## BUSINESS AFFAIRS

# Celebrity Goodwill and Its Valuation in Divorce

**by Stuart B. Walzer and Jan C. Gabrielson**

Under our legal system, legislators and judges create new law, but law is also created by commentators writing in law reviews. A seminal article can lay the foundation for farreaching developments, as did the famous 1890 article by Brandeis and Warren, The Right to Privacy. n1

A comment published in the U.C. L. A. Law Review, Community Property Interests in the Right of Publicity: Fame and/or Fortune, n2 carried forward the tradition of law review lawmaking. The commentator, Gary S. Stiffelman, developed the theme that public personalities have an interest in their right of publicity and that this interest is a divisible asset in divorce. The legal community's response was to seek to quantify and divide the proprietary component of the right of publicity and a similar property right, celebrity goodwill. A new set of intangible rights is now on the table. This article first identifies and describes these new property rights. Then it suggests ways to value them.

## I. Property Interests in Publicity and Celebrity Goodwill

### A. The Right of Publicity

Stiffelman contends that the right of publicity is a hybrid consisting of both proprietary and privacy interests. n3 This article is concerned mainly with the proprietary interest. That component consists of the right to be compensated for the misappropriation of a name or likeness for commercial purposes n4 as well as the right to control the exploitation of one's personality. n5 This proprietary interest was at stake in Harlan Laboratories, Inc. v. Topps Chewing Gum, Inc. n6 The court in that case recognized a baseball player's right to grant an exclusive license for his picture on a bubble gum card and the grantee's right to exclusivity after the license was granted.

Applying community property law to the right of publicity, Stiffelman takes the position that the proprietary interest in the right of publicity is a community asset to the extent that it is "the product of an expenditure of community energy." n7 That is, it is community property insofar as it was "acquired during the marriage through the expenditure of 'time, energy, or skill' of either spouse or both." n8 Thus Stiffelman concludes that the proprietary component of the right of publicity is subject to division upon dissolution of the marriage. n9

No reported opinion has identified the right of publicity as a divisible right in a divorce case, nor is there any guidance other than in the U.C.L.A. Law Review comment on how to value it. This, however, has not inhibited imaginative lawyers from negotiating and litigating the issue. Some large settlements have been coerced by bullheaded determination in the pursuit of this intangible right. In negotiating such a settlement, a compelling factor is the desire of a public personality not to become the subject of a test case on whether his or her name or image has value. It is a losing battle for the personality. If the name and image are found to have a large value, he or she has to pay and the sky is the limit. If the name and image are found to have a low value, it can be a negative factor in his or her career development. The personality may decide to settle on the theory that an insincere peace is better than a sincere war.

1. Whose Name, Likeness and Personality Have Value?

The U.C.L.A. comment, written in 1978, gives the following hypothetical example of how name, likeness, and personality can acquire value in a divorce:

Rock Hunter, famous matinee idol, receives $100,000 as compensation for an unauthorized use of his portrait in a magazine advertising layout. Immediately thereafter, he goes through a marital dissolution. Arguably, to the extent that the damage award was intended to compensate for misappropriation of a property right, Rock's spouse would seem to be entitled to a share. n10

The article cites the "burgeoning market for such items as Farrah Fawcett, Elvis Presley and 'Fonzie' merchandise" as illustrating the tremendous potential for financial gain from commercial exploitation of the name and image of famous personalities. n11

Attempts to value a public personality's right of publicity may be expanded beyond valuing the name and image of Hollywood stars or football superstars. Our era is dominated by the media, and anyone who has developed an ongoing access to the media may have a valuable asset in his or her name, likeness, or personality. Various types of media personalities whose name and image will sell products or generate a high income stream are in this category. Consider the sales power of the local used car dealer who appears regularly on television; people stop him on the street to shake his hand. Or consider the value of the name and image of the media lawyer who by virtue of lovable video qualities is called to remote areas of the world and paid large sums to lend his persona to a case. What is the value of the name, likeness, and personality of a charismatic television preacher whose exhortations to "keep those cards and letters coming" calls forth an avalanche of tax-free greenbacks?

## 2. Is the Right of Publicity a Valuable Asset?

Being able to sell the use of your name, image, or endorsement is a legal right in California, protected by a tort action for invasion of privacy. n12 California also has recently converted, by statute, the right of publicity into an assignable and descendible right: the right of the family upon death to the exclusive exploitation of the celebrity's name and image. California Civil Code S 990, effective January 1, 1985, dramatically changes the nature of the right by making it assignable and descendible. n13 Previously heirs had not had the right to prevent outsiders from exploiting the name and image of a deceased celebrity since it was not a "property right." Now this right takes on the stature of a full-scale property right, and earlier objections that name and image are not property and therefore not subject to division in a divorce are necessarily stilled.

These exploitation rights can embrace such diverse rights as domestic and foreign television commercials, product endorsements, or even an entire product line, such as "Here's Johnny" perfume. In short, the proprietary right of publicity allows a celebrity to be compensated for his or her ability to get the public to buy something - whether it be a box of soap or a bottle of salad dressing. This compensation is in addition to the celebrity's compensation for expending time and talents in his or her chosen field.

B. Celebrity Goodwill

Celebrity goodwill is a property right that is distinct from, but similar to, the proprietary component of the right of publicity. Recall that an example of the latter is a baseball player's right to grant a license for the use of his picture in an advertisement. In these instances, the ball player is exploiting his right of publicity.

By contrast, the player's ability to command a high salary for his services as a ballplayer is a manifestation of his celebrity goodwill. His salary may be many times the salary of a young professional baseball player playing in the minor leagues. The celebrity gets the higher salary because he has proved his ability and he is a major asset to his team.

The concept of celebrity goodwill is not discussed in Stiffelman's comment in the U.C.L.A. Law Review. Yet it is as logical to value celebrity goodwill as it is to value only the collateral right of the celebrity's name and image.

The primary benefit of being famous is that the celebrity can generate higher fees for less work. This can be illustrated by a bit of deposition dialogue - a scene taken from real life. A Hollywood agent is being deposed regarding the earning power of an actor who is one of his clients.

Q: "Now, coming back to the circumstances under which two actors performing the same role might receive different levels of compensation, do you recall the questions I asked you about the established and non-established actor?"

A: "Yes"

Q: "What other criteria might be involved in fixing compensation other than credits and experience of the actor in the industry?"

A: "The demand that the actor might have at the given time in the industry in terms of his age, in terms of his recent credits, and what we call just purely 'the heat on an artist.'"

Q: "All right. Are there any other factors that you can think of that might influence-Let me check that. You have told us about public identification, how well known an actor is?"

A: "That has no effect - that doesn't have - the public identification of an artist has no effect on the industry's decision as to what an artist should be compensated. What has the effect is the public's desire to see that actor in a film."

Q: "How is that measured?"

A: "By previous box office returns from previous pictures."

Q: "In other words, when the prevailing pictures have been successful?"

A: "That's right."

The agent's deposition went on, the agent pointing out that considerable time had elapsed since the celebrity's last big picture. The lawyer asked how long a celebrity can capitalize on past success. The agent noted that the actor's last hit picture was ten years ago, and for this reason the actor did not have much "heat"

Goodwill has many definitions, but the most durable definition is that goodwill consists of the expectation of future public patronage by reason of being well known to the public. Consider the following definition, frequently quoted in California cases, from In re Marriage of Lyons n14 :

"Goodwill [is]. . .`the advantage or benefit which is acquired by an establishment beyond the mere value of the capital stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances, or necessities, or even from ancient partiali ties or prejudices. (Story on Part., Sec. 99) ... [I]t is the probability that the old customers will resort to the old place. It is the probability that the business will continue in the future as in the past, adding to the profits of the concern and contributing to the means of meeting its engagements as they come in.'" n15

Note that common celebrity status can be the basis for goodwill. The goodwill is that much greater if it is founded on uncommon celebrity status.

In placing a value on the goodwill generated by celebrity status it is wise to keep one's sights high and exercise imagination. Recently the authors of this article received an announcement from a securities broker whose photograph frequently appears in the local social pages, announcing his appointment to a public commission that awards licenses to local television stations. The authors represent the broker's wife in a dissolution of his marriage. Fifty-thousand dollars has been put forward as the value of the broker's name and image.

Fairness is the strongest argument for including celebrity goodwill in the marital estate at dissolution. The celebrity is no different from a doctor, lawyer, or accountant in that the skills involved are similarly intangible. Furthermore, like the spouse of a doctor, lawyer, or accountant, the celebrity's spouse is often called upon to pay special attention to mundane matters such as food, shelter, and moral support while the celebrity cultivates a valuable marital asset, the public image of the celebrity. Consequently, the celebrity's spouse should acquire a property right in the goodwill of the celebrity, just as the spouse of the doctor or accountant acquires such a right.

In the sections that follow, this article addresses the valuation of both celebrity goodwill and the proprietary interest in the right of publicity. Regarding the valuation of the right of publicity, this article does not endorse the position taken by Stiffelman in the U.C.L.A. comment.

## II. Valuation

The proprietary interest in the right of both publicity and celebrity goodwill should be included in the marital estate at divorce. They are, however, separate property rights and should, therefore, be valued separately.

### A. Valuing Celebrity Goodwill

Courts routinely value and divide tangible and intangible interests in a professional practice or a business regardless of whether those rights can be sold or assigned. Techniques developed to value one such intangible, professional goodwill, can be adapted to valuing celebrity goodwill. Two goodwill valuation methods, the "going concern" method and the capitalization of excess earnings method, are discussed below. Note that both require a determination of the celebrity's average yearly income. The practitioner should make certain that the income figure used for this purpose reflects only the income the celebrity earns in his or her principal career, acting, singing, playing ball, or the like. The income figure should not include income from the celebrity's exploitation of his or her right of publicity. That is, in this computation exclude the ballplayer's income from making commercials, etc. That income goes to determining the value of the ballplayer's right of publicity.

1. "Going Concern" Valuation Method

In recent years, valuation experts have come up with a new approach to valuing professional goodwilldetermining "going concern value." This method assigns a goodwill value to the income stream of a professional practice or business based upon a percentage of gross income. A common standard for goodwill is one quarter's earnings, 25 percent of the annual gross income of a physician, for example. This going concern value has no compelling underlying logic to recommend it except that it is simple and convenient; yet courts often accept it as a legitimate measure of goodwill. The same concept may be applied to valuing the goodwill of a celebrity.

## 2. Capitalization of Excess Income Method

Stiffelman quotes a 1976 article that defines the capitalization of excess earnings method of valuing goodwill:

"Another method often used is that of finding the average gross earnings for a previous number of years (before income tax) after all reasonable and necessary business expenses. The period is usually three to five years .... Then, from the average annual net earnings, there is subtracted the annual salary of an average employed practitioner with like experience. The remaining balance is capitalized over a number of years." n16

It can be argued that there is no average salary for a celebrity, whether the celebrity is an actor, musician, or television preacher. A celebrity's experience is extraordinary and not subject to ordinary rules. Therefore, there are no base earnings from which one can calculate excess earnings.

But, like all problems surrounding the valuation of intangibles, the problem can be solved by analogy. The same problem arises in valuing excess earnings in a medical practice. What are the "average" earnings of physicians of the same age and specially designation as our subject physician? Appraisers sometimes rely on dubious statistics from the magazine Medical Economics, a journal for physicians. But we never know how many physicians were polled, how many answered the poll, and what the demographics were of those that answered. How many of the specialty physicians who answered were workaholics like the subject physician? Appraisers solve the problem of "average" earnings with whatever statistics they can glean. The published salaries of like-situated physicians employed by governmental bodies are often used as average earnings and are accepted by courts.

Similarly, statistics are available to show what actors earn in various age groups. The difference in earning power between the celebrity actor and his noncelebrity peers is his "excess earnings" Whether his celebrity status is valued at one quarter of a year's earnings, one year's earnings, or four years' earnings, the methodology will be identical to the process used to value the practice of professionals.

Overcoming the conceptual problem helps lawyers place an intangible value on the large earnings of the celebrity. If the courts are prepared to value the good-will of a doctor, a lawyer, or an accountant going through a divorce, then a court should value the good-will of a star or superstar, even if the resulting value is six figures or more.

B. Valuing the Right of Publicity

Stiffelman's comment does not deal with valuing celebrity goodwill, but advocates valuing name and image under the designation of the right of publicity. This is important because a celebrity's income from performing does not necessarily bear a direct relationship to his or her potential income from the exploitation of the right of publicity. The comment uses the following example:

"[W]hile Farrah Fawcett was earning a reported $5,000 per episode for performing on the TV program "Charlie's Angels, her income from promotions and modeling exceeded one million dollars a year. In the case of a media personality such as Ms. Fawcett, she need not even be performing to be able to reap the substantial benefits of her fame." n17

This example emphasizes that the value of exploitation rights can exceed the value of celebrity goodwill, but this is rarely the case. The "heat" the agent spoke of in the deposition quoted earlier is what drives the exploitation rights engine. Therefore, exploitation rights are the frosting on the cake rather than the cake itself. But even valuing the frosting can be worthwhile if one uses a multiple of one year's earnings from television commercials.

The value of the right of publicity is "the price which a promotional entrepreneur would be prepared to pay for the right to utilize the celebrity's name and likeness in all manners of exploitation." n18 But what if a celebrity chooses not to exercise the exploitation rights that are the natural concomitant of fame? Some artists may not want to expose themselves or their families to the loss of privacy that comes with fame. Others may conclude that overexposure would water down their principal image as a performer, thus limiting their earnings rather than enhancing them.

As stated earlier, Stiffelman maintains that there is a second component of the right of publicity: a pure right to privacy. He notes that if a celebrity is forced to compensate his spouse for her share of the proprietary component of his unexercised right of publicity, then he is being forced to pay for his privacy. n19 Stiffelman proposes that the proprietary and privacy components of the right of publicity be reconciled in the following manner:

If the celebrity has already exploited the proprietary right of publicity, he has waived his right to privacy. To that extent, the right of publicity is a divisible community asset in a divorce proceeding. However, to the extent "the celebrity has refrained from exploitation and, therefore, retains a pure privacy interest, he may bar his spouse's claim that she be compensated for her indirect contributions to the value of the unexploited proprietary interest." n20

If the party seeking to value the right of publicity rejects Stiffelman's argument and argues instead that all exploitation rights, including unexercised rights, are to be valued, then it is logical to explore potential exploitation rights through discovery procedures. This means deposing the celebrity and his agents to determine if there have been or are opportunities for commercial exploitation of the celebrity's name or image. The deponent can also be questioned whether any efforts have been made to secure commercials or endorsements.

This course has its downside risks: a court may allocate fees and costs and even sanctions on the basis that the inquiry is straying too far afield. It can be argued that a mere expectancy is being pursued and that witnesses are being asked to engage in speculation. Despite the risk, some spouses may conclude that vigorous pursuit of intangible rights is the only way to secure some portion of their value for the marital community.

This course, together with an effort to value the celebrity's goodwill, may result in a settlement or a judgment that reflects the large earning power of the celebrity.

## NOTES

1. Warren and Brandeis, "The Right to Privacy" 4 Harv. L. Rev. 193 (1890).

2. 25 U.C.L.A. L. Rev. 1095 (1978) [hereinafter cited as Right of Publicity].

3. Id. at 1102.

4. Id. at 1100.

5. Id. at 1097.

6. 202 F.2d 866 (2d Cir.), cert. denied, 346 U.S. 816 (1953).

7. Right of Publicity, supra note 2, at 1102-03. Another right of publicity case discussed in the comment is Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977)("Human Cannonball's" right to control the use of a videotape of his carnival act).

8. Right of Publicity, supra note 1 at 1111.

9. Id. at 1114.

10. Id. at 1096 n. 5.

11. Id. at 1095.

12. Cal. Civ. Code sec. 3344 (West 1970 & Supp. 1985)

13. Cal. Civ. Code sec. 990 (West 1982 & Supp. 1985).

14. 27 Cal.App.2d 293 (1938).

15. Id. at 297-98 [quoting Bell v. Ellis, 33 Cal. 620, 624-25 (1867)].

16. Right of Publicity, supra note 2, at 1117 n. 99 [quoting Breckenridge, The Elusive Intangible Asset, Goodwill, 1976 Symposium, L.A. Super. Ct. 223, 228 (1976).

17. Right of Publicity, supra note 2, at 1118 n. 100.

18. Id. at 1118.

19. Id. at 1126.

20. Id. at 1127-28.

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[ELR 8:8:3]

## RECENT CASES

### United States Supreme Court declines to review ruling awarding about $1.5 million to Nintendo Co. in counterclaims against Universal City Studios with respect to "Donkey Kong" game

The message of the jungle drums echoed in the night- the battle between King Kong and Donkey Kong may have drawn to a close at last.

In July 1985, a Federal District Court in New York granted part of a tortious interference with contractual relations counterclaim brought by Nintendo Co., Ltd., the distributor of the "Donkey Kong" electronic arcade game, against Universal City Studios, the purported holder of certain rights in the creature "King Kong;" the court also ruled for Nintendo on the company's vicarious copyright infringement counterclaim, and awarded Nintendo damages of about $1.5 million (ELR 7:12:10).

A Federal Court of Appeals has affirmed the District Court judgment, and the United States Supreme Court has rejected Universal's appeal of the ruling awarding damages to Nintendo.

The Court of Appeals reviewed the background of Universal's claim of rights in King Kong and the company's attempts to persuade Nintendo's Donkey Kong licensees to enter license agreements with Universal (including a 1983 cease and desist letter sent to the licensees, restating the claims raised in Universal's complaint against Nintendo). According to the District Court, Universal knew that it did not have trademark rights in King Kong and threatened to sue "not to adjudicate its trademark claim, but to coerce others into sharing their Donkey Kong profits" Apparently, in response to the letters, six licensees stopped manufacturing Donkey Kong products and refused to pay the royalties specified in their licenses with Nintendo.

Federal District Court Judge Metzner (sitting by designation) stated that the court was fully justified in finding that Universal did not have a good faith basis for its conduct, particularly in view of litigation conducted by the studio in 1975 in which Universal successfully argued that the name King Kong had not acquired any secondary meaning. An award of about $1.1 million in attorneys fees was upheld as was an award of about $222,000 in punitive damages on the tortious interference counterclaim-again, Universal knew that it did not have trademark rights in King Kong, "yet it proceeded to broadly assert such rights anyway a wanton and reckless disregard of Nintendo's rights."

Also upheld were additional damages of about $56,000 and attorneys fees of about $83,000 awarded to Nintendo on the basis of the company's claim that Universal vicariously infringed Nintendo's copyright in Donkey Kong by licensing a competing King Kong arcade game.

The Court of Appeals concluded by upholding the dismissal of Nintendo's counterclaims seeking $4.76 million in revenues that Universal allegedly earned from its license agreements with three former Nintendo licensees. Since Nintendo had sold its rights in Donkey Kong to Coleco, Atari and Ruby-Spears when it entered into license agreements with these companies, Universal, on the face of the transactions involved in the case, did not obtain money that was owed to Nintendo; any injustice harmed the three companies, stated Judge Metzner.

Just prior to the Court of Appeals decision, Federal District Court Judge Sweet granted Nintendo's motion to dismiss an interpleader complaint brought by Universal against Nintendo; the complaint was included along with an amended answer filed by Universal in an action brought against the studio by Coleco Industries in which Coleco sought to recoup about $4.6 million in license fees paid to Universal.

Judge Sweet determined that "given the unusual interplay" between the Nintendo and Coleco actions, Nintendo adequately established undue prejudice if the court were to hear the interpleader claim since the claim was based upon a theory of misappropriation which the court previously had dismissed. Thus, Universal would not be subject to double recovery as it alleged and the interpleader claim was dismissed accordingly for failure to raise a case or controversy.

Universal City Studios, Inc. v. Nintendo Co., Ltd., 797 F.2d 70 (2d Cir. 1986); Coleco Industries, Inc. v. Universal City Studios Inc., 637 F.Supp. 148 (S.D.N.Y. 1986) [ELR 8:8:7]

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**Artist's copyright infringement claim against Lucasfilm in connection with creatures depicted in "The Empire Strikes Back" is denied on the basis of the best evidence rule**

The "Imperial Walkers" have overcome the "Garthian Striders" in their latest legal encounter - a Federal Court of Appeals has upheld a District Court ruling (ELR 7:8:18) granting summary judgment to Lucasfilm, Ltd. in a copyright infringement action brought by graphic artist Lee Seiler.

The giant machines known as the Imperial Walkers appeared in the 1980 movie "The Empire Strikes Back." Seiler claimed that he created and published the Garthian Striders in 1976, but at a pre-trial evidentiary hearing held by the District Court, Seiler was unable to produce originals of the machines (which were copyrighted in 1981) or any documentary evidence that they existed before 1980. The court applied the best evidence rule, found that Seiler had lost or destroyed the originals in bad faith, and denied the admissibility of any secondary evidence, such as reconstructions, copies or projections.

Federal Court of Appeals Judge Farris first held that Seiler's works of art were "writings" within the meaning of the federal rules of evidence. Substantial similarity could be established only if Seiler's works were juxtaposed with Lucas' and their contents compared. But Seiler's secondary evidence did not consist of true copies or exact duplicates of his work, but of "reconstructions" made after 1980. "The dangers of fraud in this situation are clear," stated Judge Farris. And in this case, the best evidence rule was correctly applied to prevent reconstructions which might have no resemblance to the purported original works from being used to prove infringement of those works. Seiler's argument that the best evidence rule applied only to words and numbers and not to works of art was rejected, and the court concluded that the record supported the finding that the originals of the artist's works were lost or destroyed in bad faith.

Seiler v. Lucasfilm, Ltd., 797 F.2d 1504 (9th Cir. 1986) [ELR 8:8:7]

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**Playboy Enterprises obtains preliminary injunction restraining Attorney General's Commission on Pornography from publishing names of distributors of purported pornographic material**

Playboy Enterprises, the American Booksellers Association, and two organizations representing distributors Of periodicals have obtained an injunction restraining the Attorney General's Commission on Pornography from releasing a "blacklist" or taking other action to censor or to suppress the distribution of Playboy Magazine and certain other periodicals.

In early 1986, the Commission sent a letter to several companies which the Reverend Donad Wildmon (Executive Director of the National Federation of Decency) had identified in his testimony before the Commission as being involved in the sale or distribution of pornography; in Reverend Wildmon's view, Playboy and Penthouse magazines were pornographic publications. The Commission's letter did not describe or identify the source of the testimony, and although a copy of Reverend Wildmon's statement was attached to each letter, the author of the statement was not revealed. The Commission stated that it was providing the companies with an opportunity to respond to the testimony prior to drafting a section of the report on "identified distributors" of pornography.

Apparently in response to receiving the Commission's letter, Southland Corporation, the owner of 7-Eleven Stores, decided to discontinue the sale of adult magazines in its stores, and requested that the Commission delete any reference to the company in its final report.

The Playboy parties contended that as a result of the letter and the perceived "threat" that the names of various companies would be published in the report, many stores stopped selling Playboy and similar magazines.

Federal District Court Judge Penn noted that the Commission's letters did not define "pornography; " were based on the testimony of only one out of about 200 witnesses who appeared before the Commission; and appeared to contain an implied threat to addressees. The distributors' refusal to sell Playboy and the likelihood that the magazine's First Amendment rights had been affected served to show the requisite irreparable injury, stated the court. Injunctive relief also was warranted because the Commission went beyond its mandate in suggesting that distributors of pornography would be prosecuted. Thus, the only purpose which might be served by the letters was to discourage distributors from selling adult magazines, and this was "a form of pressure amounting to an administrative restraint" of the Playboy parties' First Amendment rights.

An injunction was entered prohibiting the Commission from publishing the names of distributors of purported pornographic material in the final report. The court also directed the Commission to send a letter to each addressee of the original letter advising them that the original letter was withdrawn, and that their names would not be included in the report as sellers or distributors of pornographic material.

Playboy Enterprises, Inc. v. Meese, 639 F.Supp. 581 (D.D.C. 1986) [ELR 8:8:8]

## "Saturday Night Live" skit in which character known as "Fast Frank" offered dubious tax advice did not defame identifiable private individual, rules New York appellate court

An April 11, 1984 "Saturday Night Live" show contained a segment featuring a character with the same name as Westchester tax consultant Maurice Frank. The character, who allegedly bore a noticeable physical resemblance to Frank, made several humorous suggestions about possible tax deductions, such as taking an oil-depletion allowance for acne medication expenses.

Frank sued the National Broadcasting Company for libel and also claimed that NBC's use of his name violated sections 50 and 51 of the New York Civil Rights Law. The trial court granted NBC's motion to dismiss the Civil Rights Law claim, but refused to dismiss the defamation cause of action (ELR 7:10:17); a New York appellate court has dismissed the entire complaint.

Although noting that humor and comedy have not been granted absolute or categorical First Amendment protection, "not every humorous article, comedic routine or antic performance will subject its author or performer to liability for defamation" The manner in which "laughter-provoking" statements are viewed depends in large part upon the context in which they are delivered, stated the court, citing Polygram Records v. Superior Court (ELR 8:4:14) which concerned a Robin Williams monologue.

In the instant proceeding, it was unlikely that anyone would take seriously the "tax advice" of Fast Frank. If anything, noted Judge Kooper, the statements, even more plainly than in Polygram Records, were "the obvious figments of a comic imagination ... Income taxes ... and persons connected with their collection and even preparation, have been a fertile source of the comic imagination since their adoption."

Since there was no possibility that any person hearing the Saturday Night Live routine would take it seriously, and since the skit was presented as a small comic part of a larger and obviously comic entertainment program and was not a malicious nor vicious personal attack, there was no defamation as a matter of law even though the skit "poke[d] fun at an identifiable individual."

Judge Kooper concluded by emphasizing that protection from liability would not be available if humor were used in an attempt to disguise an intent to injure an individual's character or reputation-such an attempt was not made in the Fast Frank skit.

Frank v. National Broadcasting Company, New York Law Journal, p.1, col.6 (N.Y.App., Oct.6, 1986) [ELR 8:8:8]

## Sculptor's copyright infringement claim against ABC in connection with use of interlocking ring logo for Olympics telecasts is dismissed

ABC's special logo for its television broadcasts of the Olympics consisted of the three upper circles of the fiveinterlocking ring Olympic symbol, upon which were superimposed ABC's lower-case initials. Sculptor Bradley Arthur claimed that he conceived of the ABC Olympics logo in a "sudden flash of inspiration" in 1976, and mailed a "presentation" of the idea to ABC. The Copyright Office rejected, as uncopyrightable, Arthur's attempt to register sketches of his idea. But Arthur then made a sculpture "embodying" the idea (using welded brass rings), registered the sculpture, and mailed a photograph of the work to ABC.

Assuming for purposes of ABC's motion for summary judgment that Arthur's account of the facts was true, Federal District Court Judge Owen noted that by copyrighting the sculpture, Arthur "could not acquire a monopoly on the idea of the combination of the five rings, but rather at most a right to his particular sculptural execution of this idea." (In a footnote, the court questioned whether Arthur would have even this right in view of the United States Olympic Committee's exclusive statutory right to the interlocking ring symbol.) But Arthur's sculpture was so strikingly different from ABC's "polished and modern version" as to be, as a matter of law, insufficiently similar to sustain an infringement claim, and the broadcaster's motion for summary judgment dismissing the complaint was granted accordingly.

ABC's motion for summary judgment on its counterclaim for trademark infringement and dilution was denied because there was no showing of confusion.

Arthur v. American Broadcasting Companies, Inc., 633 F.Supp. 146 (S.D.N.Y. 1985) [ELR 8:8:9]

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**Photo agency's damages for magazines infringing use of photograph of Raquel Welch are reduced to $25,000 by Federal Court of Appeals**

As described in ELR 7:5:14, a Federal District Court in New York awarded damages of about $59,000 to Sygma Photo News, the copyright holder of a photograph of "an unadorned Raquel Welch" which was reprinted, without authorization, on the cover of "Superstars of Celebrity Skin, Special No. 6," published by a successor in interest to High Society Magazine, Inc.

Federal District Court Judge Sweet determined that the photograph produced 75 % of the magazine's sales. A Federal Court of Appeals, however, while affirming the liability of the High Society parties, has modified several of the District Court's findings, thereby reducing the amount of the judgment.

The Court of Appeals rejected Sygma's claim that the printing costs allocable to the 48 % of the copies of the magazine that were not sold should not be deducted, finding that the entire costs for the unsold magazines were properly deducted from gross revenue, as was the entire amount spent on separations. But the District Court erred in disallowing a $20,000 retouching expense for the entire magazine, stating that some allocation should have been made for the cost of retouching the infringing photograph; Judge Oakes set this deduction at $16,000. A deduction of about $11,500 also was allowed-this was 50% of the cost of purchasing photographs for the publication.

In all, the profits earned by the magazine amounted to $51,395.50. But Judge Sweet's finding that 75 % of the profit was attributable to the cover of the magazine was rejected as clearly erroneous - the finding was "radically inconsistent" with certain expert testimony. And the court noted that the cover, in addition to displaying the photograph of Raquel Welch, referred to numerous other celebrities whose nude photographs were contained in the magazine. Judge Oakes concluded that the highest percentage of sales reasonably attributable to the cover photograph was 50 %, resulting in damages of $25,697.75; the matter was remanded for the entry of a modified judgment.

Sygma Photo News, Inc. v. High Society Magazine, Inc., 778 F.2d 89 (2d Cir. 1985) [ELR 8:8:9]

## T-shirt company is ordered to pay $20,000 in statutory damages for willful infringement of copyrighted photograph

Mary Engel, the daughter and executrix of the estate of the late Ruth Orkin Engel, was entitled to statutory damages of $20,000 for the willful infringement by a garment manufacturer of one of the late Ms. Engel's color photographs of Central Park, a Federal District Court in New York has ruled.

Ocean Atlantic Textile Screen Printing, Inc. (known as Wild Oats) reprinted the photograph on T-shirts and sweatshirts. Wild Oats conceded liability for copyright infringement, but argued that the amount of the company's net profits and sales commissions on the shirts - $1,978,52 - should control the amount of damages.

The court disagreed and awarded statutory damages to the estate based in part on the fact that the evidence indicated that the company's art director knew or should have known that the unauthorized reprinting of the photograph was a violation of copyright. Furthermore, the photograph was the type of work which would be "unusually susceptible to damage when reproduced on the rather less rarefied medium of a T-shirt or sweatshirt." Approximately 2500 shirts were distributed, and the harm to Ruth Engel's artistic reputation, in the form of lost revenues from her works, might not become evident for several years. An award of $20,000 would be adequate to compensate for the losses to the estate and to caution other would-be infringers of the seriousness of copyright violations, stated Judge Robert L. Carter.

However, the willfulness of Wild Oat's employee could not be imputed to New World Sales, the company which sold Wild Oat's garments. New World dealt with Wild

Oats as an independent contractor and its liability therefore was limited to $1,011.25, the sales commission it received on infringing products. The officers and directors of Wild Oats were held jointly and severally liable with Wild Oats for $18,988.75 because of their ability to supervise, and their financial interest in, the infringing activity. The officers and directors of New World Sales also were jointly and severally liable for their company's share of liability. And Judge Carter awarded the estate costs and attorney fees of $3,000, a permanent injunction restraining further infringement of the copyright, and an order requiring the delivery to the estate of all remaining infringing merchandise.

Engel v. Wild Oats Inc., Case No. 86 Civ. 5365 (S.D.N.Y., Oct. 3, 1986) [ELR 8:8:9]

## Justice Department classification and reporting requirements in connection with distribution of documentary films produced by the National Film Board of Canada are upheld by Federal Court of Appeals in Washington, D.C.; in separate action, Federal District Court in California finds the requirements unconstitutional

Was the United States distributor of a documentary film produced by the National Film Board of Canada required to assist the Board in complying with a Justice Department regulation concerning the transmission of "political propaganda" by a registered foreign agent? Yes, answered then-Federal Court of Appeals Judge Scalia in responding to an action brought by Mitchell Block, the president of Direct Cinema, Ltd.

Block, along with several environmental groups, the State of New York, a library association and a private theater sought to exhibit three films produced by the National Film Board of Canada. The Board had granted Direct Cinema the exclusive right to distribute the Academy Award winning film "If You Love This Planet." Two other documentary films about the detrimental environmental effects of acid rain were available for sale or rental directly from the Board.

Since 1947, the Board has registered with the Justice Department as an "agent of a foreign principal" under the Foreign Agents Registration Act of 1938. In its supplemental registration reports, the Board provided the Justice Department with lists of the titles of the new films the Board planned to distribute. In June 1982, the Registration Unit of the Justice Department selected five films for screening from a list of 62 titles. Subsequently, the Board was advised that the three films at issue constituted "political propaganda" under the Act.

The Act includes within the definition of political propaganda any form of communication "reasonably adapted to ... prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public ... with reference to the political or public interests, policies, or relations" of a foreign government or political party or the foreign policy of the United States. Registered foreign agents must notify the Justice Department within forty-eight hours after the agent transmits any political propaganda; the notification must disclose the name of certain recipients and exhibitors of the material.

The Block parties sought declaratory and injunctive relief challenging the propriety of classifying the three Board films as political propaganda, and the constitutionality Of the classification and reporting provisions of the Act. A Federal District Court dismissed the complaint for lack of standing.

On appeal, Block argued that the Justice Department classification of the films as political propaganda meant that potential customers, particularly public institutions, such as schools and libraries, would not purchase or rent the films. The court agreed that sufficient facts were presented to establish "concrete, particularized harm" to Block's company attributable to the classification. The factual allegations set forth also established that requiring the Board to list, in a publicly available report, the names of organizations and theaters using the films distributed by the Board, created a "disincentive" to acquire those films, thus reducing Direct Cinema's profits. And since the injury to Block consisted of the disruption of a vendor-vendee relationship, Block possessed standing to raise alleged violations of the vendee's First Amendment rights related to their dealings with him.

However, the requisite demonstration of injury was not presented with respect to the Act's requirement that the

Board set forth the names of those to whom it transmitted 100 or more copies of the films.

In turning to the substantive issues raised, Judge Scalia declined to accept the Block parties argument that the Registration Unit was not entitled to classify a film as political propaganda under the Act unless the film was found subversive and disseminated in the "political interests" of a foreign principal.

The court then discussed Block's assertion that the statutory term "propaganda" amounted to a constitutionally prohibited governmental pronouncement that the films contained "misstatements, half-truths and attempts to mislead." But the record in the case refuted any equivalence between the classification of a film as "political propaganda" under the Act and governmental disapproval, stated Judge Scalia. Block had asserted that the purported unconstitutionality would be cured if the statutory text were changed from "political propaganda" to "political advocacy;" this was an indication of the "insubstantiality of... [an] essentially terminological attack upon the classification scheme," in Judge Scalia's view. The classification identified an objective category of speech, and unless the classification was inaccurate or unconstitutional, no basis was found for a First Amendment objection.

Furthermore, even if the classification of the films as political propaganda amounted to an expression of official governmental disapproval of the ideas in question, such an expression in itself was not necessarily unlawful since not every government action which affects speech implicates the First Amendment. After a considered discourse on government expression, Judge Scalia emphasized that the "line of permissibility" did not fall "between criticism of ideas in general and criticism of the ideas contained in specific books or expressed by specific persons but rather between the disparagement of ideas (general or specific) and the suppression of ideas through the exercise or threat of state power. If the latter is rigorously proscribed ... the former can hold no terror."

The registration and classification scheme of the Act also had an independent validating purpose. In all, Block's contentions were characterized as "no more than objection to governmental criticism in principle" and in view of the above discussion, were rejected by the court. Also rejected were Block's due process and vagueness claims.

The court then reviewed the dissemination reporting requirement of the Act. According to the government, one of the interests served by the requirement was to increase public awareness of the nature and extent of an agent's dissemination of foreign advocacy, not to publicly disclose which films private organizations might be viewing. And although, in the opinion of Judge Scalia, such an interest might not be of the highest importance, the First Amendment values allegedly impaired - the right to receive ideas in privacy and the right to privacy in the dissemination of ideas - were outweighed by the asserted interest. The matter therefore was remanded to the District Court with instructions to enter judgment for the government parties.

The reporting requirements of the Act also were considered by a Federal District Court in California in an opinion with which Judge Scalia disagreed. Barry Keene, a member of the California State Senate, claimed that he wished to acquire and exhibit three National Film Board of Canada documentaries (the same films as those at issue above), and that he was deterred from doing so by the government's characterization of the films as political propaganda.

In affirming that Keene possessed standing in the matter (see ELR 5:8:3 for an extensive discussion of an earlier proceeding in the case) Federal District Court Judge Raul A. Ramirez referred to the complained - of government conduct as censorship - a present governmental interference with or suppression of expression in circumstances "of immediate consequence" to Keene, who also claimed that the Act would result in imminent injury to his reputation in that he might be considered a "purveyor of propaganda."

Judge Ramirez then found that the matter did not present a non-justiciable political question and stated that the issue before him was whether the First Amendment imposes any limitations on the power of Congress to choose a word or phrase, i.e., political propaganda, as a term of art. According to the court, the term propaganda, as used in ordinary speech, is a word of reproach. However, the definition of the phrase contained in the Act was a "unique construct" not partaking of the usual negative sense of the words; considered apart from ordinary usage, the phrase did not carry a negative connotation. Nevertheless, found the court," the suppression of speech was part of the intent of Congress in adopting the challenged portions of the... Act." Evidence which was not rebutted or impeached by the government established "beyond peradventure of a doubt" that parties who disseminate material officially found to be political propaganda run the risk of being held in a negative light by members of the general public. Thus, the use of the phrase imposed a burden on speech "by making such material unavailable to all but the most courageous."

In this case, the purpose of the Act as a whole may have been to inform recipients of advocacy materials produced by or under the aegis of a foreign government of the source of such material, but there was no justification, "compelling or otherwise" for the use of the phrase political propaganda. The provisions of the Act containing the phrase were declared an abridgement of Keene's First Amendment rights and (in an opinion on a motion to alter judgment) the court enjoined the government from enforcing specified sections (containing the challenged phrase) of the Act as against the films "If You Love This Planet, Acid Rain: Requiem or Recovery," and "Acid From Heaven."

Block v. Meese, 793 F.2d 1303 (D.C.Cir. 1986); Keene v. Meese, 619 F.Supp.1111 (E.D.Ca. 1985) [ELR 8:8:10]

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**Cable television operator was not liable for copyright infringement when retransmitting programming, notwithstanding substitution of commercials, rules Federal Court of Appeals, and affiliated cable system was entitled to common carrier exemption**

A Federal Court of Appeals has affirmed the dismissal of Hubbard Broadcasting's copyright infringement action against Southern Satellite Systems (ELR 7:3:13).

The Copyright Act of 1976 provides for a compulsory licensing program for cable systems that retransmit television signals containing copyrighted programming material. Copyright liability has been limited to the retransmission of distant non-network programming; however, communications carriers that are "Passive" with respect to the retransmission of television signals incur no copyright liability when acting as a "communications conduit" between the distant broadcast station and interested cable systems.

Southern Satellite was licensed by the Federal Communications Commission to provide services as a communications common carrier; the company retransmitted the signal of WTBS, an Atlanta based television station owned and operated by Turner Broadcasting System, to cable systems throughout the country. In 1979, Southern Satellite, in addition to receiving WTBS' UHF signal, began receiving a second WTBS signal by direct microwave connection; the signals were retransmitted, without editing or modification, by Southern Satellite.

Hubbard Broadcasting operated local television stations in three markets reached by the WTBS signalMinneapolis/St. Paul, Minnesota; Albuquerque, New Mexico, and St. Petersburg, Florida. Several programs licensed by Hubbard also were licensed by Turner. Thus, on occasion, programs shown on Hubbard's stations also appeared as part of the WTBS signal available to cable subscribers in Hubbard's markets.

Hubbard argued that the carrier exemption and the compulsory licensing provisions of section Ill of the Copyright Act were inapplicable in this case because WTBS' microwave signal was "not made for reception by the public at large but [was] controlled and limited to reception by particular members of the public. . ."

Federal Court of Appeals Judge Fagg rejected Hubbard's claims, pointing out that section Ill was not intended to regulate methods of transmission, but applied when a primary transmitter sought to limit the reception of its signal, i.e., via closed circuit television, pay television or pay cable. Turner's microwave signal, however, was not controlled or limited by Turner to "specific, identifiable recipients;" indeed, the UHF signal and the microwave signal contained the identical copyrighted programming material and both signals were transmitted free of charge with Turner deriving its income primarily from the sale of advertising.

Judge Fagg also rejected Hubbard's argument that the WTBS microwave signal was not protected by the compulsory licensing provisions of the Copyright Act. According to Hubbard, these provisions applied only when the secondarily transmitted television signal was initially broadcast over the air. It was found that the WTBS microwave signal, like the UHF signal, was a "primary transmission" and the compulsory licensing system thus was applicable despite the fact that the signal was not broadcast over the air.

The court then determined that Southern Satellite qualified for the carrier exemption and therefore was not liable for the unauthorized public performance of copyrighted material. Among other facts, the court found it significant that Southern Satellite did not directly or indirectly control either the programming or nonprogramming content of the WTBS signal. Turner was entirely responsible for any commercial substitution that occurred; Southern Satellite did not make any deletions or modifications in the signal. And Southern Satellite's decision to select for retransmission the microwave signal rather than the UHF signal did not remove the company from the protection of the carrier's exemption, declared the court; the choice of signal was an automatic process designed to provide "a better quality, more dependable television signal to the viewing public."

Judge Fagg next considered Hubbard's argument that Turner's substitution of commercials at the primary transmission stage meant that cable systems carrying the WTBS signal could not qualify for a compulsory license. It was agreed that neither Southern Satellite nor any cable system carrying the WTBS signal ever substituted commercials originally placed on the WTBS signal by Turner. Furthermore, WTBS included only national advertising on the microwave signal and did not attempt to reach the local advertising markets served by Hubbard. The court concluded that Turner's development of two separate WTBS signals had no adverse impact on the interests of copyright holders, and that no local broadcaster was forced to compete with Turner on any greater level than would exist absent Turner's transmission of two different types of signals.

Hubbard Broadcasting, Inc. v. Southern Satellite Systems, Inc., 777 F.2d 393 (8th Cir. 1985) [ELR 8:8:11]

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**Cox Cable Tucson lacked standing to challenge Copyright Office regulation concerning royalty payments by cable systems for certain distant broadcast signals**

Cox Cable Tucson did not possess standing to challenge a Copyright Office regulation concerning grandfathered distant signals, a Federal Court of Appeals has ruled.

Under Federal Communications Commission regulations issued in 1972, cable television systems were permitted to continue carrying distant signals that had been carried prior to March 1972. Cox began its cable television operation in Tucson in 1982; the company claimed that its programming included two of the original five signals purportedly "grandfathered" by a predecessor cable system, and three "substitute" distant signals. However, under the challenged regulation, the substitute signals would be considered new signals added by Cox as a result of the FCC's 1980 elimination of the distant signal and syndicated program exclusivity rules, and Cox would be required to pay program suppliers higher royalty fees for carrying the signals.

In response to Cox's action seeking a declaration voiding the regulation, program suppliers such as the Motion Picture Association of America, Major League Baseball, the National Basketball Association, the National Collegiate Athletic Association and the National Hockey League argued that the cable company lacked standing because its predecessor did not comply with certain notice requirements in the Commission's former rules. A Federal District Court found that Cox Cable had standing. But a Federal Court of Appeals has disagreed on the ground that Cox did not present evidence that the requisite notice was given to a local television station permittee. The five signals listed in the notification therefore never were lawfully authorized; the carriage of the signals was not grandfathered; and Cox was not "arguably within the zone of interests to be protected or regulated" by the Copyright Office regulation, concluded the court in reversing the determination of the District Court and remanding the matter to the court with directions to dismiss the action.

Cox Cable Tucson, Inc. v. Ladd, 795 F.2d 1479 (9th Cir. 1986) [ELR 8:8:12]

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# Federal Communications Commission decisions involving utility company pole attachment charges for cable television systems are vacated

What can you say about a determination by the Federal Communications Commission that the pole attachment rates which the Alabama Power Company charged Group W Cable, Inc. were higher than the maximum permitted by the Pole Attachment Act? Federal Court of Appeals Judge Bork, after careful review, said that the Commission had not fairly and accurately calculated the maximum allowable rate and therefore vacated the FCC's order and remanded the matter to the Commission for further proceedings. The Commission used an erroneous method for computing Alabama Power's non-cable related investment in the pole and improperly excluded certain costs as non-cable related, noted the court.

In a separate case decided one month after the Alabama Power matter, a Federal Court of Appeals in Florida found that an FCC order authorizing certain cable television companies to maintain cable equipment on Florida Power Corporation's utility poles, at a rate significantly less than that specified in prior contracts between the parties, amounted to a taking of private property for which just compensation was due under the Fifth Amendment. Because the Pole Attachment Act did not properly allow for a judicial determination of just compensation, the Act was unconstitutional, stated the court, and the FCC's order was vacated accordingly.

The court described the common practice whereby telephone and electric utility companies have permitted cable television operators to set up distribution systems by attaching cables and equipment to preexisting pole systems owned and maintained by the utilities. In 1978, Congress passed the Pole Attachment Act, authorizing the FCC to regulate the rates and conditions for pole attachments; the Act contained a formula by which the FCC was to determine the "just and reasonable" rate in particular situations.

In 1980, Teleprompter Corporation complained to the FCC that Florida Power's then annual rental rate of $6.24 was excessive. The FCC's Common Carrier Bureau found in favor of Teleprompter and ordered an annual per pole rate of $1.79; this decision was upheld by the Commission.

In vacating the FCC's order, the court stated that Florida Power made its poles available on the condition that cable companies paid an agreed upon annual per pole rate; however, the "occupation" of Florida Power's poles at the rate specified by the FCC was "anything but invited" by the company. Thus, the case relied upon by Florida Power, Loretto v. Teleprompter-Manhattan CATV Corp., 458 U. S.419 (ELR 4:24:6; 4:6:1; 1:5:7) was not distinguishable, as argued by the FCC, on the basis of uninvited access. And it appeared to the court that Florida Power would face considerable difficulty in trying to exclude the cable companies even upon the expiration of their contracts. According to the court, the FCC has made it clear that it intends to require the continued provision of space at FCC-ordered rates. Thus "the fact that this physical occupation is pursuant to a contract for a term of years is by no means proof that the physical occupation will cease at any particular time." And, as in Loretto, the instant case involved the placement of plates, boxes, wires, bolts, and other equipment upon the property of a reluctant owner.

After finding that the FCC's order effected a taking of Florida Power's property, the court declared that the Commission's determination of just compensation was constitutionally inadequate since it was not based upon the requisite judicial inquiry.

Alabama Power Company v. Federal Communications Commission, 773 F.2d 362 (D.C.Cir. 1985); Florida Power Corporation v. Federal Communications Commission, 772 F.2d 1537 (11th Cir. 1985) [ELR 8:8:13]

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**Action by applicant for Rhode Island cable television franchise challenging state agency's public access conditions for franchisees is remanded for dismissal**

When Berkshire Cablevision of Rhode Island applied for a CATV franchise, the state's Division of Public Utilities and Carriers stated that it would require the franchisee to dedicate several cable channels to "public access" and to connect certain community institutions, including churches, to the CATV system.

A Federal District Court found the conditions lawful and denied Berkshire's request for injunctive and declaratory relief (ELR 6:3:15). While Berkshire's appeal was pending, the state agency awarded the franchise to another applicant who did not object to the conditions. Accordingly, Federal Court of Appeals Judge Breyer found that Berkshire's case was moot, and remanded the matter with instructions to vacate the judgment.

Berkshire had argued that the public access conditions violated its First Amendment rights of expression; that requiring a cable system to serve community institutions such as churches violated the First Amendment's prohibition against the "establishment" of religion; that the public access rules would take the franchisee's property without compensation in violation of the Fifth Amendment; and that the conditions exceeded the agency's statutory authority.

But the court found that the dismissal of the appeal was required because there no longer was any real possibility that the agency's rules would deprive Berkshire of the rights the company sought to protect. It was unlikely that Berkshire would be an applicant for a CATV franchise in Rhode Island in the future (the franchises for the most populous areas in the state already had been awarded) and the court declined to rule on the constitutionality of the existing rules when future franchise agreements for rural areas might not contain the same conditions as those challenged by Berkshire.

Berkshire Cablevision of Rhode Island, Inc. v. Burke, 773 F.2d 382 (1st Cir. 1985) [ELR 8:8:13]

## Former licensing agent was not a proper party to bring antitrust action against exhibitors participating in "split" agreement, rules Federal Court of Appeals

In order to resolve a "bidding war" for the right to exhibit first run films in the theaters located in a Phoenix shopping center, American Multi-Cinema, Inc. and Blair & Reid, Inc., the owners of six and eight screens, respectively, in the shopping center, entered an agreement to allocate films between them. Blair & Reid subsequently terminated its contract with Exhibitors' Service, Inc., a film licensing agent, and began using the licensing services of AMC Film Marketing, a subsidiary of American Multi-Cinema.

Exhibitors claimed that the American Multi-Cinema/Blair & Reid agreement was an improper restraint of trade in violation of section 1 of the Sherman

Act. A Federal District Court denied American Multi-Cinema's motion for partial summary judgment on the antitrust claim, finding that Exhibitors possessed standing to assert its claims as a competitor within the area of the economy that would be endangered by a breakdown in competitive conditions, at least in the market of motion picture theaters around the Metro Center in Phoenix. It also was found that damage to Exhibitors was the direct and foreseeable result of price fixing; that Exhibitors' injury was an "integral aspect" of the purported bid rigging conspiracy; and that the injury was "inextricably intertwined" with the injury suffered by distributors and other exhibitors as a result of the alleged illegal activity engaged in by American Multi-Cinema and Blair & Reid.

The jury then returned a verdict in favor of Exhibitors on its section 1 claim and awarded the company about $70,000 in damages before trebling; the District Court later awarded Exhibitors $105,000 in attorneys fees and $7000 in costs.

Federal Court of Appeals Judge Canby has concluded that Exhibitors did not incur "antitrust injury" and thus was not a proper party to bring an action against the exhibitorsthe licensing agent was not a consumer of the exhibitors' goods or services, nor a competitor of the exhibitors in the relevant market. The court rejected Exhibitors' argument that it satisfied the "consumer or competitor" criterion because it competed with AMC Film Marketing as a licensing agent. Even if Blair & Reid intended to terminate Exhibitors' contract after entering the split agreement, this was not a direct injury to the licensing agent as a result of the conspiracy, stated Judge Canby. Thus, since any injury to Exhibitors did not come from the existence of the split agreement, the Court of Appeals remanded the matter for the dismissal of Exhibitors' antitrust claim; the award of attorneys fees and costs also was vacated.

Exhibitors' Service, Inc. v. American Multi-Cinema, Inc., 788 F.2d 574 (9th Cir. 1986) [ELR 8:8:14]

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**Tax Court revokes exempt status of foundation which served private interests of individual donors of artworks and of foundation trustees**

In 1967, Martin S. Ackerman organized the tax-exempt Martin S. Ackerman Foundation to provide assistance to individuals wishing to donate works of art to charitable and/or educational institutions. Ackerman also was the president of Sovereign American Arts Corp.; in this capacity, he advised individuals who were planning to purchase works of art from Sovereign (a private profit-making enterprise), that the foundation would be able to assist them in making charitable contributions of the artworks to donee institutions, such as museums, libraries or universities.

The Internal Revenue Service determined that there were deficiencies in the foundation's income taxes for the taxable years 1979-1981. According to the Commissioner, the foundation's services assisted the private interests of the individual donors and of Martin Ackerman and his wife, and this activity caused the foundation to lose its tax-exempt status.

Tax Court Judge Tannenwald has agreed with the Internal Revenue Service that the foundation's activities on behalf of potential donors of artworks appeared to go beyond putting the donors in touch with donee organizations, and were so substantial in relation to the foundation's overall activities as to warrant the revocation of the foundation's tax-exempt status. There was no evidence as to the total number of purchases of works of art from Sovereign and the volume of Sovereign's annual sales. Thus the court could not determine the ratio of the dollar amount of sales to donors who used the foundation's services to Sovereign's total sales. The extent of the benefits to Ackerman's law practice also could not be determined from the record.

Judge Tannenwald therefore concluded that the foundation did not meet its burden of proof that it did not, to a more than insubstantial degree, serve "a private interest" and the deficiency determination totalling about $17,000 was upheld.

Martin S. Ackerman Foundation v. Commissioner, T.C. Memo 1986-365 (U.S.Tax Ct. 1986) [ELR 8:8:14]

## Professional gambler was entitled to refund of income tax because gaming activities constituted "trade or business" qualifying for application of maximum tax rate on personal service income

Professional gambler William Baxter's gaming activities constituted a trade or business under the Internal Revenue Code, a Federal District Court in Nevada has ruled, in finding that Baxter met the initial prerequisite for the application of the maximum tax on personal services.

Baxter, a gambler since the age of 14, was an "extremely skillful" poker player whose reported income for the years at issue, 1978-1981, exceeded $1.2 million. The government argued that since Baxter did not engage in the selling of goods or services, he was not conducting the requisite trade or business.

Federal District Court Judge Bruce R. Thompson ruled otherwise on the basis of a test examining "the frequency, extent, and regularity of a taxpayer's financial activities as well as the taxpayer's intent to earn a profit." In addition to meeting the trade or business prerequisite, Judge Thompson found that Baxter's income was earned income derived from the expenditure of substantial time and energy and qualified for the fifty percent maximum tax rate on personal service income.

A Treasury regulation excluding gambling gains from the definition of earned income should have distinguished between gambling income derived from a taxpayer's "active expenditure of time, energy, and skill" and gaming income derived from games such as keno or slots where skill is not required. By prohibiting Baxter's gaming income from qualifying as personal service income, the regulation was unreasonable and not entitled to enforcement, stated the court. Judge Thompson concluded by finding that capital was not a material income-producing factor in Baxter's gaming income-the capital Baxter used to finance his poker playing was a "tool of the trade" The gambler therefore was entitled a refund of federal income taxes and his motion for summary judgment was granted accordingly.

Baxter v. United States, 633 F.Supp. 912 (D.Nev. 1986) [ELR 8:8:15]

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**Pennsylvania Shield Law protected broadcaster from court order requiring production of outtakes and documentary material pertaining to allegedly defamatory report; statute was not limited to nondisclosure of identity of confidential informant, according to state appellate court**

A Philadelphia Superior Court has found, reluctantly, that the Pennsylvania Shield Law prevented George Hatchard and Mount Pocono AMC/Jeep from obtaining all of the documentary material relating to a 1979 report on KYW-TV entitled "Wheeling and Dealing with City Hall." Hatchard claimed that the report (and a sequel), which concerned the sale of cars to the city of Philadelphia, defamed him; he sought to compel the production of a wide variety of video and documentary material. KYW claimed that the state Shield Law protected documents as well as persons, and that the material sought was privileged.

The trial court granted Hatchard's motion as to the outtakes, although denying his request for other documentary items (the issue as to documentary material arose in a companion case which was consolidated on appeal). The court pointed out that the broadcaster would not be required to produce any material which might reveal the identity of confidential sources.

Superior Court Judge Spaeth determined that the court was bound by the Pennsylvania Supreme Court's decision in In re Taylor, 412 Pa. 32 (1963) as to the scope of the protection afforded by the Shield Law to "the source of any information." Taylor broadly defined the coverage of the Shield Law to protect undisclosed statements even when the name of an informant had been revealed. Judge Spaeth concluded that the Superior Court was prevented from distinguishing Taylor because the issue in that case-the meaning of the term "source"-Was the same as the issue in Hatchard. And the Taylor court had cautioned that in the event of doubt as to the interpretation of the Shield Law, the statute "must be liberally construed in favor of the newspapers and media."

Judge Spaeth found it significant that in recent federal court cases concerning the Shield Law, the courts uniformly considered Taylor's definition of the term "source" to be dispositive. Notwithstanding Taylor's continuing vitality, Judge Spaeth expressed concern that applying the case to the Hatchard proceeding might lead to an unjust result. Therefore, while reversing the orders of the trial court, Judge Spaeth stated his reservations regarding Taylor, including the view that if Taylor were not binding upon the court, he would consider the challenged language in the Shield Law as referring to people and not to information-if read this way the statute would protect only material in which a confidential source is revealed or through which the source might ultimately be revealed.

In dissent, Judge Tamilia stated that he would have affirmed the orders of the lower court on the ground that neither the Shield Law nor the First Amendment protected the broadcasting parties from relinquishing the outtakes (in both cases) and the documentary material (in the companion case). In Judge Tamilia's view, the broadcasting parties failed to consider "the fundamental right to the protection of one's reputation provided by the Pennsylvania Constitution..." The Taylor case, which arose in the context of a grand jury proceeding, was not a libel action and was not controlling in Hatchard, in which an individual was seeking to vindicate a fundamental right, stated Judge Tamilia, a right which was "more compelling" than the public's interest in the investigation of the criminal matters at issue in Taylor. Viewing the outtakes was an important means of determining the broadcasters' culpability in a manner least intrusive into the editorial process. The lower court order thus would have accommodated the competing interests of the parties, suggested Judge Tamilia.

The dissent then rejected any claim that if the Shield Law did not protect broadcasters from the compelled disclosure of the outtakes, then a qualified privilege under the First Amendment was available. Again, the interest of an individual presenting a libel claim was a compelling consideration. Judge Tamilia questioned the argument that the dissemination of information to the public would be reduced if confidential informants were not assured anonymity; in this case, the outtake and documentary material were nonconfidential and the truthfulness of the newsgatherer's information was directly at issue.

Judge Cirillo, in dissent, pointed out that New York Times v. Sullivan, which was decided after Taylor, imposed increased pleading burdens which have made the Shield Law, as interpreted in Taylor, "clearly unreasonable." Judge Cirillo would have distinguished Taylor because intervening developments have served to "strip it of its precedential effect."

A dissenting opinion also was written by Judge Wieand who would have limited the holding in Taylor to the facts before that court.

Hatchard v. Westinghouse Broadcasting Company, 504 A.2d 211 (Pa.App. 1986) [ELR 8:8:15]

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**Television critic's reference to hypothetical comment by producer of sex education program was protected expression of opinion, rules California Supreme Court**

In December 1983, the Los Angeles Herald Examiner published a column by Peter Bunzel entitled "Birds and bees bomb in 'Sex Education' tonight;" the column reviewed a television documentary, produced by Walter Baker, concerning sex education. Bunzel expressed a critical view of the program and stated, in part: "My impression is that the executive producer Walt Baker ... told his writer/producer, Phil Reeder, 'We've got a hot potato here-let's pour on titillating innuendo and as much bare flesh as we can get away with. Viewers will eat it up!'"

When Baker sued the newspaper for libel, the trial court ruled that the statement at issue was nonactionable opinion and dismissed the action. The trial court's decision was reversed by an appellate court which held that the statement was defamatory as a matter of law. The California Supreme Court, however, has concluded that the statement indeed was opinion.

Chief Judge Bird pointed out that based upon Bunzel's use of the word "impression," a reasonable person would understand that a statement of opinion rather than of fact was to follow. As distinguished from Selleck v. Globe International, Inc., 166 Cal.App.3d 1123 (ELR

7:2:15), the review did not assert as a fact that Bunzel made the disputed statement. And the use of quotation marks was a "valid journalistic decision" indicating that the statement did not purport to be an accurate account of a conversation, particularly given the "flashy hyperbole" used. Furthermore, Bunzel's statement was included in an editorial column which began with a discussion of the author's personal experiences related to sex education and which was "permeated with opinion." The statement did not imply the existence of any undisclosed fact, and, observed Judge Bird, "A reader of a television review ... does not reasonably expect every word of the review to be based on facts or even on private conversations with ... industry personnel. Instead, one expects a reviewer's opinions to be based on aesthetic sense and discriminating taste." The sarcastic tone of the challenged statement, the opinionconveying nature of reviews, and the subject matter of Bunzel's piece all served to support the conclusion that the statements in the piece were likely to be opinions rather than facts.

The appellate's court's one-paragraph analysis, finding that the statement charged Baker with "an intentional presentation of pornography, obscenity, and lewdness" not only misapplied defamation principles, but exceeded the scope of appellate review, stated Judge Bird, in directing the appellate court to affirm the trial court's judgment dismissing the action.

Baker v. Los Angeles Herald Examiner, 228 Cal.Rptr. 206 (Cal. 1986) [ELR 8:8:16]

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**Municipal admissions tax violated First and Fourteenth Amendment rights of theater owners, rules California appellate court**

In September 1983, the City Council of Pleasant Hill, California, adopted an ordinance imposing a five percent tax on the admission price of sporting events, movie theaters, concerts, shows, museums, performances, displays and exhibitions within the city.

Several Pleasant Hill theater owners filed a complaint for declaratory and injunctive relief claiming that the tax was an unconstitutional interference with protected free speech. The trial court issued preliminary and permanent injunctions, finding that the tax violated the First Amendment and this ruling has been upheld on appeal.

Judge Low noted that the showing of commercial motion pictures by the theater owners was protected speech, and that the city therefore was required to assert an interest of "compelling importance" which would justify any discriminatory tax treatment. In this case, the theater owners apparently were expected to bear the entire impact of the admissions tax, which was adopted in order to raise revenue-this was not a broadly based tax applicable to businesses in general, but was added to the basic business license tax. The court concluded that the admissions tax was not necessary to achieve the goal of raising revenue, and was an impermissible differential burden on the theater owners' business in violation of the First Amendment.

Furthermore, even if the admissions tax, as written, could be considered constitutional, the impact of the tax on the theaters was discriminatory and therefore violated the equal protection clause. There was no indication that other businesses subject to the tax might begin operation in the city; the city was relying only on the theater owners to pay the tax; and the impact of the admissions tax on the theater owners was just as burdensome as if the ordinance's language expressly, and impermissibly, singled out their theaters for special tax treatment.

Festival Enterprises, Inc. v. City of Pleasant Hill, 227 Cal.Rptr. 601 (Cal.App. 1986) [ELR 8:8:16]

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**Cable television company was not entitled to preliminary injunction seeking to prevent the city of Sacramento from denying the company the opportunity to build and operate a cable system**

In 1983, the Sacramento Metropolitan Cable Television Commission denied Pacific West Cable Company's request to construct a cable television system in the Sacramento area, and granted a nonexclusive franchise to another company. Shortly before the Commission chose the franchisee, Pacific West brought a lawsuit claiming, in part, that Sacramento's refusal to grant the company a franchise violated the First and Fourteenth Amendments to the United States Constitution and the Sherman Act and sought a preliminary injunction that would allow the company to lay its cables along with the cables being installed by the successful franchisee.

A Federal District Court denied an injunction and this ruling was affirmed by a Federal Court of Appeals on the ground that Pacific West failed to show irreparable harm.

In 1985, Pacific West again attempted to restrain the city from denying it the opportunity to build and operate a cable television system. The District Court denied the company's motion because of the failure to show either a likelihood that it would prevail on the issue of the physical capacity of Sacramento's public utility facilities, or that it would establish a potential injury to its free speech outweighing the injury that Sacramento would suffer if a preliminary injunction were granted.

A Federal Court of Appeals has upheld the District Court's ruling, stating that the court did not abuse its discretion in denying Pacific West's motion for a preliminary injunction. It was observed that "regardless of the merits of Pacific West's attack on the constitutionality of Sacramento's franchising procedures, Pacific West has no such right to unrestricted access to Sacramento's utility facilities. Although Pacific Wests' broadcasting activities involved First Amendment interests, those interests were not absolute and Sacramento "at the very least" was entitled to regulate the noncommunicative aspects of cable broadcasting through reasonable time, place and manner restrictions. The court emphasized that Sacramento had the legitimate power to prevent disruption of the public domain. And the court's decision in Preferred Communications, Inc. v. City of Los Angeles (ELR 7:1:12) did not mean that a municipality was required to grant franchises to all cable television operators, regardless of size, qualifications or "threat to the ultimate capacity of the system."

Pacific West could proceed with its challenge to Sacramento's franchising procedure but the court declined, at the preliminary injunction stage of the matter, to declare the company free from all municipal regulations concerning the allocation of utility resources.

Pacific West Cable Company v. City of Sacramento, 798 F.2d 353 (9th Cir. 1986) [ELR 8:8:17]

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**Reader's Digest obtains permanent injunction barring Conservative Digest from distributing issues containing confusingly similar cover design**

Conservative Digest, Inc. has been permanently enjoined from further distributing the covers of its October and November 1985 issues because the covers contained trade dress features similar to the front cover design of Reader's Digest magazine. The placement of the table of contents, the name of the magazine, and the date and cover price of Conservative Digest were identical to the placement of such information on Reader's Digest covers. Conservative Digest also followed the Reader's Digest back cover and page layouts, and the design of its anecdote and feature sections.

Federal District Court Gesell first observed that Reader's Digest had established popular recognition and a secondary meaning for the magazine's trade dress. But while Conservative Digest may have sought to achieve "instant recognition" by copying the cover design, Reader's Digest did not show that there was an attempt to palm off Conservative Digest as a Reader's Digest publication. It also was noted that the confusingly similar cover design appeared on only two issues of Conservative Digest and was withdrawn almost immediately after Reader's Digest filed its lawsuit; the two issues were sold only to pre-existing subscribers to Conservative Digest.

Thus, although Reader's Digest established a claim for the infringement of its copyrighted cover and a claim under section 43 of the Lanham Act, the magazine did not offer proof of any actual confusion in the marketplace or diversion of business and therefore was not entitled to an award of monetary damages, other than a minimal award of $250 in statutory damages for each issue. The limited permanent injunction reflected the court's view that Conservative Digest was unlikely to ever again engage in the "wholesale appropriation" of Reader's Digest's property rights in its trade dress.

Reader's Digest Association v. Conservative Digest, Inc., 642 F.Supp. 144 (D.D.C. 1986) [ELR 8:8:17]

## Federal Communications Commission order requiring divestiture of Amarillo broadcaster's interest in local cable television system is upheld

In 1965, Marsh Media, lid., the owner of an Amarillo, Texas television station, along with three partners, received a franchise to establish a cable television system in Amarillo. In 1975, the Federal Communications Commission issued a regulation prohibiting cable system ownership by a person owning an interest in a television station whose broadcast area overlapped the service area of the cable system. The regulation contained a grandfather clause exempting cable interests owned on July 1, 1970-divestiture was required for cable systems acquired after that date.

In 1977, Marsh exercised a right of first refusal acquired in the cable project and bought the interest of one of two selling partners. The FCC then ordered Marsh to divest itself of the newly-acquired 25 % interest based on the determination that the interest was not grandfathered.

A Federal Court of Appeals has denied Marsh's petition for review after finding that the rule was a valid exercise of the Commission's authority over television licensees, that the Commission's refusal to grandfather an interest acquired via a right of first refusal was not clearly erroneous, and that the rule did not violate Marsh's First Amendment rights.

Marsh Media, Ltd. v. Federal Communications Commission, 798 F.2d 772 (5th Cir. 1986) [ELR 8:8:17]

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**Oregon Supreme Court rules that broadcaster's use of individual's photograph in promotional spot for news report did not constitute invasion of privacy**

When Richard Anderson was injured in an automobile accident, a television cameraman for KATU-TV photographed the accident scene. The television station did not use the pictures or report the accident on its regular news broadcast; however, some time later, the station used an excerpt of the film showing Anderson, bleeding and in pain, to illustrate promotional spots advertising a special report about a new system for dispatching emergency medical help.

Anderson sued Fisher Broadcasting Companies for invading his right to privacy by publicizing his private life and by appropriating his image for the broadcaster's gain, and sought damages for mental anguish. The trial court granted Fisher Broadcasting's motion for summary judgment on the ground that the pictures were newsworthy, remained so despite not being promptly published, and did not lose their newsworthiness when used to advertise another program. An appellate court reversed this decision, holding that there was an issue of fact whether the film showing Anderson's injured condition was newsworthy, given the use of the film to attract viewers for a different show.

The Supreme Court of Oregon, while declining to consider the case on constitutional grounds, has held that the undisputed facts did not give rise to a claim for damages. Since the court previously had not "squarely decided" the question of whether truthfully publicizing a fact about a private individual would amount to tortious conduct, Judge Linde carefully reviewed the nature of privacy interests. It then was pointed out that Anderson did not claim the KATU's promotional spots implied that Anderson endorsed the station's program about emergency medical services, nor that the broadcaster unjustly realized any gain from appropriating a photograph belonging to Anderson. Without a showing that Anderson's picture either was obtained or broadcast "in a manner or for a purpose wrongful beyond the unconsented publication itself," Anderson's claim failed.

The court stated in conclusion that in Oregon, the truthful presentation of facts concerning a person, even facts that a reasonable person would wish to keep private and that are not "newsworthy," does not give rise to common law tort liability for damages for mental or emotional distress, unless the manner or purpose of the publisher/broadcaster's conduct is wrongful in some respect apart from causing hurt feelings. Liability might be imposed, noted the court, in instances where, for example, private information was published in a socially intolerable way, or if the information was wrongfully obtained by conversion or bribery, or upon the breach of a duty of confidentiality or other statutory duty. But since Anderson did not show any such wrongful element in the broadcaster's conduct, the decision of the appellate court was reversed, and the judgment of the trial court was reinstated.

Anderson v. Fisher Broadcasting Companies, 712 P.2d 803 (Ore. 1986) [ELR 8:8:18]

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**Briefly Noted:**

**Disc Jockey Employment.**

When Valentine Jurado (performing under the name Val Valentine) was a disc jockey on radio station KIIS-FM, he began using some Spanish words and phrases during his English-language program. KIIS, although initially agreeing to allow Jurado to speak Spanish on the air, eventually asked the disc jockey to stop broad-casting in the Spanish language; Jurado refused this request and KIIS terminated his employment. After describing Jurado's various claims and the lengthy course of the litigation, Federal District Court Judge Rea granted the radio station's motion for summary judgment on the ground that discontinuing Jurado's bilingual presentation was a programming decision by KIIS and, as such, was protected by the First Amendment and the Communications Act. Furthermore, Jurado did not present any evidence to support a disparate treatment claim, i.e., that "racial or national origin animus" was directed toward him so as to impair his employment.

Jurado v Eleven-Fifty Corporation, 630 F.Supp. 569 (C.D.Ca. 1985) [ELR 8:8:18]

**Illegal Lottery.**

A Federal District Court in Illinois has held that a newspaper's "Pick and Play" game, in which contestants predicted the winners of upcoming college and professional football games for prize money, constituted an illegal lottery. The publisher of a newspaper known as Nightmoves, and Dreem Arts, Inc., a company which supplied advertisements to the newspaper, sought an injunction, prohibiting the City of Chicago from confiscating the newspapers which contained the "Pick and Play" game. The parties complained that the Chicago police illegally confiscated the Nightmoves newspapers from certain individuals and wrongfully charged several of the newspaper's distributors with gambling. The City argued that the game was a lottery in violation of Illinois law. Federal District Court Judge Grady noted that the three essential elements of a lottery are chance, consideration and a prize. After finding that the publisher's offer of free entry blanks was illusory due to certain "formidable" obstacles to obtaining entry blanks, the court concluded that contestants did in fact pay consideration for the game by purchasing Nightmoves for two dollars. And because "Pick and Play" was not entitled to First Amendment protection as a promotional device, the publisher's constitutional rights were not violated by the enforcement of the Illinois statute. Summary judgment accordingly was granted to the city.

Dreem Arts, Inc. v. City of Chicago, 637 F.Supp. 53 (N.D.Ill. 1986) [ELR 8:8:19]

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**Racing Regulation.**

The New York State Racing and Wagering Board denied Bernard Webster's application for a harness racing license on the basis of Webster's alleged participation in a scheme to fix a race in which he was riding at Meadowland Raceway and to share in the unlawful winnings of two "confederates." A New York appellate court has found that the determination of the Board was supported by substantial evidence including a video tape showing Webster holding back his horse near the end of the race, and evidence of certain telephone conversations. The fact that Webster was acquitted when he was tried on federal criminal charges resulting from the incident was not binding on the Board, nor was the fact that Webster was granted a license in New Jersey, stated the court. The Board was found to have "properly fulfilled its obligation to control licensing consistent with the public interest and in the best interests of harness racing generally. . ." in denying Webster's application.

In dissent, Judge Kupferman stated that he would have granted Webster's application, noting that a steward's report indicated that there were no irregularities in the race, that New Jersey (the state where the race took place) had found no wrongdoing and granted Webster a license, and that Webster's acquittal in the criminal proceeding "should give one pause."

Webster v. Van Lindt, 499 N.Y.S.2d 63 (N.Y.App. 1986) [ELR 8:8:19]

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**Cable Television.**

American Television and Communications Corporation, a Florida cable television distributor, has obtained a preliminary injunction restraining certain hotel and motel operators from the unauthorized use of satellite antennas to receive and retransmit to patrons' rooms the satellite signals intended for fee-paying customers of several American Television subscription television services. A Federal District Court in Florida noted that the hotel/motel's unauthorized reception, use and re-transmission of the signals deprived the subscription television services of their business investment, and of potential customers, and that there was no practical method of terminating or preventing the interception and retransmission of the programming. In granting the in-junction, the court found that the hotels/motels violated section 605 (redesignated in 1984 as section 705) of the Communications Act because they deliberately inter-cepted programming services which were not intended for the use of the general public. The hotels/motels were not entitled to the statute's "private viewing" exception which was created to protect individual owners of back-yard earth stations. And it was found that American Television possessed standing to sue under section 605 because the company, although not a program origina-tor, had a personal stake in the outcome of the controversy, suffered "injury in fact," and was within the zone of interests intended to be protected by the statute. The denial of standing to local distributors of cable television services would require each programming service to sue signal "pirates" in many areas, causing an unwarranted multiplicity of parties and lawsuits, observed the court; the purpose and policies underlying both the former and the amended section 605 supported the view that American Television possessed standing to seek and in this case, obtain, injunctive relief.

American Television and Communications Corporation v. Floken, Ltd., 629 F.Supp. 1462 (M.D.Fla. 1986) [ELR 8:8:19]

## Labor Relations.

A dispute between television newscaster Forrest Sawyer and the William Morris Agency was subject to arbitration under the American Federation of Television and Radio Artists contract entered into by the parties, a New York trial court has ruled. Sawyer had sought to stay arbitration on the ground that at the time the contract was executed, he resided and was employed in Georgia. According to Sawyer, Georgia law governed the dispute, and because the agency was not licensed in Georgia, the contract was void and unenforceable in that state. The applicability of Georgia law and the question of whether or not the William Morris Agency was engaged in the employment agency business in Georgia were issues to be raised before an arbitrator, stated the court. Furthermore, Sawyer's participation in the arbitration process, including naming one of the arbitrators on the panel, weighed against granting a stay of arbitration, as did

New York's public policy in favor of arbitration. Sawyer's petition was dismissed accordingly.

Sawyer v. William Morris Agency, Inc., Index No. 3152/86 (N.Y.Cnty., Sept. 15, 1986) [ELR 8:8:19]

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## IN THE NEWS

### Los Angeles trial court dismisses suicide-by-music action against Ozzy Osbourne and CBS Records

A Los Angeles trial court judge has dismissed an action against Ozzy Osbourne and CBS Records involving a claim that Osbourne's music contributed to the tragic suicide of teenager John McCollum. McCollum's parents alleged that Osbourne's song "Suicide Solution" contained some "speeded up" lyrics which urged listeners to commit suicide and also contained a low hum that made their son, who allegedly listened to the song repeatedly before killing himself, susceptible to the song's lyrics.

Judge Cole stated that holding performers liable in circumstances such as those presented to the court would have a chilling effect on the performers' First Amendment rights, and commented that the hum was "nothing more than another generalized expression-if they reach that dignity-of ideas which cannot be distinguished in analysis from the thoughts and concepts clearly protected by the First Amendment."

The court previously had dismissed the action, but allowed McCollum's parents the opportunity to amend their allegations about certain low frequency sounds and masked words on the song. The amended complaint, which charged that Osbourne and CBS knew or should have known that listeners would be susceptible to the lyrics and intentionally disseminated to the public music which encouraged listeners to commit suicide, was found insufficient to overcome Osbourne's First Amendment rights. [Jan. 1987] [ELR 8:8:20]

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**Judas Priest rock group is ordered to trial in suicide-by-musical influence claim**

A Nevada trial court judge has rejected a motion by the heavy metal rock group Judas Priest to dismiss an action alleging that the group's music induced two young men to shoot themselves, resulting in the death of one of the youths. The action, which also named CBS Records, stated that the shooting occurred after the young men spent six hours listening to a Judas Priest album. [Jan. 1987] [ELR 8:8:20]

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## San Diego jury awards former San Diego Chargers owner Gene Klein over $5 million in damages in malicious prosecution action against Los Angeles Raiders official Al Davis

When Los Angeles Raiders managing general partner Al Davis brought an antitrust action against the National Football League in 1981, Davis named Gene Klein as a defendant in the action. Klein and two other individual defendants (Los Angeles Rams owner Georgia Frontiere and NFL Commissioner Peter Rozelle) eventually were ordered dropped from the case. Unfortunately, while testifying in the case, Klein suffered a near-fatal heart attack.

Klein thereafter sued Davis for malicious prosecution, claiming that due to their long-time rivalry, Davis used the antitrust lawsuit to inflict emotional and physical damage upon Klein.

A San Diego Superior Court jury awarded Klein $5 million in compensatory damages and about $48,000 in medical expenses; Klein has stated that he will donate most of the award to medical research. [Jan. 1987] [ELR 8:8:20]

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**Federal District Court jury in Las Vegas awards Wayne Newton $19.2 million in libel action against NBC**

Entertainer Wayne Newton has been awarded $19.2 million in damages by a Federal District Court jury in a libel action based on NBC broadcasts in 1980 and 1981 which linked Newton to organized crime figures. According to news reports, the jury decided that NBC knew or should have known that the broadcasts were false and that the network and reporter Brian Ross and producer Ira Silverman intended, in at least one of three broadcasts, to convey a false impression of Newton.

The jury award included $5 million in punitive damages, $5 million for loss of reputation, $7.9 million for loss of income, about $1.1 million for loss of future income and $225,000 for Newton's physical and mental suffering. [Jan. 1987] [ELR 8:8:20]

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**Federal District Court in Los Angeles enjoins dinner theaters unauthorized use of works by Richard Rodgers and Oscar Hammerstein**

A Federal District Court in Los Angeles has granted a request by the Rodgers and Hammerstein Library Museum to restrain the Mission Hills Dinner Theater from performing material from "The Sound of Music" and "South Pacific The theater did not obtain a license to use the songs in its "Best of Broadway Holiday Revue." [Jan. 1987] [ELR 8:8:20]

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## American Federation of Radio & Television Artists will permit talent agent commissions on scale for national television commercial and industrial films

AFTRA has announced that it is implementing a new rule which will permit talent agents to obtain commissions on scale for performances on national television commercials and industrial films. it is anticipated that the rule will increase the employment of AFTRA members in these productions. [Jan. 1987] [ELR 8:8:20]

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## Federal District Court jury in Illinois finds exhibitors not guilty of product splitting charges

A Federal District Court jury in Illinois has found Kerasotes Theaters not guilty of charges that the exhibitor engaged in criminal violations of the Sherman Act. The United States Department of Justice claimed that Kerasotes and Dickinson Operating Co. entered an anticompetitive motion picture split arrangement; Dickinson had pleaded guilty to violating the Sherman Act and paid a $175,000 fine (ELR 7:7:20). [Jan. 1987] [ELR 8:8:21]

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**Federal District Court jury in Memphis finds that nine motion picture distributors were not liable in product splitting case**

Nine motion picture distributors did not violate the antitrust laws, a Federal District Court jury in Memphis has found, in an action involving Balmoral Cinema's allegation that the distributors conspired with major exhibitors to split product, thereby denying Balmoral access to films. The court then ordered Balmoral (now defunct) and its owner to pay $9000 to United Artists and $2000 to Columbia Pictures for delinquent 1977 film rentals. [Jan. 1987] [ELR 8:8:21]

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### United States Department of Justice withdraws charges against Pacific Theaters and Syufy Enterprises

The United States Department of Justice has decided not to continue proceedings based on a grand jury indictment charging Pacific Theaters and Syufy Enterprises with engaging in product splitting in violation of federal antitrust laws. According to news reports, the Justice Department's request for dismissal was made just prior to a scheduled contempt hearing involving the Department's failure to deliver certain documents to Federal District Court Judge Manuel Real. As requested, the court dismissed the action with prejudice.

Syufy and Pacific were accused of participating in product splits among their drive-in multiplexes in Orange County and in the city of Carson. The theater owners claimed that the criminal charges violated their right to due process because the Justice Department purportedly agreed in 1977 not to criminally prosecute alleged participants in splits until the legality of product splits was resolved. However, in the Justice Department's view the law on splits has been settled both as to civil and criminal proceedings, and its request for dismissal was based on a technicality involving the possible inadvertent waiver of a privilege. [Jan. 1987] [ELR 8:8:21]

## Burbank agrees to pay $3.8 million to settle litigation with former operator of municipal amphitheater

The City of Burbank has agreed to pay Cinevision Corp. the sum of $3.8 million to settle litigation arising from the company's operation of the municipally owned Starlight Amphitheater. Cinevision claimed that its First Amendment rights were violated and that a five year contract was breached when the city canceled seven of the nine concerts which were scheduled for the amphitheater's 1979 season. After a series of court rulings (ELR 6:12:17; 6:11:6), a Los Angeles Superior Court jury awarded Cinevision $4.6 million in damages (ELR 7:4:12); the jury award was being appealed when the settlement was reached. [Jan. 1987] [ELR 8:8:21]

## "Ghost Story" teamsters receive prison sentences and fines for racketeering, conspiracy and extortion convictions

Three members of Teamsters Union Local 294 have received prison sentences totalling more than 140 years and various fines amounting to more than $350,000 arising from their conviction on charges of racketeering, conspiracy and extortion during the 1980-1981 filming of Universal Studios' film "Ghost Story." Concurrent sentencing on the charges will result in prison terms of six years each for business agent J. Michael Robilotto and for Louis Spagnola, the Teamster captain on "Ghost Story." Teamster steward Anthony Civitello will serve four years in prison in accordance with sentences imposed by Federal District Court Judge Lee Gagliardi. [Jan. 1987] [ELR 8:8:21]

## Publishers of Point Reyes Light newspaper settle litigation with Synanon

The publishers of the Point Reyes Light newspaper have been paid $100,000 by Synanon to settle litigation arising from Synanon's libel action against the paper (ELR 6:10:14). David Mitchell and Cathy Mitchell had responded to Synanon's Action with a counterclaim charging that the organization was attempting to intimidate them for publishing a series of critical articles; the articles earned a Pulitzer Prize for the newspaper. [Jan. 1987] [ELR 8:8:21]

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## DEPARTMENTS

## In the Law Reviews:

Reexamining the Reasonable Access and Equal Time Provisions of the Federal Communications Act: Can These Provisions Stand if the Fairness Doctrine Falls? 74 Georgetown Law Journal 1491 (1986)

The National Endowment for the Arts: A Search for an Equitable Grant Making Process, 74 Georgetown Law Journal 1521 (1986)

"We're Mad as Hell as We Aren't Going to Take It Anymore": The Press Responds to Meritless Libel Suits by Jana Miller Brewer, 20 Loyola of Los Angeles Law Review 45 (1986)

Who Owns the Air? Unscrambling the Satellite Viewing Rights Dilemma by Robert D. Haymer, 20 Loyola of Los Angeles Law Review 145 (1986)

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Children and the Recorded-Message Industry: The Need for a New Doctrine, 72 Virginia Law Review 1325 (1986)

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Controlling Professional Sports Team Relocations: The Oakland Raiders' Antitrust Case and Beyond, 17 Rutgers Law Journal 283 (1986)

First Amendment Constraints on the Regulation of Telephone Pornographv by Ellen L. Nagel, 55 University of Cincinnati Law Review 237 (1986)

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A Primer on Trademarks and Service Marks by Lawrence E. Evans, Jr., 18 St. Mary's Law Journal 137 (1986) (published by St. Mary's Law School, 1 Camino Santa Maria, San Antonio, TX 78284)

The Remedies Available to Candidates Who Are Defamed by Television or Radio Commercials of Opponent's by James A. Albert, 11 Vermont Law Review 33 (1986)

The Press and the Limits of the First Amendment: A Free Exercise Analogy by Prof. Michael W. Bowers, 13 Western State University Law Review 455 (1986)
[ELR 8:8:22]