson found that the District Court did not clearly err in refusing to credit Craft's contradicted testimony; that Craft was not subject to sex discrimination due to either KMBC's application of its appearance standard or the reassignment; and that there was insufficient evidence for a reasonable jury to have found that the alleged "no-makeover" representations made to Craft at the time of her hiring were fraudulent.

Craft v. Metromedia, Inc., 766 F.2d 1205 (8th Cir. 1985) [ELR 7:6:15]

Federal Communications Commission's mandatory carriage rules violate the First Amendment, holds Federal Court of Appeals; FCC announces inquiry rulemaking proceeding to amend rules

The Federal Communications Commission's mandatory carriage rules are "fundamentally at odds" with the First Amendment rights of cable television programmers, cable system operators and the viewing public, a Federal Court of Appeals in Washington, D.C. has ruled.

The mandatory carriage rules require cable television operators, upon request and without compensation, to transmit to their subscribers every over-the-air television broadcast signal that is "significantly viewed in the community" or otherwise considered local under the Commission's rules.

In 1980, Turner Broadcasting System petitioned the FCC to institute a rulemaking procedure to delete the "mustcarry" rules, arguing, in part, that the must-carry rules might so "saturate" a cable system that programmers would be deprived of the opportunity to sell their services to the system. In denying the petition, the FCC concluded that Turner failed to show that the Commission's interest in protecting local television had ceased to justify the continuation of the must-carry rules.

In a separate proceeding which originated in 1979, Quincy Cable Television, the operator of a cable system in Quincy, Washington, petitioned the court for review of an FCC order requiring Quincy to carry the signals of several Spokane broadcast stations and imposing a $5,000 "forfeiture" for the company's failure to do so.

In vacating the FCC's actions in the consolidated Turner and Quincy matters, Federal Court Of Appeals Judge Skelly Wright conducted a lengthy review of the must-carry regulations. It was noted that cable television and commercial broadcast television operate on the basis of "wholly different technical and entrepreneurial principles;" that the FCC has viewed the must-carry rules as "critical stones in the regulatory bulwark erected to guard against destruction of free, community-oriented television;" but that in recent years, several lower federal court decisions have suggested that the Commission's regulation of cable television may withstand First Amendment scrutiny only if the Commission proves that a particular regulation burdens speech only incidentally, serves an important governmental interest, and is no broader than necessary to further that interest.

Judge Skelly Wright found that cable television warrants a standard of review distinct from that applied to broadcasting, since cable systems are not subject to the technological limitations faced by broadcasters. The restricted broadcast spectrum has served to justify government oversight of radio and television stations in order to assure compliance with their public interest obligations.

Under Judge Skelly Wright's standard of review, the mustcarry rules, even if propounded as speech-neutral regulations designed to preserve local broadcasting, had the effect of favoring one group of speakers over another. According to the court, the local broadcasters were granted the right to convey their programming over cable systems with the likelihood that cable program suppliers would be foreclosed from the cable forum. And for the cable operator, the mustcarry rules would not only "coerce speech," but would substantially limit an operator's otherwise broad editorial discretion to select the programming the operator offers to subscribers.

Furthermore, the Commission's established regulatory policy is to disregard the viewing preferences of cable subscribers (who might elect to receive otherwise foreclosed programs) - a policy described by Judge Skelly Wright as "difficult, if not impossible, to reconcile with the Supreme Court's repeated admonition that the interests of viewers should be considered "paramount" in the First Amendment "calculus."

For all of the above reasons, in particular, the intrusion into editorial autonomy, Judge Skelly Wright declared that the must-carry rules might be considered an intolerable restraint on First Amendment expression. Thus, it was with reluctance that the court proceeded to apply a standard of review in this case which usually is reserved for incidental burdens on speech. However, even assuming that the rules burdened speech only incidentally, the court still found them impermissible.

It was pointed out that the Commission's avowed interest in maintaining the must-carry rules in order to preserve free locally oriented television has been undercut by recent deregulatory activity by the FCC including the elimination of numerous regulations which were premised on the goal of protecting local broadcasters from cable industry competition. New multi-channel video competitors have been authorized and exempted from any obligation to carry local programming.

Judge Skelly Wright also emphasized that the Commission never has proven the underlying economic assumptions of the must-carry rules, but that even if those assumptions were accepted by the court, the FCC had not met its "heavy burden of justification." The Commission has not shown that unless protective regulations are maintained, cable subscribers would cease to view locally available off-the-air television and that the economic viability of local broadcasting would be affected by this possible loss of viewers.

Assuming that the substantiality of the interest served by the must-carry rules had been demonstrated, the rules nonetheless were "grossly overinclusive" in that they indiscriminately protected each and every broadcaster "regardless of the quality of local service available in the community and irrespective of the number of local outlets already carried by the cable operator."

Judge Skelly Wright concluded by reiterating that it remains for the FCC to determine which broadcasters or classes of broadcasters are "sufficiently at risk" to warrant protection, but that the failure to draw any lines at all was unacceptable. The court did not decide whether any version of the must-carry rules would violate the First Amendment, and stated that while the rules could not stand in their present incarnation, the Commission is free to recraft the rules if it so chooses.

Apparently in response to Judge Skelly Wright's suggestion, the Federal Communications Commission has voted to conduct a combined inquiry rulemaking proceeding to amend the must-carry rules.

Quincy Cable TV Inc. v. Federal Communications Commission, 768 F.2d 1434 (D.C.Cir. 1985) [ELR 7:6:15]

Federal Communications Commission is ordered to hold a hearing on issue raised by public interest group seeking to deny San Francisco television station KQED's license renewal application

In 1977, KQED, Inc., the holder of broadcast licenses for two public television stations and one FM radio station in San Francisco, filed a renewal application with the Federal Communications Commission. Several public interest groups and a group representing "a faction of dissatisfied members of KQED," filed a petition to deny the renewal of the broadcast licenses, alleging that KQED: was "betraying" its noncommercial status by operating for private gain; had refused to disclose financial information and to open its meetings to the public; was inadequately serving the local news, public affairs and childrens programming needs of the community; and was not sufficiently pursuing affirmative action policies.

The Commission denied the public interest groups' petition to deny the license renewal and also denied their petition for reconsideration of the license renewal decision. When the groups subsequently petitioned, unsuccessfully, to deny KQED's 1980 license renewal application, they further alleged that KQED had misrepresented to the FCC the reasons for the deactivation during December 1979 of one of the broadcaster's television stations.

The FCC's decision to deny a hearing with respect to the misrepresentation claim was arbitrary and capricious, according to a Federal Court of Appeals in Washington, D.C. Judge Skelly Wright stated that the Commission "ignored statutorily adequate allegations going to a substantial and material factual dispute..." and remanded the issue for a hearing.

The FCC also had concluded that the public interest groups' allegations of "excessive and intrusive" commercialization did not amount to a material and substantial factual question. The Court of Appeals affirmed this ruling and also affirmed the Commission's decision not to set a hearing based on the allegation that KQED did not comply with the open meeting and financial disclosure requirements of the Public Broadcasting Act of 1967.

Senior Court of Appeals Judge MacKinnon dissented from that part of the court's opinion which required the FCC to hold a hearing on the circumstances surrounding KQED's deactivation of one of its public television stations.

California Public Broadcasting Forum v. Federal Communications Commission, 752 F.2d 670 (D.C.Cir. 1985) [ELR 7:6:16]

Briefly Noted:

Cartoon Character Infringement.

A Federal District Court in Michigan has found that clothing retailers Neil and Lawrence Kleiman infringed United Features Syndicate's copyrighted "Garfield" and

"Odie" cartoon characters by selling, without authorization and without the appropriate copyright line, T-shirts and heat transfers bearing the likenesses of the characters. The retailing parties stipulated as to their liability for violating United Features Syndicate's copyrights in the Garfield characters. The court, noting that the Kleimans had been sued on two previous occasions for infringing the copyrighted "Peanuts" cartoon characters and faced two other infringement actions, enjoined the Kleimans from committing any further infringement of United Features' copyrights in the Garfield characters. Maximum statutory damages were found appropriate because the retailers' conduct was willful. The court therefore awarded United Features a total of $100,000 as well as attorneys fees, but denied a request for the costs of investigation.

United Features Syndicate, Inc. v. Spree, Inc. 600 F.Supp. 1242 (E.D.Mich. 1984) [ELR 7:6:17]

Trivial Pursuit Infringement.

A Federal District Court in Illinois granted a temporary restraining order to Horn Abbot, Ltd. in the company's copyright and trademark infringement action against Sarsaparilla, Ltd., the publisher of the book "In Further Pursuit of Trivial Pursuit." The book included, verbatim, all 6000 questions and answers of the "Genus Edition" of the Trivial Pursuit game. The cover of the book was colored a shade of blue similar to that of the game package; other similarities to the game package included an orange-gold line around the edge of the cover and a distinctive ornamental scroll design. The court found that Horn Abbot had shown a substantial likelihood of success on its claims, noting that Sarsaparilla, which had been denied a license to publish its work, could not have "intended anything other than to mimic the game's distinctive trade dress," and that public confusion was likely to result from the continued distribution of the book. Horn Abbot also had shown a "powerful" pendent claim of trademark dilution under Illinois law and presented a strong case of copyright infringement since the 6000 questions and answers, the "essence" of the game, were reproduced without permission.

The fact that Sarsaparilla included a fine print disclaimer on the book's cover was not likely to obviate consumer confusion stated the court. And the court rejected the claim that Sarsaparilla made a fair use of the copyrighted work. The requested temporary relief was appropriate due to the irreparable injury Horn Abbot was likely to incur during the approaching holiday gift season. Horn Abbot had not delayed in enforcing its claim and the publication of several other Trivial Pursuit "reference" books did not diminish the effect of the Sarsaparilla book, which essentially made it possible for people to play Trivial Pursuit without using the game itself. The balance of hardships did not weigh in Sarsaparilla's favor despite the time and money spent by the company in preparing the book, and a temporary restraining order was issued accordingly.

Horn Abbot Ltd. v. Sarsaparilla Ltd., 601 F.Supp. 360 (N.D.Ill. 1984) [ELR 7:6:17]

Trivial Pursuit Infringement.

Decipher, Inc., the creator of Forte Trivia Cards, a replacement card set designed for use in playing the game of Trivial Pursuit, engaged in unfair competition in violation of section 1125(a) of the Lanham Act, a Federal District Court has ruled. The design of both the packaging and the question cards, i.e., the trade dress of Forte, were virtually identical to Trivial Pursuit's subsidiary card sets, noted the court. Selchow & Righter, the exclusive United States licensee for the distribution of Trivial Pursuit, established that the trade dress of the game had acquired a secondary meaning. And the court concluded that it was likely that the public would be confused by the overwhelming similarities between the products at issue so as to believe that the Forte trivia cards were manufactured, authorized or sponsored by the makers of Trivial Pursuit. The court also found that Decipher intended to deceive buyers as to the origin of the Forte product, citing evidence such as department store displays in which the products were featured side by side. Furthermore, Decipher's use of the phrase Trivial Pursuit on its packaging went further than was necessary to describe a use of the Forte cards, and the company did not show that the term Trivial Pursuit had become a generic phrase. The court therefore enjoined Decipher from marketing the Forte trivia cards in its infringing trade dress.

Selchow & Righter Company v. Decipher, Inc., 598 F.Supp. 1489 (E.D.Va. 1984) [ELR 7:6:17]

Constitutional Law.

A Federal Court of Appeals in the District of Columbia reversed a District Court ruling, and held that Tele-Communications of Key West, a purveyor of cable television service on a Florida Air Force base, stated valid First and Fifth Amendment claims against the United States. Tele-Communications had provided exclusive cable service to the base for ten years when the Air Force, in 1983, awarded an exclusive service contract to another company. In reviewing Tele-Communications claims for injunctive and declaratory relief, the Court of Appeals noted that providing cable television service was a recognized First Amendment protected activity. The company adequately alleged, under the public forum doctrine, that it was unreasonable for the government not to grant use of the cable right-of-way to two competing cable television companies. Under the doctrine, the court explained, if Tele-Communication's cable right-of-way to the base was a public forum, governmental restrictions on speech would be permitted only to serve a significant or compelling govemmental interest. However, if the right-of-way was not a public forum, governmental restrictions would at least be required to be reasonable. The court also found that unreasonable restriction by the government might have violated the equal protection requirements of the Fifth Amendment.

Tele-Communications of Key West v. United States, 757 F.2d 1330 (D.C.Cir. 1985) [ELR 7:6:18]

Copyright.

A Federal District Court in Delaware has granted summary judgment to Hideout Records and Distributors in a copyright infringement action brought against the owners of the Red Lantern Inn in New Castle, Delaware. Hideout alleged that unauthorized public performances of its copyrighted songs had occurred in one of the owner's clubs. In 1979, following a successful copyright infringement action against the club owners, ASCAP, which holds a non-exclusive right to license Hideout's copyrighted musical compositions, had entered into a license agreement with the club owners. The agreement was terminated in 1981 for nonpayment of the license fees. The club owners claimed that their failure to pay the license fees was based on their attorney's mistaken advice and that they believed in good faith that they were not infringing copyrighted works. The court dismissed this argument as meritless, noting that even if it were true, it would not effect the liability of the club owners. Federal District Court Judge Wright also rejected the club owners' argument that they were shielded from personal liability as officers and directors of a corporation, noting that the owners were the dominant influence in, and had the capacity to control the acts of the corporation. Because the club owners deliberately violated the copyright laws and were not deterred from further violations by their previous defeat in a copyright infringement action, an award of $500 for each of the eight infringing performances was found appropriate.

Hideout Records and Distributors v. El Jay Dee, Inc., 601 F.Supp. 1048 (D.Del. 1984) [ELR 7:6:18]

Copyright.

A Federal District Court in Massachusetts has granted summary judgment to Cass County Music Company and five other copyright owners in an infringement action brought against an inn owner. Cass County had alleged the unauthorized public performances of copyrighted compositions at the inn. The inn owner argued that ASCAP, the holder of non-exclusive rights to license the copyrighted works, had failed to respond to its oral re-quests for complete lists of the copyrighted compositions in ASCAP's repertory. A copyright owner, held the court, is merely obligated to respond to a written request asking whether certain specifically named compositions are in the ASCAP repertory. Justice Caffrey also found it of no legal consequence that the guitarist who performed the unauthorized compositions was not a paid employee of the inn owner. Damages of $1,500 for each of the six violations plus $700 in reasonable attorneys' fees were ordered by the court.

Cass County Music Company v. Vineyard Country Golf Corp., 605 F.Supp. 1536 (D.Mass. 1985) [ELR 7:6:18]

Copyright.

A Federal District Court in Texas has granted summary judgment for copyright infringement to BMI against

Allen-Genoa Rd. Drive-In. Allen-Genoa failed to disclose to BMI the identity of the operator of a jukebox in Allen-Genoa's establishment and was found subject to liability for copyright infringement under section 116(a)(1) of the Copyright Act. The court found that no genuine issue of material fact existed and awarded BMI $9,000 plus interest, about $3,000 in attorney's fees, and enjoined AllenGenoa from further infringements of the copyrighted musical compositions.

Broadcast Music, Inc. v. AllenGenoa Rd. Drive-In, Inc., 598 F.Supp. 415 (S.D.Tex. 1984) [ELR 7:6:18]

Copyright.

A Federal District Court in Colorado denied a professional photographer's motion for summary judgment in a copyright infringement action against an advertising agency which commissioned the photographer and then refused to pay for his services. The court found that the photographer and the agency had a "work made for hire" relationship; therefore, the agency was considered the author of the photographs and the photographer could not validly claim copyright ownership. The court noted that the photographer may have brought the lawsuit to obtain payment for his services. However, neither the federal courts nor the Copyright Act are amenable to the use of federal question jurisdiction to resolve a quantum meruit collection action.

Peregrine v. Lauren Corp., 601 F.Supp. 828 (D.Colo. 1985) [ELR 7:6:18]

Copyright.

A Federal District Court in New York held that a government indictment properly charged several video game distributors with copyright infringement. The distributors moved to dismiss the indictment on the ground that their lack of sufficient notice that video games are subject to the copyright laws made it "improbable" that the distributors engaged in wilful infringement The court stated that the distributors were on notice that video games are capable of being copyrighted but left for the trier of fact the question of the distributors' willfulness. The question of whether the indictment's allegations of public performance or display were equivalent to "distribution" also was left to the trier of fact. The court also noted that the "first sale doctrine," under which a copyright owner loses his/her protection upon giving up title to a copy of a work only applies to copies which are lawfully obtained, and concluded that the indictment was sufficient although the government's affidavit never explicitly stated that the distribution of the video games was unauthorized.

United States v. Gallo, 599 F.Supp. 241 (W.D.N.Y. 1984) [ELR 7:6:19]

Release Agreement.

A Federal District Court in Kentucky granted summary judgment to Paducah International Raceway in an action for damages brought by James Carrell Dunn's administrator. Dunn was killed during a car race at Paducah . Prior to the race, Dunn signed an agreement releasing the Raceway from all liability caused by its negligence. Dunn's administrator alleged that the agreement was void as against public policy. Generally, agreements which release someone from liability for his own negligence are invalid. The court held that agreements signed by racers are an exception to the general rule. The court reasoned that a release by a racer is voluntary because he/she can refuse to participate in a race. Racing involves a purely private, as opposed to a public, interest. Also, the exception promotes the public's interest in racing. Without a release, it is unlikely that anyone would be willing to sponsor racing events.

Dunn v. Paducah International Raceway, 599 F.Supp. 612 (W.D.Ky. 1984) [ELR 7:6:19]

School Athletics.

A Federal Court of Appeals in Texas has held that a high school student football player's state law claims should not have been dismissed with prejudice when a Federal District Court dismissed the student's constitutional claims. The student challenged a University Interscholastic League rule stating that he was ineligible to play football because he had moved from one Texas town to another. The court affirmed the dismissal of the constitutional claims, stating that "participation in interscholastic athletics is not an 'interest' protected by the Due Process Clause," and that the remaining claims were best determined by the state court.

Hardy v. University Interscholastic League, 759 F.2d 1233 (5th Cir. 1985) [ELR 7:6:19]

Constitutional Law.

Several owners of topless bars successfully challenged a Pensacola city ordinance which banned topless dancing in establishments where alcohol was served. A Federal Court of Appeals held that topless dancing was a form of expression protected by the First Amendment. Although Pensacola claimed that the purpose of the ordinance was to regulate crime, the city failed to show substantial evidence that any criminal problems in fact existed. After reviewing the legislative history of the ordinance, the court found that its purpose focused entirely on the morality of topless dancing and not the regulation of criminal activity, and therefore reversed a District Court ruling which had upheld the ordinance.

Krueger v. City of Pensacola, 759 F.2d 851 (11th Cir. 1985) [ELR 7:6:19]

Constitutional Law.

Carlin Communications, Inc. has successfully challenged the constitutionality of a Federal Communications Commission regulation which restricted the operation of "dial-a-porn" services to between the hours of 9:00 p.m. and 8:00 a.m. eastern standard time. The Federal Court of Appeals found that the regulation was an unreasonable time, place or manner restriction because the regulation was content based. Section 223(b) of the Communications Act of 1934 applies to services transmitting only obscene or indecent messages rather than all dial-it services. The FCC failed to meet its heavy burden of demonstrating that the compelling state interest of protecting youth from dial-a-porn was served in the least intrusive manner. Section 223 (b) denied access to adults between certain hours but did not prevent youths from gaining access during dial-aporn's operational hours. Although the court set aside the regulation, it rejected Carlin's challenge that section 223(b) was arbitrary and capricious, finding that the FCC had legitimate reasons for distinguishing between live pornographic telephone services and prerecorded message ser vices like dial-a-porn. While granting Carlin's petition for review, the court affirmed a District Court order in a related case, and denied a preliminary injunction against the enforcement of section 223(b).

Carlin Communications, Inc. v. Federal Communications Commission, 749 F.2d 113 (2d Cir. 1984) [ELR 7:6:19]

Libel.

A Federal District Court in Massachusetts denied a commercial fisherman's motion for summary judgment against Forbes, Inc. which published the fisherman's photograph with an article detailing the domination of organized crime in New York's Fulton Fish Market. The fisherman claimed the use of the photograph was defamatory and constituted a commercial misappropriation and invasion of privacy. The court stated that the photograph, taken together with the caption and accompanying text, might be defamatory and that Forbes may have negligently published the photograph. The court then denied the fisherman's motion for summary judgment on the invasion of privacy claim, because the Massachusetts courts had not yet considered the state's relatively new privacy statute. Forbes motion to dismiss the commercial misappropriation and intentional tort allegations was granted.

Morrell v. Forbes, Inc., 603 F.Supp. 1305 (D.Mass. 1985) [ELR 7:6:19]

Previously Reported:

The following cases, which were reported in previous issues of the Entertainment Law Reporter, have been published: Brock v. Writers Guild of America, West, Inc., 762 F.2d 1349 (7:3:9); Broadcast Music, Inc. v. All-Industry Television Station Music License Committee, 611 F.Supp. 868 (7:4:3); Allen v. National Video, Inc., 610 F.Supp. 612 (7:5:7); Zambito v. Paramount Pictures Corp., 613 F.Supp. 1107 (7:5:7). [ELR 7:6:21]

IN THE NEWS

Los Angeles attorney Don Engel files malicious prosecution action against CBS alleging record company's misconduct in dispute over recording group Boston

Attorney Don Engel (a member of the Advisory Editorial Board of the Entertainment Law Reporter) has filed a malicious prosecution action in a Federal District Court in Los Angeles against CBS, Inc. and its attorneys.

Engel represented Tom Scholz and the musical group Boston when CBS sued the performers for breach of contract, demanding damages in excess of $20 million. In August 1984, CBS filed a second lawsuit against Scholz for breach of contract and copyright infringement and named Engel as a party in the action. Federal

District Court Judge Vincent L. Broderick granted summary judgment to Engel. In dismissing the action against the attorney, Judge Broderick, in a remark which has been quoted repeatedly, called CBS' action against Engel "an absolutely outrageous and frightening suggestion that an attorney who represents a client in litigation or in negotiation is at risk for actions he takes in the course of the representation of that client" (ELR 6:10:20).

In April 1985, Judge Broderick denied CBS' motion for a preliminary injunction which would have prevented MCA Records from releasing a Boston album (ELR 7:1:10). CBS' action against Scholz and Boston is proceeding to trial in New York.

Engel's complaint for malicious prosecution, abuse of process, intentional infliction of emotional distress, and tortious interference with contractual and prospective business relationships, demands actual damages in excess of $2 million and punitive damages of $104 million, based upon allegations that CBS, the New York law firm of Moses & Singer, and New York attorney Stanley Rothenberg brought their action against him with malice and without probable cause.

According to Engel, the CBS parties made false and misleading statements to the court concerning Engel's conduct in representing Scholz in order to interfere, in various ways, with the Engel-Scholz attorney-client relationship; to "diminish or destroy" Engel's law practice; and to dissuade Engel from representing recording artists in the future in connection with disputes between artists and CBS. [Nov. 1985] [ELR 7:6:20]

Record companies agree to identify albums containing explicit references to sex, violence or substance abuse

The Recording Industry Association of America, on behalf of 22 of its 44 recording company members, has announced a voluntary plan to identify albums containing explicit lyric references to sex, violence or substance abuse. In response to concerns expressed by the National Parent Teacher Association and the Parents Music Resource Center, the companies have agreed to assume the responsibility for labelling albums containing potentially objectionable material with the warning "Explicit Lyrics-Parental Advisory," or to print the song lyrics on the back of the album cover. [Nov. 1985] [ELR 7:6:20]

Producers Guild of America approves Alliance of Motion Picture & Television Producers' offer of pension, health and welfare benefits

The members of the Producers Guild of America have voted to approve a "letter of practices" whereby the Alliance of Motion Picture & Television Producers will provide pension, health and welfare benefits to all "bona fide" producers and associate producers. The Alliance, which does not recognize the Producers Guild as a labor union, also agreed to give the Guild screen credit and to provide pension, health and welfare coverage to IATSE Production Office Coordinators & Accountants Guild Local 717. According to news reports, membership in either the Producers Guild or Local 717 is not required in order for an individual to receive coverage; all producers, associate producers, accountants and production coordinators who meet certain eligibility standards will be included in the plans. [Nov. 1985] [ELR 7:6:20]

WASHINGTON MONITOR

Federal Communications Commission approves media acquisitions by Rupert Murdoch and Capital Cities Communications

The Federal Communications Commission has approved Rupert Murdoch's proposal to purchase, for more than $2 billion, the chain of independent television stations owned by Metromedia, Inc. Murdoch's News America Television, Inc. obtained a two year waiver of the broadcast-newspaper cross-ownership rules in order to allow for the more orderly transfer of the company's New York Post and Chicago SunTimes. News America has agreed to sell Metromedia's Boston station to the Hearst Corp., but will retain ownership of television stations in New York, Los Angeles, Washington, Dallas, Houston and Chicago.

The Commission, also approved Capital Cities Communications' $3.5 billion acquisition of the ABC television network, the first transfer of a television network since network broadcasting began more than 50 years ago. Capital Cities was granted a permanent waiver of an FCC rule which would have prohibited the company from owning a Philadelphia television station along with WABC-TV in New York; the waiver was in the public interest, according to the Commission, which noted that the New York and Philadelphia markets are "truly separate;" that both television stations were ABC affiliates; that a number of other media outlets were available in the service areas; and that Capital Cities proposed to provide special local service to certain areas within its broadcast boundaries.

Capital Cities obtained waivers of up to 18 months to divest itself of some of its radio stations in New York, Los Angeles, Chicago and San Francisco, and of its cable television properties.

According to news reports, when the acquisition is completed, Capital Cities will own eight television stations serving 24.38 percent of the nation's television households. [Nov. 1985] [ELR 7:6:21]

Federal Communications Commission refuses to review denial of fairness doctrine complaint against CBS documentary "The Uncounted Enemy: A Vietnam Deception"

The Federal Communications Commission has rejected the American Legal Foundation's request for a review of a Mass Media Bureau ruling denying the Foundation's fairness doctrine complaint against CBS. The Mass Media Bureau found that CBS did not deliberately attempt to distort or falsify the information which was presented in the January 1982 documentary "The Uncounted Enemy: A Vietnam Deception" (ELR 6:11:21). [Nov. 1985] [ELR 7:6:21]

DEPARTMENTS

In the Law Reviews:

Music Videos by Jonathan L. Kirsch, 5/11 California Lawyer 40 (1985) (published by the State Bar of California, 555 Franklin St., San Francisco, CA 94102)

Insurers to Libel Defense Counsel: "The Party's Over" by Donald Baer, November The American Lawyer 69 (1985) (published by AM-LAW Publishing Corporation, 205 Lexington Ave., New York, NY 10016)

Libel 1980-85: Promises and Realities by Henry R. Kaufman, 3/4 Communications Lawyer 1(1985) (published by the Forum Committee on Communications Law, American Bar Association, 750 North Lake Shore Drive, Chicago, IL 60611)

I Did It My Way: Establishing a Communications Practice in the Other America by Matt Leibowitz, 3/4 Communications Lawyer 3 (1985)

Where Are We Going With Private and Consensual Sexual Telecommunications? by Jonathan L. Rosner, 3/4 Communications Lawyer 6 (1985)

The Latest Brand of Libel Suit Is Won or Lost on the Courthouse Steps by Eleanor Randolph, 3/4 Communications Lawyer 7 (1985)

Fighting Back-Media Lawyers Are Developing New Tactics to Discourage Libel Suits by Jay Cutting and Lee Levine, 3/4 Communications Lawyer 11 (1985)

Profile: The Libel Defense Resource Center at Five Years of Age by Dorothy C. Young, 3/4 Communications Lawyer 24 (1985)

Problems in Libel Litigation by Erik L. Collins, Jay B. Wright and Charles W. Peterson, 7/5 Communications and the Law 41 (1985) (published by Meckler Publishing, 11 Ferry Lane West, Westport, CT 06880)

The Applications of British Copyright Protection and Liability to Cable Operators by Stephen de B. Bate and Richard McD. Bridge, 7 European Intellectual Property Review 249 (1985) (published by ESC Publishing Limited, 25 Beaumont St., Oxford OXI 2NP, England)

Anton Piller Orders: An Introduction, by John Adams, 7 European Intellectual Property Review 292 (1985)

The O'Sullivan Case: Remedying Undue Influence in Music Contracts by Jane Tatt, 7 European Intellectual Property Review 301 (1985)
[ELR 7:6:22]