BUSINESS AFFAIRS

The New Approved Production Contracts for Plays and for Musical Plays

by Robert M. Cavallo and Nancy E. Wolff

In June 1985, The Dramatists Guild distributed its new production contracts between Authors and Producers for the production of plays and musical plays. These two contracts are actually settlement agreements resulting from several years of negotiations between what is now known as The League of American Theatres and Producers, Inc. (formerly known as The League of New York Theatres and Producers, Inc.) and The Dramatists Guild, Inc. (The agreements resolved a major antitrust lawsuit commenced against The Dramatists Guild by

Richard Barr, the President of The League of American Theatres and Producers, and a countersuit by The Dramatists Guild).

Norman Kean, the Chairman of the Production Committee for the League of American Theatres and Producers, negotiated the terms of the new contracts with Peter Stone, the President of The Dramatists Guild and David E. LeVine, the Guild's Executive Director, and their respective counsel. These negotiation sessions, which the parties referred to as settlement discussions, were over eighty in number in addition to countless telephone conversations over a period of approximately two years. (The Dramatists Guild was represented by Floyd Abrams, Denis McInerey and Laurence Sorkin of Cahill, Gordon & Reindel. The League of American Theatres and Producers was represented by George G. Gallantz, Jeffrey A. Mishkin and Daniel D. Brambilla of Proskauer Rose Goetz & Mendelsohn. The Production

Committee for The League of American Theatres and Producers, in addition to Norman Kean, consisted of Richard Barr, Bernard B. Jacobs, James M. Nederlander, Robert E. Nederlander, Harvey Sabinson and Gerald Schoenfeld. The Dramatists Guild Contract Committee, in addition to David E. LeVine and Peter Stone, consisted of James Goldman, Garson Kanin, Arthur Kopit, Stephen Sondheim and Terrence McNally). During this period of settlement discussions business continued as usual on Broadway.

The new contracts are referred to as the "APCS" (Approved Production Contracts): the APC for Plays and the APC for Musical Plays. They are radically changed from the prior production contracts, referred to as the MBPC (Minimum Basic Production Contract). Some basic concepts of the MBPC have been carried over, such as the Author's control of his or her work and the ownership of the copyright. However, the structure of

royalties and other payments to Authors has changed significantly.

As a practical point, the APCs are intended to be all inclusive documents except for Article XXII which permits the Producer and Author to add certain additional terms (provided that such terms do not conflict with or modify the APC except where the APC specifically allows modifications). Examples of additional terms include Author's billing credits, cast album provisions, music publication clauses, house seats, and additional warranties, representations and covenants. Article XXII eliminates the MBPC's Paragraph Tenth clause which often contained pages of additional terms which then had to be approved by The Dramatists Guild before the MBPC would be countersigned by them. The minimal amount of additional terms which may now be negotiated expedites the process now called the "Certification Procedure" in the APCS. (The Certification Procedure is

described below and is diagrammed in the flow chart that accompanies this article).

The most significant substantive change is that Authors receive substantially more money up front, in options and advance payments, in exchange for a lower weekly royalty. This, in essence, acknowledges the work of the Authors and time spent writing the play or musical.

Authors may also receive a larger share of income under the APCs than what they received under the old MBPC from stock and ancillary performances or amateur performances. However, Producers may now receive more income than before in the early years of these performances, while the Authors may receive greater benefits later on.

In return for advancing Authors more money up front, Producers under the APC also receive more subsidiary rights than they previously received under the MBPC. For example, media rights income (i.e. film, television

and the like) is divided 50/50 between the Authors and Producers rather than the 60/40 split under the MBPC in favor of the Author. In addition, Producers have obtained the right to produce the play in Additional Territories, the right to pay royalties on first and second class tours on a "fixed fee" basis (i.e. the monies actually received which is usually far in excess of the fixed fee), the right to present the play Off-Broadway and the absolute right to participation in 20 % of the Author's share of royalties from Revival Productions of the play or musical for 40 years after the expiration of the original production rights. These additional rights accrue to the limited partnership as well, since the APC is assigned to the limited partnership. With the addition of revival rights and other territories, the partnership is likely to be kept open longer in order to receive earnings from these additional rights which pass to the general and limited partners or their heirs or assigns.

All of these changes are intended to permit investors to recover their capital investment in a production more expeditiously than under the MBPC and, in the cases of successful productions, the income stream to the investors and producers may be more significant and continue over a longer period of time than under the former MBPC.

The APC even provides an automatic royalty reduction in marginal weeks and in losing weeks to help the play or musical reach recoupment and then profits.

This article will point out important aspects in both the APC for Plays and the APC for Musical Plays.

Option and Advance Payments

Plays

Under Article 11 of the APC for Plays, the Producer is granted three option periods in which to maintain the right to present the play, provided that the first paid public first class performance occurs prior to the expiration of the applicable option period. With respect to plays, the first two option periods are for six months each. The Producer pays the Author $5,000 for the first option and $2,500 for the second. The third option payment of $5,500 is for twelve months payable $2,500 in advance for the first six months, then $500 monthly for the remaining six months. In order to exercise the third option the Producer has to justify the extension. The Producer must give the Author written notice before the last day of the second option period of the intended date of the first paid public performance together with commitments representing contributions of equity capital which equal at least 50 % of the production costs plus copies of one of the following documents: (i) a commitment for the

licensing of a first class theatre with occupancy to occur prior to the expiration of the third option; (ii) a contract with a star, featured actor or director; or (iii) if the Author and Producer agree, a contract for the presentation of a developmental production of the play, the first performance to be held before the expiration of the third option period.

Musical Plays

For musical plays there are three option periods as well. The first option is for twelve months with a payment in the aggregate of $18,000 payable only upon completion of the three elements of a musical: book, music and lyrics. The APC provides for a second option period of an additional consecutive twelve months with an option payment of $9,000 and a third option period

for a maximum of twelve consecutive months with an option payment of $900 per month.

The APC for both Musicals and Plays provides for an extension of the option periods if the Producer presents a second class performance or developmental production (i.e. workshop performance).

Option payments are not returnable but are recoverable or deductible. With musical plays, the second and third option periods are deductible from advance payments otherwise payable to the Authors described in Section 6.01 of the APC. In addition, all option and advance payments received by the Authors may be deducted from royalties after the musical has reached recoupment at a rate of up to 50% per performance week but only to the extent that such deductions will not cause the Authors for any week to earn royalties in the aggregate of less than $3,000 per performance week.

With plays, the third option period is deductible from advance payments. All other option and advance payments may be deducted from Authors' royalties after recoupment at a rate of up to 50 % per week, but in no event may such deductions cause the Authors to cam less than $1,000 a week for such performance weeks.

The advance payments under the APC are as follows: With plays, the Authors receive in the aggregate, on the first day of rehearsals at which the Producer requires the attendance of all cast members, an advance sum equal to 3 % of the amounts defined as constituting capitalization, up to a maximum payment of $35,000. For musicals, Authors receive in the aggregate, on the first day of rehearsals at which the Producer requires the attendance of all cast members, 2 % of the amount defined as constituting capitalization up to a maximum payment of $60,000. Certain deductions provided for in the APC are allowable from advance payments to the Authors.

Under the old MBPC, the aggregate option payment to all authors of a musical play was minimum of $2,000 for a twelve month period and a royalty of ten (10%) percent of the weekly gross box office receipts for a play and six (6%) percent for a musical play. Producers then had one year to produce the play or musical with no provision for extensions once they had received what was defined as a completed play or musical. This often created problems when producers and authors went to renegotiate at the end of the year since many authors would ask for substantially higher payments to extend the option period to present the play or musical. During the past few years, many authors received far more than the minimum option payments under the MBPC from Producers. Clearly, the old MBPC minimum option payments were unrealistic, as they had not been changed for over thirty years.

Royalties

Under the APC, the royalty formulas are more clearly written than under the MBPC. They now reflect adjustments for preview performances and for regular performances, both pre and post-recoupment, as well as taking into account the problems of marginal and losing weeks. This royalty adjustment formula in the APC reflects the need to encourage individual investors to invest in theatre by accelerating the period of time which a play takes to reach recoupment.

Plays

In productions under the former MBPC for Plays, the Authors received a royalty of 10% of gross weekly box office receipts ("GWBOR"). Under the new APC, the Authors receive in the aggregate 5% of GWBOR, for all

performances prior to recoupment, whether during out-oftown or preview performances or during regular performances. After recoupment the royalty is 10%. All royalties are subject to adjustment based on the play's weekly break-even except for out-of-town try-out performances and preview performances prior to the official New York opening where the Authors always receives 5% of GWBOR with no royalty adjustment. The royalty adjustment for regular performances (defined as those performances commencing with the first performance after the official press opening in New York City) differs with respect to prerecoupment and post-recoupment weeks.

During pre-recoupment weeks (excluding the first three consecutive 7 day periods following the official press opening of the play in New York City), if the GWBOR up to and including the performance week in which the cost of presenting the play has been recouped does not

exceed 110% of weekly break-even, then, in lieu of the royalties otherwise payable, the Authors' royalty is comprised of a fixed royalty of $1,000 per full performance week, plus a royalty percentage equal to 25% of weekly profits, if any.

To give an example, if break-even is $100,000 and the GWBOR is $101,000, the Authors' royalty would be $1,000 plus $250 or $1,250. The Authors' royalty payment can never exceed 5% of GWBOR. As referred to above the APC for Plays provides that the total paid to the Authors for the first three weeks following the press opening in New York City is only $1,000 per week, regardless of the GWBOR. This enables the Producer of a play to plan the use of extra dollars for advertising and promotion during the first three weeks after the reviews, in order to exploit the production during what is usually a crucial period.

An example of the benefit to producers, authors and investors is the production of Hurlyburly by David Rabe last season. If the APC existed at that time, the production company could have benefitted by approximately $25,000 over the three week period. Similar benefits would have applied to other previous productions including The Gin Game by D. L. Coburn and Same Time Next Year and Tribute by Bernard Slade.

The royalty adjustment formula for post-recoupment weeks provides that if the GWBOR after recoupment does not exceed 120% of weekly break-even, the Authors' aggregate royalty will be a fixed sum of $1,000 per week plus a percentage royalty equal to 35 % of weekly profits, if any. The Authors' royalty payment cannot exceed 10% of GWBOR. If for any week after recoupment, the Director agrees to receive a royalty less than full royalty payable pursuant to his or her agreement with the Producer, then the Authors' percentage

royalty may be reduced pro rata from 35% of such weekly profits, but never to less than 25%.

There are additional royalty adjustments under the APC. For example, the APC. For example, the Authors' royalty during losing weeks, as defined in the APC, is $1,000. There are also adjustments for touring performances, fixed fee performances, and a yearly royalty adjustment in New York City to provide for income fluctuations during the Christmas period.

This royalty adjustment formula has benefits to both the Authors and the Producers. Under the APC Authors are now guaranteed income of $1,000 weekly in losing weeks, but the Authors' royalty is automatically reduced during lean weeks.

Musicals

The Authors' regular prerecoupment royalties under the APC have been reduced from the 6% of GWBOR called for under the MBPC to 4.5% of GWBOR. The Authors' royalty adjustment formula is designed to accelerate recoupment. The Authors' royalties for performances out of town and preview performances is $4,500 per week in the aggregate for up to the first twelve performance weeks in lieu of any royalty based on GWBOR. However, there is a formula in the APC under which if there is an aggregate profit for this period, the Authors can recover further royalties. Commencing with the thirteenth performance week, the royalty is 4.5% of the GWBOR until the company has reached recoupment.

All royalties based on GWBOR are subject to royalty adjustment provisions. This eliminates the practice prior to the APC where many Authors waived or deferred royalties in losing weeks or when the production was operating marginally. During regular performance

weeks, Authors are entitled to 4.5% GWBOR in the aggregate until recoupment and 6% in the aggregate thereafter. These royalties are subject to royalty adjustment provisions as well.

The same royalty formula is used for touring performances. There is an additional formula for royalty payments to Authors for fixed fee performances which can be found under Section 4.02(d) of the APCs for Musicals and Plays.

Royalty Adjustments

The royalty adjustments under Article V of the APCs are based on the definition of weekly break-even and weekly profits. The APC for Musical Plays sets forth an adjustment for royalties during regular performance weeks which differs depending upon whether the production is in prerecoupment or post-recoupment. For

any week up to the week of recoupment in which the GWBOR does not exceed 110% of weekly break-even, the Authors' royalty in lieu of the other royalties is $3,000 in the aggregate per full performance week plus a percentage royalty equal to 25% of the weekly profits, if any. Authors' fixed and percentage royalties can never exceed 4.5% of GWBOR for such weeks prior to recoupment and can not exceed 6% of GWBOR post-recoupment. However, if any of the Authors of a musical successfully negotiate with the Producer for more than 6% in the aggregate after recoupment, then those Authors must "trade" all or part of their advance payment (whatever the parties negotiate) for the additional post-recoupment royalties. In addition, weekly break-even post-recoupment, which is referred to later, is calculated for these particular Authors at 115% instead of 120% of weekly break-even. This is explained in detail under Article XVI, Section 16.02(b).

During regular performance weeks, those weeks defined as after the official press opening in New York City, the APC for Musicals includes what is known as "The 87% Formula." This formula is intended to compensate Authors in situations where a musical becomes a fast hit such as occurred with La Cage Aux Folles. This formula comes into effect during regular performances in New York City only in the first twenty-one performance weeks following the official press opening of the Musical, the gross weekly ticket sales in seventeen of the twenty-one weeks are equal to at least 87% of the potential gross weekly ticket sales. In such event, commencing with the performance week following such seventeenth performance week, Authors' royalties will increase from 4.5% to 6% of GWBOR (subject to the royalty adjustments). However, if anytime thereafter the actual gross ticket sales for any three consecutive weeks Ms below 87% of potential gross ticket sales for each

such week, then Authors' royalty will revert to 4.5% of the GWBOR until the musical has subsequently earned actual gross ticket sales during seventeen of any consecutive twenty-one performance weeks equal to 97% of the potential gross ticket sales, at which point it will increase to 6% again. This formula continues until the cost of presenting the musical has been recouped.

During post-recoupment weeks, if the GWBOR of the Musical does not exceed 115% of weekly break-even, Authors' royalties are adjusted to $3,000 in the aggregate per full performance week plus a percentage royalty equal to 35% of weekly profits. However, the Authors' royalty cannot exceed 6% of GWBOR. If the director agrees to accept less than full royalty under his or her contract with the producer, the Authors' percentage may be reduced pro rata from 35% to no less than 25% of weekly profits. There is also an adjustment for

touring performances which can be found in Section 5.07 of the APC for Musicals.

The APC for Musicals also provides for guaranteed royalties in losing weeks. If a company had weekly losses in any regular touring performance, the Authors' weekly royalty is $3,000 in the aggregate. As in the APC for Plays, there is a yearly royalty adjustment for the Christmas period in New York City.

Territory and Additional Territories

Under the APCs for Plays and for Musicals, in addition to First-Class performance rights, Producers are granted Second-Class performance rights and Off-Broadway performance rights in the territory (United States, Canada, Puerto Rico) and the right to produce the Play or Musical in a first class manner in the additional territories of British Isles, Australia and New Zealand. The

grant of OffBroadway performance rights is a new provision under the APC. Under the MBPC Off-Broadway rights had to be renegotiated between the Producers and Authors and there was no provision for additional territories other than the United Kingdom.

The Producer now acquires these and other rights to produce the Play or Musical in these additional territories upon "vesting," a new term introduced in Section 11.02 of the APCs. It is defined as having presented the Play or Musical Play for a prescribed number of consecutive paid public First-Class performances. Vesting in the "Territory," which includes the United States, Puerto Rico and Canada, occurs when one of the following is reached (i) 10 preview performances plus the official press opening of the Play in New York City, (ii) 5 preview performances, the official press opening and 5 regular performances, (iii) 5 out-oftown performances, 5 preview performances and the official press opening,

provided there are no more than 28 days between the last out-of-town performance and the first preview, or (iv) 5 preview performances and the official press opening of the play in New York City, if the play has been previously produced by someone other than the Producer and is presented by the Producer under an APC with substantially the same cast and set design that existed in the prior presentation.

The Producer is also granted the right to produce the play or musical in Additional Territories, which include the United Kingdom, Australia and New Zealand. The APC has added the Additional Territories of Australia and New Zealand which were not included in the MBPC. The right to produce in Additional Territories is subject to the condition that the Producer has vested in the Territory and is not in breach of any provisions of the contract. The APC provides for certain advance payments to the Authors to extend the rights to present the

Play in the Additional Territories and provides for royalty payments as well. The definition of vesting for these territories outside New York City is sixty-four consecutive paid out-of-town performances within eighty days of the first performance. In the United Kingdom if the Play is first produced in London, then the Play vests after twenty-one consecutive performances. If the Play is first outside of London, it vests after sixty-four performances within eighty days after the first performance either outside of London or partly in London. In order to vest in Australia and New Zealand it is necessary for the Producer to produce twenty-one consecutive performances which are equivalent to First-Class performances in the Territory.

The additional production rights are the same under Musicals as Plays. The definition of vesting for Musicals is substantially the same as described in Section 11.02 except that the (iii) manner of vesting provides

that there can be no more than 42 days between the last out-of-town performance and the first performance rather than the 28 days allowed for Plays.

Subsidiary Rights

Under the APCs for both Plays and Musicals, Producers (and in turn the limited partnership) have obtained more subsidiary rights than were available under the MBPC. As defined in the APC, subsidiary rights include media productions, commercial use products, stock performances, amateur performances, ancillary performances and revival performances. One major addition is the absolute right of the Producer and his or her investors, heirs or assigns to participate in 20% of the Authors' share of royalties for revival productions for forty years after the expiration of the original production

rights. Revival performances are defined under Section 11.01 (g).

Under the APC, Producers acquire participation in subsidiary rights based on the recognition that by a successful production the Producer makes a contribution to the value of all other rights in the Play or Musical. Under the APC, the Producer participates in the subsidiary rights once the Producer has vested in the Territory and Additional Territories and provided that the Producer has not breached any provisions of the APC. After vesting the Authors are not permitted or authorized to sell any subsidiary rights during the applicable period. The Authors are required to use best efforts in exploiting the Play for subsidiary rights purposes.

Plays

Under the APC for Plays, the Producer has the right to choose one of four "Producer's Alternatives" as set forth in Section 11.03 of the APC. The Producer must give the Authors and The Dramatists Guild written notice of such choice on or before midnight of the first day of rehearsals at which the Producer requires all the cast members of the principal company. Failing to do so, the Authors may choose the alternative or, if no one chooses, Producer's Alternative III will apply. Each of the four alternatives grants the Producer a percentage of the Authors' compensation earned from several subsidiary rights categories, including media productions, stock, ancillary and amateur productions. Each Producer should carefully examine the type of play being produced to determine which Producer's Alternative should apply. It should be noted that under that APC for Plays, if Producer's Alternative IV is chosen, the Producer has rights in stock, amateur and ancillary performances for a

much longer period of time than under the other three alternatives (36 years); however, the Producer assigns to the Authors the first $100,000 otherwise payable to the Producer.

With respect to Commercial Use Products under the APC for Plays, the Authors grant to the Producer the sole and exclusive right to create, manufacture and sell Commercial Use Products during the time the Producer retains any rights to present the Play. The Producer then pays the Authors 10% of the gross retail sales (minus taxes) for products sold in the theatre, the Producer pays the Authors a sum of 50% of Producer's net receipts from such sales. After the rights of the Producer to exploit Commercial Use Products has expired, the Authors may exploit or enter into contracts for the exploitation of Commercial Use Products. The Authors then must pay the Producer 10% of the gross retail sales of products

sold in the theatre (such as during revivals) and 50% of net receipts for products sold in other locations.

There are other specific provisions in the APC regarding subsidiary rights but what is important to note is that none of the sums paid or retained by the Producer in connection with the exploitation of Commercial Use Products are included in the calculation of the recoupment as defined in the APC. There are also specific restrictions on dispositions by the Authors of worldwide media productions, and Foreign Local Television Productions and rights with respect to each of the Additional Territories.

Musicals

Under the APC for Musical Plays, the Producer has the right to choose Alternative I or II of the three Producer's Alternatives. The choice of Alternative Ill must be

specified by the Producer in Article XXII upon the signing of the APC. The choice of Alternative I or II must be made by giving the Authors and The Dramatists Guild written notice of such choice on or before midnight of the first day of rehearsal at which the Producer requires all cast members of the principal company. If the Producer fails to give such notice in a timely manner, the Authors may choose, upon giving the Producer and The Dramatists Guild written notice by midnight on or before the next business day following said rehearsal date. If both the Authors and Producer fail to choose in a timely manner, then the Producer's Alternative III applies.

Each of the three Producer's Alternatives grants the Producer participation in the Authors' compensation in the subsidiary rights which vary with respect to the percentage of the contribution and the number of years the Producer retains the performance rights. For example,

Producer's Alternative I and II grants the Producers 50% of all media productions in perpetuity. Again, the area in which the Producer has the most decisions to make is in the area of stock, ancillary and amateur performances. It is necessary to examine the particular characteristics of a Play or Musical to determine where the likelihood of the partnership earning additional money from a particular subsidiary right will be in the future. The Producer's rights regarding Commercial Use Products is the same for Musicals as for Plays.

Under the APC, the Producer's right to participate in 50% of the media rights in perpetuity, rather than 40% as in the MBPC, and in 20% of the Author's royalties in Revival rights for 40 years are important bargaining tools for raising money.

Cast Albums

The APC for a Musical has a specific provision relating to cast albums. The terms, as set forth in the APC, are that the Author and Producer shall share in perpetuity the proreeds received from worldwide exploitations of such cast albums. The split between Authors and Producers is 60% for Authors and 40% for Producers. The Producer's share of proceeds is not included in the calculation of recoupment. In addition, Section 8.17(b) provides that if the Producer acquires the right to create cast albums but does not license or produce the play in the British Isles, Australia or New Zealand, then the Authors are free to authorize a record company to record the cast album in such areas. However the Authors must give the original record company who did the cast album written notice of the terms of any offer they receive. The original record company then has thirty days in which to match the monetary terms of such offer.

Musical Scores

Section 8.19 of the APC for Musicals is a provision which relates to the payment for musical scores. Initially the Producer, as part of the costs of production, must purchase the necessary orchestral scores and vocal parts, etc. The Producer, subject to the Authors' copyright, may sell, license, assign, rent or dispose of such scores and retain the proceeds which will not be counted in the calculation of recoupment. However, a new provision to the APC is that the Authors have the option to elect to own the scores. The scores will then be jointly owned by the lyricist and composer. If the composer and lyricist elect to own the scores, then the Producer may deduct from the royalties otherwise payable to each composer and lyricist $500 per week in the aggregate for out-of-town and preview performances. This is only allowed however, so long as the remaining royalties

payable to the Authors are not less than $4,500 in the aggregate for preview and out-of-town performances or $3,000 for all other performances, until an amount equal to 50% of the actual expenditures for the musical scores have been recovered by the production.

Additional Collaboration

Section 8.20 relating to additional collaboration is also a section new to the APC for Musicals. This section permits the replacement of any Author subject to the consent of the remaining Authors prior to first rehearsal, during rehearsal or during paid public First-Class performances. If an Author is replaced prior to first rehearsal, the Author is entitled to retain option payments payable to him or her as of the date of replacement. If replacement is after the first rehearsal but prior to first paid Public Performance, the remaining Authors'

approval is required and the removed Author is entitled to 1/2 of his or her portion of the Authors' share of royalties and subsidiary rights. After the first paid performance the Producer may replace any Author with the approval of the remaining Authors but the replaced Author receives his full share of options, advances, royalties and subsidiary rights under APC. There is also an APC section relating to deleted music and lyrics.

Theatrical Conciliation Council

An important new provision of the APCs for Plays and Musicals is the establishment of the Theatrical Conciliation Council. The purpose of this Council is to quickly and effectively resolve questions and problems that may arise from time to time regarding the APCs. The Council consists of seven Author members and seven Producer members. The Author members are: James Goldman,

Garson Kanin, Arthur Kopit, David E. LeVine, Peter Stone, Stephen Sondheim and Terrence McNally. The Producer members are: Richard Barr, Bernard B. Jacobs, Norman Kean, James M. Nederlander, Robert E. Nederlander, Harvey Sabinson and Gerald Schoenfeld.

There is also a "Certification Procedure" under Article XVI replacing the unwieldy countersignature requirements of the old MBPC. Under the Certification Procedure the APC is submitted to The Dramatists Guild to determine whether the contract as signed conforms with or is reasonable equivalent to the form of the APC. If there are no modifications in the APC, The Dramatists Guild will certify that the contract conforms with the APC. However in cases where there have been modifications of the APC, The Dramatists Guild will certify the APC if it determines that the contract is reasonably equivalent and that the modifications are necessary due to "special circumstances," as defined in Section

16.02(a) of the APC, relating to or arising from the nature of the Play.

An example of a "special circumstance" under the APC would have been the musical by Stephen Sondheim and James Lapine, Sunday in the Park With George if it was presented under the APC. This musical was presented in a non-musical size theatre and would have been too expensive to produce and operate without adjustments in advances and royalties. An example of a play that would require special circumstances under the APC would be The Real Thing by Tom Stoppard. Many of the subsidiary and other rights had been disposed of when the play was first produced in London. In addition, a new director and two major stars were engaged for the American version thereby increasing costs and possibly reducing profits and the ability to reasonably repay the investors. The par-ties agreed during the settlement discussions that a theatre with a certificate of occupancy of 550

seats or less would be considered a special circumstance.

Joint Review Board

Another provision new to the APC is the Joint Review Board consisting of two persons chosen from the then current membership of the Theatrical Conciliation Council. If the Producer and Authors disagree with The Dramatists Guild's comments or The Dramatists Guild's opinion that the contract neither conforms or is reasonably equivalent to the APC, the Producer can submit The Dramatists Guild's comment letter to the Joint Review Board which will make the determination within 10 days as to whether the contract conforms or is equivalent to the APC. The Joint Review Board decides either that the contract is to be certified as written or that certain

revisions are necessary. The flow chart accompanying this article explains the Certification Procedure in detail.

Using the form of the APCs

The Approved Production Contracts are practical in size, in contrast to the cumbersome MBPC. The type is large and clear and the headings and subheadings are easily distinguished, making the contract very readable. The APCs are individually bound by staples and should not be unstapled. The APC for Musical Plays has a yellow cover and consists of 51 pages including appendices. The APC for Plays has a peach cover and consists of 45 pages including appendices. The architects of the APCs thoughtfully included a table of contents and an index of the defined terms. The APCs are available at The Dramatists Guild as well as The League of American Theatres and Producers.

When signing the APCs, the first page can be handwritten or typed, then xeroxed and stapled or glued to the actual APC page. The signature page is best photocopied, signed and then attached to Article XXII and stapled to the existing signature page (page 40 for Plays and page 46 for Musicals) or stapled to the inside back cover. It should be noted that there is a typographical error in the APC for Musical Plays at page 22, and the APC for Plays at page 17: Article 9.01(b) refers to Section 4.02(d) when it should refer to Section 4.02(c).

Evaluation of the APCs

The APCs for Plays and Musical Plays have now been available for over one year. We spoke with Norman Kean, Chairman of the Production Committee for the League of American Theatres and Producers who negotiated the terms of the APCs with Peter Stone, the

President of The Dramatists Guild, David E. LeVine and their respective counsel named earlier. We asked Mr. Kean for his opinion as to whether the APCs have been successful in accomplishing some of the Producer's goals. In his opinion the APCs are accomplishing two of the many goals they set out to accomplish, namely acknowledging the long creative process of the Authors with up front remuneration, and allowing the production when operating to reach recoupment faster with a substantial reduction of Authors' royalties while at the same time guaranteeing the Authors a minimum in critical or losing weeks. Furthermore, the territories for production have been expanded and the Producer and the Partnership are irrevocably guaranteed 20% of the Author's share of revivals of the play or musical for 40 years after the initial production rights have expired.

As an example, Mr. Kean points out that the original producers and investors or their heirs or assigns would

have received or would be receiving income from many revival productions including My Fair Lady, Fiddler on the Roof Kismet, The King and I, Zorba, Guys and Dolls, Pippin, Stop the World - I Want to Get Off, Camelot, Sweet Charity, Long Day's Journey Into Night, A Streetcar Named Desire, Brigadoon, South Pacific, Peter Pan, Candide, Follies, West Side Story, Sweet Bird of Youth, Gypsy, Carnival, Little Me, Man of La Mancha and Death of a Salesman if these productions had been originally produced under an APC.

Plays and Musicals Produced Under APCs

As of the date of this writing approximately forty APCs for Plays and Musical Plays have been certified or are in the certification process with The Dramatists Guild. Approximately one-third of the APCs are Musi-cals. A review of some of the Plays and Musicals

produced and expected to be produced under the APCs reveal that important Authors and Producers are using the APCs for Plays and Musical Plays.

The first play to be produced under the APC was As Is by William Hoffman and presented at the Lyceum Theatre by John Glines/Lawrence Lane, Lucille Lortel, The Shubert Organization, Circle Repertory Company and The Glines.

Other Plays produced under the APC include Precious Sons by George Furth produced by Roger Berlind and Marty Bell; the 1986 Tony Award winner I'm Not Rappaport by Herb Gardner, starring Judd Hirsch and Cleavon Little and produced by James Walsh, Lewis Allen and Martin Heinfling and in London starring Paul Scofield and Howard E. Rollins; Sweet Sue by A. R. Gurney, Jr., to be produced by Arthur Whitelaw and starring Mary Tyler Moore and Lynn Redgrave; the revival of Athol Fugard's Blood Knot produced by James

B. Freydberg, Max Wertzenhoffer, Lucille Lortel, Estrin/Rose Berman Productions in association with FWM Producing Group and Yale Repertory Theatre; and Wildfire by Richard N. Nash which was produced in London by Barry Brown and Fritz Holt.

Upcoming plays to be produced under the APC for Plays include Sleight of Hand (scheduled to open in April), by John Pielmeier being produced by Suzanne J. Schwartz; Goose and Tom Tom, by David Rabe, being produced by Fred Zollo and starring Sean Penn and Madonna; Let's Lunch by Muriel Resnik being produced by Stewart Lane, Charlene Nederlander and James M. Nederlander; The Widow's Blind Date by Israel Horowitz, being produced by Fred Zollo and Ivan Bloch and starring Kathleen Turner; Return Engagements by Bernard Slade and being produced by Lewis Allen; Twelve Dreams by James Lapine and being produced by Briar Patch Construction Corporation (John Roberdeau and

Robert Geisler); The Double Cross by Gary L. Bohlke being produced by Michael White and the John F. Kennedy Center for the Performing Arts; and Sherlock's Lost Case by Charles Marowitz being produced by Frank Langella and Alvie Productions being directed by A.J. Antoon and starring Mr. Langella.

The first Musical on Broadway to be presented under the APC was Rags with book by Joseph Stein, music by Charles Strouse and lyrics by Stephen Schwartz and produced by Lee Guber, Marvin A. Krauss and Martin Heinfling. The Musical Brownstone was presented by the Roundabout Theatre Company with book by Andy Kadiff, music by Josh Rubins and Peter Larson and lyrics by Josh Rubins and if successful would have been transferred under its APC to Broadway by producer Roger Berlind.

Other Musicals which have been certified or are in the certification process include Annie II being produced by

Mike Nichols, Lewis Allen, James M. Nederlander, and Roger L. Stevens with book by Thomas Meehan, music by Charles Strouse and lyrics and book by Martin Charnin; My Man Godfrey being produced by Allan Carr, with book by Kristi Lane, music by Gerard Kenny and lyrics by the late Alan Jay Lerner; Arthur: The Musical being produced by Joseph Billone and Bruce Michael with book and lyrics by David Crane and Marta Kauffman and music by Michael Skloff; The Dream Team being produced by Bernard Carragher with book by Richard Wesley, music by Thomas Tierney and lyrics by John Forster; Sports and Swells being produced by Stuart Ostrow with book by John Lahr and music and lyrics by Alan Price; Curtains with book by Peter Stone, music by John Kander and lyrics by Fred Ebb; Little Pinks being produced by William Johnson with book by Leonard Melfi, music by Werner Jansenn and lyrics by Hal Hackady; Captain America being produced by Hal

J. Upbin and Shari Upbin with book by Philip Rose, Mel Mandel and Norman Sachs, music by Norman Sachs and lyrics by Mel Mandel; Blondie being produced by King Features Syndicate with book by Dean W. Young, music by Galt MacDermot and lyrics by Josh Rubins; The Chosen being produced by M Square Entertainment Productions, with book by Chaim Potok and lyrics by Hall David; a revival of Follies being produced by Cameron Mackintosh with book by James Goldman and lyrics and music by Stephen Sondheim; Into The Woods being produced by Heidi and Rocco Landesman with book by James Lapine, music and lyrics by Stephen Sondheim; The Apprenticeship of Duddy Kravitz produced by Craig S. Dorfman and Gesser Enterprises, Inc. with book by Austin Pendleton and Mordecai Richler, music by Alan Menken and lyrics by David Spencer; Elmer Gantry being produced by Joseph Cates with book by John Bishop, music by Stanley

Lebowsky and lyrics by Fred Tobias; Father of the Bride being produced by Fred Walker, with book by Enid Rudd, music and lyrics by Richard and Robert Sherman; The Turning Point being produced by Kaslan Productions, Inc., (David Landay and Lawrence Kasha), with book by Arnold Schulman and music by Charles Fox; Little Mighty being produced by HGL Productions and written and composed by James Paul Grady, J. Richard Harris and Craig Giles; and a musical about Will Rogers starring John Denver under the working title Will being produced by Pierre Cossette with book by Peter Stone, music by Cy Coleman and lyrics by Betty Comden and Adolph Green with Tommy Tune announced as director and choreographer.

Two of this season's production's, Smile and Legends! were produced under the former MBPC as they were signed either prior to the availability of the APC or

during the "MBPC-APC" transition period in the summer of 1985.

The first musical revival, Guys and Dolls, is expected to be produced under the APC for Musicals by Emanual Azenberg, Roger Berlind, Pace Theatrical Group, Inc. and Jujamcyn Theatres with book by Jo Swerling and Abe Burrows and music and lyrics by Frank Loesser. "Special circumstances" under the APC will apply as there has already been a previous production and a film based on the prior production. Therefore, there are substantially fewer subsidiary rights in which the Producers and investors can participate with the Authors. In addition, approximately thirty years of stock and amateur rights have been exploited. As a consequence the Authors and the Producers will work out reasonably equivalent terms to be approved by The Dramatists Guild.

Conclusion

The APCs acknowledge the work Authors have done, usually over a long period of time and compensate them with larger option payments and advances up front. In turn, Authors accept lower royalties so that productions under the APCs can reach recoupment more quickly than under the MBPC. Importantly, relationships between members of the League of American Theatres and Producers and The Dramatists Guild have continued to be harmonious and cooperative. In fact, Richard Barr, who was the plaintiff on the initial antitrust lawsuit against The Dramatists Guild, has plans to produce under the APC a musical, Sunset Boulevard, with David Bixler and Clark Bason with book and lyrics by Calvin Remsberg and music by Roger Ames.

Although the contract arose out of a major antitrust lawsuit, an air of even greater mutual respect has

resulted. The industry has looked at the APCs and the reaction has been generally positive. Since the publication of the APCs there have been unprecedented labor negotiations between the League of American Theatres and Producers and several of the craft unions with which they work. The positive results of these negotiations reflected in the respective collective bargaining agreements between the parties is in part directly attributable to the spirit of this remarkable contract between author,; and producers which acknowledges effort while holding as its goal the total health of a production and the theatre industry.

APPROVED PRODUCTION CONTRACT ("APC") CERTIFICATION PROCEDURE FLOW CHART (ARTICLE XVI)

[1] Author and Producer sign APC (or an amendment).

[2] On the first business day after full execution execution of the Contract, Author submits Contract to Guild.

[3] Within 10 business days following full execution, Guild must give one of the following responses:

[a] Guild Certifies Contract.

[b] If Guild fails to respond within the 10 business day period, the Contract is deemed Certified.

[c] Guild says Contract neither conforms with nor is reasonably equivalent to the APC. Guild gives suggested changes.

[4] The Contract will automatically terminate 10 business days after Producer's receipt of the Guild's

response unless Producer gives one of the following responses:

[a] Producer and Author accept changes and the Contract is deemed Certified.

[b] Producer sends the Guild a letter, signed by both Producer and Author, eliminating the automatic termination provision. The Contract is then effective without being Certified.

[c] Producer does not accept changes and submits Contract to the Joint Review Board.

[5] With 10 business days after its receipt of the matter, the Joint Review Board must give one of the following responses:

[a] The Joint Review Board decides the Contract conforms with or is reasonably equivalent to the APC and the Contract is deemed Certified.

[b] The Joint Review Board cannot reach Agreement. Author has 5 business days to rescind the Contract. If not rescinded, the Contract is effective without being Certified.

[c] The Joint Review Board decides the Contract neither conforms with nor is reasonably equivalent to the APC. The Board gives suggested changes.

[6] The Contract will automatically terminate 10 business days after Producer's receipt of the Guild's response unless Producer gives one of the following responses:

[a] Producer and Author accept changes and the Contract is deemed Certified.

[b] Producer sends the Guild a letter, signed by both Producer and Author, eliminating the automatic termination provision. The Contract is then effective without being Certified.

Robert Cavallo practices law in New York City, as does Nancy Wolff who is associated with Mr. Cavallo's firm. This article was written as a report to, and was reviewed by members of, the New York State Bar Association's Special Committee on Entertainment Law. In releasing the article, Committee Chairman Marc Jacobson, also of New York City, noted that adoption of the Approved Production Contract "represents a major development in the business and legal aspects of Broadway theatre," and he asks that any comments on the article be directed

to the Special Committee on Entertainment Law, New York State Bar Association, One Elk Street, Albany, New York 12207.
[ELR 8:10:3]

RECENT CASES

Copyright infringement action against composer of the theme from the movie "E.T.: The Extra-Terrestrial" is remanded for jury determination of themes substantial similarity to 1954 song

E.T.'s plan to proceed home has been delayed by a Federal Court of Appeals decision to remand for trial a copyright infringement action involving the theme from the movie "E.T.: The Extra-Terrestrial."

Leslie T. Baxter claimed that composer John Williams' "Theme from E.T." infringed Baxter's copyrighted song "Joy" (the sheet music for the song originally was copyrighted in 1954). A Federal District Court granted summary judgment to Williams on the ground that, based on the court's "ear," there was no substantial similarity of expression between the two works.

In reversing the District Court's decision, Federal Court of Appeals Judge Tang disclaimed possessing more sophisticated ears than the District Court, but nevertheless concluded that reasonable minds could differ as to the substantial similarity between Joy and Theme from E.T., and that summary judgment therefore was improper.

It was noted that Baxter has presented ample evidence of access-he and Williams were personally acquainted for several decades, and Williams participated as the pianist in the orchestra for a public performance of Joy in the Hollywood Bowl in the 1960s. The evidence of

access was relevant to the issue of substantial similarity and should have been submitted to a jury, stated Judge Tang.

The court disagreed with Williams' argument that any similarity between the works involved only a six-note sequence which was not protectible expression under the copyright laws. Baxter's infringement claim extended to the entire song, and it remained for a jury to determine that any similarity was limited to a particular sequence and that the similarity was insubstantial.

Baxter v. MCA, Inc., Case No. 84-6522 (9th Cir., March 5, 1987) [ELR 8:10:12]

Members of musical group obtain preliminary injunction preventing their former record company from using the mark "New Edition"

After a series of court proceedings (ELR 7:1:9) five young performers have obtained the exclusive right to the mark "New Edition." The mark was first used in commerce in February 1983 when the group's album "Candy Girl" was released by Streetwise Records, Ltd. Streetwise claimed that the mark identified its recordings, and not the group members, and sought to enjoin the group from using the mark.

A Federal District Court in Massachusetts has ruled that the group's appearances in the local entertainment market prior to the release of their album, as well as the promotional effort expended by and on behalf of the group, indicated a plan to commercially exploit the mark and served to establish prior appropriation.

The court went on to state that even assuming there was no prior appropriation by the group, the performers nonetheless owned the mark at issue. Judge Zobel

pointed out that the "norm" in the music industry is that an artist or group owns its own name. New Edition was not a "concept group" whose name, as in the case of Menudo or Planet Patrol, belonged to the person or entity that conceived the concept and name. Rather, the membership of New Edition was consistent, and as distinguished from the situation in Rick v. Buchansky (ELR 8:2:15; the "Vito and the Salutations" case), the performers were not "replaceable actors in a play written by Maurice Starr." Starr, the president of Boston International Music, made a substantial contribution to the Candy Girl record, stated Judge Zobel, but Starr's activities "were consistent with the duties of a producer." And while Streetwise's promotional work was unusually extensive, its efforts were characterized as the normal function of a recording company.

In addressing the question of which "goods" the mark served to identify, Judge Zobel noted that the members

of New Edition were individual persons that the public, on the basis of personality, not marketing, came to know as such. Thus, New Edition signified five young men with distinctive personalities and style as performers - the "goods" involved were the entertainment services they provided. The performers controlled the quality of those services and owned the exclusive right to appear, perform and record under the mark, concluded the court and granted the group a preliminary injunction to prevent Streetwise from using the mark.

Bell v. Streetwise Records, Ltd., 640 F.Supp. 575 (D.Mass. 1986) [ELR 8:10:12]

Los Angeles Raiders were not entitled to offset player Dan Pastorini's post-waiver earnings from other clubs and were required to pay Pastorini contractually-specified compensation

In 1978, Dan Pastorini negotiated a series of six one-year contracts to play football for the Houston Oilers. During 1981, 1982 and 1983, Pastorini was scheduled to receive $150,000 per year and additional deferred compensation. Pastorini was traded to the then-Oakland Raiders in 1980, and the Raiders assumed the contracts. However, in September 1981, the Raiders placed Pastorini on waivers and released him; Pastorini subsequently signed with the thenLos Angeles Rams and was paid $190,000 for the year. In 1982 and 1983 seasons, the Philadelphia Eagles paid Pastorini $140,000 and $175,000 respectively.

When the Raiders informed Pastorini that they would no longer pay his salary, claiming an offset of his earnings from the other teams, the National Football League Players Association and Pastorini commenced an arbitration proceeding. The arbitrator determined that mitigation and offset were not applicable and directed the Raiders to pay Pastorini as provided in the contracts. The arbitration award was confirmed by a San Francisco County trial court, and this decision has been affirmed.

The appellate court noted that the arbitrator considered testimony regarding the NFL's purported salary offset policy - an unwritten policy that did not form part of the collective bargaining agreement. After reviewing two decisions of the Player-Club Relations Committee, the arbitrator concluded that when an offset was intended. specific provisions for offset were inserted into player contracts; Pastorini's contract had no such provision. And mitigation did not apply as it might in a wrongful

termination case because Pastorini was not discharged. Pastorini was not seeking damages for an alleged breach of contract; his waiver was authorized under the contract. The arbitrator could "plausibly conclude that the parties intended guaranteed unconditional payment, and that therefore mitigation of damages and offset would not be applied."

The court declared that it would reach the same decision under state law as under section 301(a) of the Labor Management Relations Act, and concluded by rejecting the Raiders' contention that Pastorini was unjustly enriched and that the award therefore violated public policy, pointing out again that the contracts guaranteed Pastorini's salary even if his performance was unsatisfactory and contained no provision for offset in the event of waiver.

National Football League Players Association v. National Football League Management Council, 233 Cal.Rptr.147 (Cal.App. 1986) [ELR 8:10:12]

United States Supreme Court lets stand jury award of $35.8 million to cable television operator in antitrust and tortious interference with business expectancy claims against incumbent cable television franchisee

In 1981, Jefferson City, Missouri announced that it was soliciting bids for its cable television franchise. TCI Cablevision, Inc., the company which managed and then acquired the franchise during the years 1973 until 1981, refused to participate in the bidding, arguing that it had a First Amendment right to continue to provide cable television service in the city. In April 1982, the City

Council voted to grant the franchise to Central Telecommunications, but the mayor vetoed the ordinance and subsequently cast a tie-breaking vote in favor of TCI; the TCI proposal provided fewer viewing channels and inferior picture quality at a higher monthly rate than did the Central proposal.

Central sued TCI, alleging unlawful interference with the bidding process. A Federal District Court jury ruled in favor of Central on three claims: that TCI has unlawfully conspired with the mayor and other city officials to retain its exclusive franchise in violation of section 1 of the Sherman Act; that TCI had undertaken illegal anti-competitive actions to retain its monopoly of the city's cable television market in violation of section 2 of the Sherman Act; and that TCI tortiously interfered with Central's business expectancy in violation of state law.

The jury awarded Central $10.8 million in actual damages on its antitrust and state law claims, and $25

million in punitive damages on the state law claim. The court trebled the $10.8 million award and entered judgment for $32.4 million on the antitrust claims and, in the alternative $35.8 million on the state law claim (see ELR 6:10:9; 7:8:17).

A Federal Court of Appeals in St. Louis affirmed the judgment; the United States Supreme Court recently declined to hear TCI's appeal and has let stand the jury award.

In affirming the District Court judgment, Federal Court of Appeals Judge Heaney first pointed out that there was substantial evidence in the "over 7,000-page record" to support the conclusion of the trial judge and jury that TCI did not seek merely to compete in the Jefferson City market, but to retain its monopoly. Central also demonstrated that the city's cable television market possessed "natural monopoly" characteristics. By attempting to open up competition for the market, and by

obtaining a proposal from Central for a "state-of-the-art" system, the city, rather than TCI, was serving the First Amendment interests of the viewing public in having access to a wide variety of programming and could properly offer a de facto exclusive franchise in order to create competition for its cable television market.

TCI argued that it was exempt from antitrust liability for activities which were designed to procure favorable governmental action, even if the underlying motivation and effect of the activities were anti-competitive (the NoerrPennington doctrine).

Judge Heaney pointed out that TCI's activities in 1981, after the city announced its competitive bidding process, included public announcements that it would cut off service if it was not awarded the franchise; the refusal to pay the prior year's franchise fees in an amount exceeding $60,000; misstatements of fact concerning the company's distribution of satellite dishes; and certain

purported coercive threats to a cable television consultant and to a competing bidder. The jury was properly instructed that it could only base liability on acts which were not genuine efforts to influence city officials. It appeared to Judge Heaney that there was full support for the jury's and trial judge's conclusion that TCI "overstepped" the boundaries of Noerr-Pennington protection, and that the jury may have concluded that TCI's "heavy-handed tactics frightened the mayor and some members of the City Council into awarding the franchise to TCI."

Various evidentiary challenges raised by TCI also were rejected, as was the company's claim that it could not have possessed monopoly power because Jefferson City regulated price and entry in the cable television business. Although the city's cable market was regulated, TCI had monopoly power in the market, and "it used that power and ... methods other than superior ability to exclude competition."

With respect to damages, it was noted that the record supported the jury's conclusion that Central had made sufficient preparations to enter the cable television business to recover for injury to a protectable interest under federal antitrust law and under state law on tortious interference with a business expectancy. Central presented, without objection, a detailed damages study and argued that it should receive the fair market value of the lost franchise, and that this value was ascertainable through the use of an industry assumption-ten times cash flow in Central's proposed third year of operations. The jury was entitled to infer actual damages in an amount of $10.8 million, and the court declined to reduce this award. Furthermore, although the punitive damage award was large, the award was based on a jury instruction which was not objected to at trial or on appeal, and was supported by substantial evidence of intentional tortious conduct.

Central Telecommunications, Inc. v. TCI Cablevision, Inc., 800 F.2d 711 (8th Cir.1986) [ELR 8:10:13]

Cable television system was not subject to penalty provision of franchise agreement during penitency of modification request

Tribune-United Cable of Montgomery County executed a cable television franchise agreement with Montgomery County, Maryland in 1983. Construction and equipment problems ensued and in 1985 the county sent TribuneUnited a notice of default; the company responded, in part, by requesting the modification of the franchise agreement, citing commercial impracticability. The county stated that it would consider the modification request, but that it planned to begin proceedings to

revoke Tribune-United's franchise and to assess $9,000 a day in liquidated damages for construction delays.

Tribune-United brought an action for declaratory and injunctive relief to prevent the county from carrying out the penalty provisions of the franchise agreement until the county acted on the pending modification request. A Federal District Court denied the company's motion for a preliminary injunction, but the court's decision has been reversed.

Federal Court of Appeals Judge Sprouse noted that section 545 of the Cable Communications Policy Act of 1984 grants cable operators the right to have certain franchise requirements modified if the commercial impracticability of the requirements can be demonstrated. The county had argued that it could impose penalties during the pendency of the modification request for defaults which had occurred prior to Tribune-United's modification application. But the Act made a local

government's enforcement power "subject to section 545." Therefore, a cable operator's opportunity to establish commercial impracticability would mean very little if local franchising authorities were able to burden the right by enforcing massive penalties during the penitency of modification proceedings, stated Judge Sprouse. TribuneUnited's application for modification should have stayed the city's action to enforce the penalty provisions of the franchise agreement until a final decision was reached on the application.

Tribune-United Cable of Montgomery County v. Montgomery County, Maryland, 784 F.2d 1227 (4th Cir. 1986) [ELR 8:10:14]

Christie, Manson & Woods and aft investment company settle dispute over 1981 auction

In early 1981, when Cristallina, S.A., an art investment company, consigned for sale eight Impressionist paintings to Christie, Manson and Woods, International, David Bathurst, the former president of Christie's, suggested that the auction's gross sales figure might be as high as $12.6 million. During the following months, however, Christie's revised its estimate of the gross to $8.5 million, and advised the media that the paintings might earn between $5 million and $9 million. And the recommended reserves for the paintings, contrary to Christie's normal policy, were set at a figure greater than the high estimates (reserves, which are not made public, are the prices below which an item may not be sold at auction). The auction, despite extensive publicity, media coverage and a sell-out crowd, resulted in the sale of only one painting - a Degas - for a record $2.2 million. Nevertheless, Christie's issued a press release

announcing that three paintings were sold for a total of $5.6 million.

In Cristallina's perspective, the failure of the auction was due to Christie's conduct in deciding to auction "difficult" paintings from the company's collection, in withholding from Cristallina important information about the pending sale, in presenting to the public a low estimate of the value of the paintings, and in recommending higher than standard reserves. Cristallina asserted eight causes of action against Christie's including fraudulent misrepresentation, breach of contract and breach of fiduciary duty and sought $5.5 million in damages. A trial court granted summary judgment to Christie's (ELR 7:4:8); but a New York appellate court found that factual issues were presented which barred the grant of summary judgment.

Judge Sullivan pointed out that as an agent, Christie's had a fiduciary duty to act "in the utmost good faith" and

in the interests of Cristallina throughout their relationship. In particular, it was noted that Christie's knew or should have known that it would be virtually impossible to sell the paintings unless the reserves were lowered. But the reserves were increased, with the alleged result that the value of the paintings was adversely affected when they were "brought in."

Although an auctioneer is not required to guarantee the results of a sale or even predict the price that a particular item will bring, the agent is "held to a standard of care commensurate with the special skill which is the norm in the locality for that kind of work." Cristallina presented sufficient evidence to require further proceedings on the question of whether Christie's and Bathurst acted in a manner commensurate with their skill and expertise.

Christie's argued that Bathurst, in advising Cristallina as to the value of the paintings and setting reserves, was

merely expressing an opinion, which was not actionable. Even assuming that Bathurst's statements were opinions rather than representations of an existing fact, Bathurst had an obligation to be truthful in giving such opinions, stated the court. Bathurst's choice of eight paintings which could have been difficult, if not impossible to sell and offering estimates of the value of the paintings at variance with the reserves raised "serious questions" as to whether he misrepresented the prices which could be obtained at the auction, according to Judge Sullivan.

The trial court also had found that Cristallina's claim for damages was speculative. However, the pre-auction value of the paintings could have been established by various estimates and the measure of damages would have been the difference between the pre-auction value and the value after the auction. And the determination of punitive damages should have been left to the trier of fact since the complaint contained the requisite

allegations of recklessness and conscious disregard of Cristallina's rights. Cristallina was not entitled to recover the $3.6 million purported purchase price of the two paintings falsely listed as sold in Christie's press release since the paintings were not rendered worthless as a result of the false representation.

In January 1987, Cristallina, in return for a cash payment from Christie's, the amount of which was not disclosed, agreed to settle its claim.

Cristallina, S.A. v. Christie, Manson & Woods International, Inc., New York Law Journal, p. 1, col.6 (N.Y. App., May 16, 1986) [ELR 8:10:14]

Widow was entitled to sue National Broadcasting Company for trespass, invasion of privacy and infliction of emotional distress in connection with camera crew's unauthorized filming of paramedic rescue effort

On October 30, 1979, an NBC television camera crew filmed the activities of Los Angeles Fire Department paramedics as they attempted to assist David Miller, who had suffered a heart attack in his home; unfortunately, Miller died that evening at a hospital. NBC used the film on its nightly news and later used portions of the film in a commercial advertising a report about the paramedics' work.

Miller's widow, Brownie, and daughter, Marlene Miller Belloni, sued NBC, alleging that the use of the film without consent constituted trespass, invasion of privacy and infliction of emotional distress. A Los

Angeles trial court granted summary judgment on behalf of the broadcaster and producer.

On appeal, Judge L. Thaxton Hanson found that Mrs. Miller stated causes of action for trespass and for breach of privacy, for "reasonable people could regard the NBC camera crew's intrusion into Dave Miller's bedroom at a time of vulnerability and confusion occasioned by his seizure as 'highly offensive' conduct..." Judge Hanson distinguished the case of Flynn v. Higham, 149 Cal.App.3d 677 (ELR 6:1:10) upon which the trial court apparently relied, because in the instant case, the NBC parties invaded not only the home and privacy of the deceased, but of Brownie Miller as well.

Mrs. Miller also was entitled to have a jury consider her cause of action for intentional infliction of emotional distress. The camera crew, according to the court, gave little thought to its "obvious transgression," and had encountered no objections when entering other private

places without consent. But Judge Hanson stated that the complained-of conduct "illustrates, perhaps, a widespread loss of certainty about where public concerns end and private life begins, and a loss of personal identity manifested by individual members of the public when confronted by aggressive media representatives. Personal security in a society saturated daily with publicity about its members requires protection not only from governmental intrusion, but some basic bulwark of defense against private commercial enterprises which derive profits from gathering and disseminating information."

Therefore, a jury will have to determine whether the NBC parties, in entering the Miller home and in filming and broadcasting the film of the last moments of David Miller's life, notwithstanding his family's protests, engaged in outrageous conduct. It was immaterial, in Judge Hanson's view, that the body of David Miller was

not identifiable by the average viewer for Brownie Miller was not an average viewer.

The court rejected the broadcaster's claim that Miller by calling for the paramedics, impliedly consented to the entry of the NBC camera crew.

Furthermore, assuming that public education about paramedics and the value of CPR techniques qualified as "news," the obligation not to enter the private premises of private individuals did not place an impermissible burden on NBC and was not likely to have a chilling effect on the exercise of the broadcaster's First Amendment rights, concluded the court. For Judge Hanson, to hold otherwise "might have extraordinarily chilling implications for all of us."

The court upheld the trial court's order granting summary judgment to the NBC parties with respect to Marlene Miller Belloni's claims.

Miller v. National Broadcasting Company, 232 Cal.Rptr. 668 (Ca.App. 1986) [ELR 8:10:15]

United States Postal Service was not entitled to enforce orders prohibiting Larry Flynt from mailing issues of Hustler magazine to the offices of members of Congress

Hustler magazine was entitled to mail its monthly issues to each member of Congress, a Federal District Court has ruled.

In September 1983, Larry Flynt mailed a copy of the then current issue of Hustler to each member of Congress, and, in an accompanying letter, stated that he planned to continue this practice. By October 1984, about 264 members of Congress had filed complaints with the Postal Service. A federal statute, 39 U.S.C.

section 3008, provides that an "addressee" who receives by mail a "pandering advertisement" may direct the United States Postal Service to prohibit the sender from making any further mailings to the addressee. In response to the complaints, the Postal Service issued prohibitory orders directing Flynt to refrain from further mailings of Hustler to the named addressees.

About a month after receiving the prohibitory orders, Flynt mailed a second issue of Hustler to the members of Congress, including those named in the orders; Flynt stated that he was exercising his right to petition the government. When over 50 members of Congress again protested, the Postal Service sued Hustler and Flynt, requesting an injunction to enforce the orders.

The court, in refusing to issue the injunction, distinguished Rowan v. United States Post Office Department, 397 U.S. 728 (197O) in which the United States Supreme Court upheld section 3008. In Rowan, the

court's primary concern was protecting the privacy interests of householders; the special privacy rights enjoyed inside the home would not apply to a mailing sent to the offices of members of Congress, stated Judge John H. Pratt. Members of Congress operate "in a fish bowl" and relinquish certain claims of privacy upon leaving their homes for the office. On the other hand, Flynt claimed that the mailings impaired his First Amendment right to petition the government for redress of grievances.

After weighing Flynt's claims against the limited right of members of Congress to be let alone in their offices, the court concluded that the statute was not a valid basis for a prohibition on all further mailings to Congress. Even if the prohibitory orders were considered a restriction on speech apart from the issue of the rights to petition, the orders were not valid time place and manner restrictions they were content-based, served no governmental interest, and did not provide alternative channels

of communication to Flynt. Members of Congress were not forced to read the magazine, and Congressional offices do not lack wastebaskets, observed the court in finding section 3008 unconstitutional.

United States Postal Service v. Hustler Magazine, Inc. 630 F.Supp. 867 (D.D.C. 1986) [ELR 8:10:15]

California appellate court upholds motion picture producer's conviction of violating pandering statute

A California appellate court has upheld the conviction (ELR 7:3:17) of motion picture producer Harold Freeman for violating California Penal Code section 266i by hiring actors and actresses to appear in the epic film "Caught From Behind, Part II." The trial court had

sentenced Freeman to a 90 day jail term, five years probation and a $10,000 fine.

Acting Presiding Judge Robert Kingsley stated that although the distribution of a book or movie is protected by the First Amendment, "a criminal act is not protected under the First Amendment merely because it occurs within the context of a motion picture production." The question of whether the actors and actresses obtained sexual gratification from participating in the explicit activities depicted in the film was immaterial, stated the court - the performers hired by Freeman (who also directed the film) apparently engaged in sexual acts for money and thereby violated section 266i.

In dissent, Judge Eugene McClosky stated that while "Caught From Behind, Part II" may be "of little value to our culture," Freeman was not charged with or found to have violated any obscenity law. The purpose of section 266i, according to Judge McClosky, was not to prevent

the production or distribution of theatrical plays or motion pictures depicting sex acts between consenting adults. And since the legislature did not include the production of such plays or films in the lists of acts and conduct proscribed by the statute, the court should not have interpreted the statute so as to encompass Freeman's conduct, declared Judge McClosky, particularly when First Amendment interests were involved.

People v. Freeman, Case No.BO15697, (Ca.App., Jan.6, 1987) [ELR 8:10:16]

United States Supreme Court declines to review ruling denying damages to Robert Guccione, publisher of Penthouse magazine, in libel action against Hustler magazine

As reported in ELR 8:5:13, in October 1985, a Federal District Court jury awarded Penthouse magazine's publisher Robert Guccione $1.00 in nominal damages and $1.6 million in punitive damages in his libel action against Hustler Magazine, Inc. and Flynt Distributing Company. Judge Robert J. Sweet rejected Hustler's motion for judgment notwithstanding the verdict or for a new trial.

A Federal Court of Appeals reversed the District Court's decision, finding that the statement at issue was substantially true and that Guccione was "libel-proof" with respect to an accusation of adultery; the United States Supreme Court has declined to hear Guccione's appeal.

The challenged statement appeared in the November 1983 edition of Hustler in an article written by Hustler's publisher, Larry Flynt. Flynt, according to Federal Court of Appeals Judge Jon 0. Newman, commented on

Guccione's practice of being photographed, fully clothed, with naked Penthouse models; the article was accompanied by a photograph from Penthouse depicting a clothed Guccione with his arm around an unclothed model sitting on his knee. Flynt stated "Considering he is married and also has a live-in girlfriend, Kathy Keeton ... we wonder if he would let either of them pose nude with a man" (elipsis in original).

Guccione, who separated from his wife in 1964 and was divorced in 1979, claimed that the article falsely accused him of committing adultery in 1983. The jury, in awarding the above-mentioned damages, determined that the article's reference to Guccione's relationship with Keeton, his cohabitee since 1966, constituted libel per se, was false, and was published and distributed with actual malice.

Judge Newman observed that Flynt's statement could be read to mean, in the absence of any indications or

evidence to the contrary, only that Guccione's marriage and the cohabitation with Keeton "existed simultaneously throughout an undefined span of time that included the period immediately prior to publication." And, given this reading, the facts established the defense of substantial truth as a matter of law. While describing Guccione as a "former long-time adulterer" would have been more precise, calling him an "adulterer" in 1983 was substantially true, stated Judge Newman.

Guccione also was "libel-proof" with respect to the accusation of adultery printed in the article, concluded the court. The libel-proof doctrine applies where "an allegedly libelous statement cannot realistically cause impairment or reputation because the person's reputation is already so low or because the true portions of a statement have such damaging effects, even nominal damages are not to be awarded" Guccione argued that the libel-proof doctrine did not apply to him because he was

not convicted of the crime of adultery. But the doctrine is not limited to individuals with criminal records, stated the court, and the evidence established that Guccione's reputation regarding adultery rendered him libel-proof on this subject. Many magazine and newspaper articles discussed Guccione's marital status and his ongoing relationship with Keeton; this evidence was improperly excluded by the trial court. And Guccione did not restore his reputation on the issue of adultery during the four years after his divorce and prior to the Hustler article - his reputation for adultery thus could not have been further damaged by the publication of the alleged libel in 1983.

Guccione v. Hustler Magazine, Inc., 800 F.2d 298 (2d Cir. 1986) [ELR 8:10:16]

Recalculation of damages is ordered in Barry Blackman's copyright infringement action against Hustler Magazine for unauthorized use of nude photographs of model Elizabeth Ray

Having found that Hustler Magazine infringed Barry Blackman's copyrighted photographs of Elizabeth Ray (ELR 7:12:13, 6:8:10), a Federal District Court in the District of Columbia proceeded to consider the question of damages.

The parties agreed that the gross revenues from Hustler's infringing uses of the photographs were about $2.4 million for the September 1976 issue and about $1.5 million for the late 1976 publication "The Best of Hustler." Hustler claimed that it lost the records relating to the deductible costs associated with the infringement and introduced evidence that the profit margin in 1976 from the overall operations of Larry Flynt Publications,

its parent company, was 19 Hustler then argued that its profit from the two issues of the magazine would be 19% of gross revenues.

The District Court rejected this approach, observing that the 19% profit figure bore little relationship to the profit margin of the Hustler issues in question. The court also rejected as too great a windfall the approach suggested by Blackman who argued that because Hustler had not carried its burden of proving expenses, the expenses should be deemed equal to zero, resulting in profits equal to the admitted revenue figures.

Rather, the court multiplied Hustler's revenues for the two issues by the 19% profit figure, determined how much of that profit was attributable to the infringing photographs, and awarded Blackman a total of $397,988 for the 1976 infringements.

Federal Court of Appeals Judge Kosinski (sitting by designation), first noted that under the Copyright Act of

1909, a copyright holder is entitled to the profits earned by an infringer as a result of the infringement. Profits usually are determined by subtracting expenses from revenues. In this case, Blackman established the revenues earned by Hustler from the infringing issues of its magazines. And although sympathizing with the District Court's attempt to avoid a possible windfall to Blackman, Judge Kosinski stated that the court incorrectly applied the statutory damages approach since statutory damages are available only where a party is unable to prove revenues or where the court determines that statutory damages would more adequately compensate the copyright holder. (In a footnote, the court pointed out that a copyright holder on occasion may "reap a windfall to further the Copyright Act's policy that infringers shall not profit from their wrongdoing.")

The District Court's approach would reward Hustler for mishandling important records during the course of

the litigation, noted Judge Kosinski, who stated that "to mislay key documents under such circumstances shows about as much respect for the litigation process as [Hustler's] republication of the infringing materials after suit was commenced shows for the copyright laws." Hustler made few efforts to find the lost records or to substitute records such as duplicate invoices from suppliers, and the 19% profit margin figure was characterized as a "Rube Goldberg construct." Indeed, the District Court's use of the 19% profit figure to calculate statutory damages, after finding it "neither equitable nor based on fact," led to an irrational result, declared Judge Kosinski - the figure proven by Blackman established the profits from the infringing issues of the magazine.

The court concluded by noting that although not all the profit from the infringing issues of Hustler were attributable to the Ray photographs, the District Court did not err in allocating as much as 60% of the profits from the

September 1976 issue and 35% of the profits from the "Best of" issue to the photographs, particularly since the infringing photographs "were the highlight of the September 1976 issue and a prominent part of Best of Hustler 2." The matter was remanded for the entry of judgment for Blackman and the recomputation of damages.

Blackman v. Hustler Magazine, Inc., 800 F.2d 1160 (D.C.Cir. 1986) [ELR 8:10:17]

Briefly Noted:

Trademark Infringement.

The Entertainment Network, Inc. has obtained a preliminary injunction restraining Television Enterprise

Network, Inc. from using the designation "TEN" in connection with Television Enterprises's program syndication services. Television Enterprise had sought a declaratory judgment that its mark did not infringe The Entertainment Network's mark. But a Federal District Court in New Jersey noted that the marks were spelled identically and appeared very similar on the two companies' letterheads. Furthermore, the word TEN, as applied to the television program marketing business, was an arbitrary mark entitled to trademark protection. Television Enterprise network used the mark for only a short time before actual confusion arose among television station and advertising agency employees doing business with the company, according to evidence presented to the court. And the fact that Television Enterprise primarily distributed telecasts of sports events did not create a sufficient distinction between the two parties. In all, there was a reasonable probability that Television

Enterprise Network's use of TEN violated the Lanham Act and that The Entertainment Network would suffer irreparable injury if an injunction were denied.

Television Enterprise Network, Inc. v. The Entertainment Network, Inc., 630 F.Supp. 244 (D.N.J. 1986) [ELR 8:10:18]

First Amendment.

In December 1984, the Daily Nebraskan, the campus newspaper of the University of Nebraska-Lincoln, adopted a policy prohibiting advertisements indicating the advertiser's sexual preference. Two individuals who were denied the opportunity to publish their sexual orientation in roommate advertisements claimed that the newspaper's policy violated the First and Fourteenth

Amendments. A Federal District Court in Nebraska has refused to grant declaratory and injunctive relief, holding that the fact that the newspaper received funds from the state did not mean that state action was involved in the newspaper's editorial decision-making process. Even if state action were assumed, the "rejection of an advertisement is a constitutionally protected editorial decision in nowise diminished by state support or subsidization." Furthermore, there was no constitutional right to access to the Daily Nebraskan as a public forum; the newspaper's policy was reasonable and was not an attempt to suppress expression which is found offensive; and the limited denial of access to the newspaper's advertising columns did not violate the equal protection clause.

Sinn v. The Daily Nebraskan, 638 F.Supp. 143 (D.Neb. 1986) [ELR 8:10:18]

Attorneys Fees.

In granting summary judgment to two companies which allegedly infringed a copyrighted Halloween horror sound effects recording, a Federal District Court denied, without stating any reason, the companies' motion for attorneys fees. A Federal Court of Appeals was unable to determine the basis for the denial of fees and has remanded the matter for further consideration. Judge Weis suggested that on remand, if the District Court concluded that fees were proper, the court should review, among other factors, the relative lack of complexity of the litigation and the proportionality between the sum requested and the amount at stake for "the aims of the statute are compensation and deterrence where appropriate, but not ruination." The companies' claim for attorneys fees under Federal Rules of Civil Procedure 11 also was remanded.

Lieb v. Topstone Industries, Inc., 788 F.2d 151 (3d Cir. 1986) [ELR 8:10:18]

Copyright Infringement.

A Federal Court of Appeals has upheld a District Court decision holding that the owners of a roller-skating rink were obligated to pay royalties to the copyright holders whose songs were played on a jukebox located on the rink's premises. The District Court found that Gerry's Roller Skating Rink in Corbin, Kentucky was an establishment which directly or indirectly charged for admission via a $2.00 "skating fee," and therefore did not qualify for the statutory jukebox exemption from liability for copyright infringement. The court enjoined the further use of the jukebox at the rink until the owners

obtained an ASCAP license and paid royalties to the copyright owners; and ordered damages of $3000 for past infringements and over $4,000 for attorneys fees.

Senior Federal Court of Appeals Judge Bailey Brown stated that "skating at a skating rink, like dancing at a dance hall, is an activity traditionally and usually associated with musical accompaniment. It seems undeniable that it was the well-known preference of skaters for such accompaniment that led [the owner] to position all six of the jukebox's external speakers immediately around the perimeter of the skating area. . ." There was a sufficient nexus between the jukebox music and the skating fee so as to characterize the skating fee as an indirect admission charge within the meaning of the Copyright Act, stated the court and attorneys fees were properly awarded.

MCA, Inc. v. Parks, 796 F.2d 200 (6th Cir. 1986) [ELR 8:10:18]

Previously Reported:

The following cases, which were reported in previous issues of the Entertainment Law Reporter, have been published: Blatty v. New York Times Company, 232 Cal.Rptr. 542 (8:9:4); Kelly v. William Morrow & Co., 231 Cal.Rptr. 497 (8:9:4).

The Federal Court of Appeals opinion in Seiler v. Lucasfilm Ltd., reported at 8:8:7, has been modified and superceded by an opinion published at 808 F.2d 1316.

The United States Supreme Court has declined to hear an appeal in the case of Marsh Media, Ltd. v. Federal Communication Commission, 798 F.2d 772 (ELR 8:8:17). The FCC had ordered Marsh to divest part of

its interest in an Amarillo, Texas cable television system because Marsh also owned a local television station. A Federal Court of Appeals upheld the FCC's ruling, stating, in part, that the Commission's broadcast-cable cross-ownership rules did not violate Marsh's First Amendment rights.
[ELR 8:10:18]

IN THE NEWS

High Court of London rejects copyright infringement claim against composer of "Chariots of Fire" theme

Vangelis, the composer of the theme from the 1981 film "Chariots of Fire," did not infringe the song "City of Violets" which was written in the mid-1970s by Stavros

Logarides for a Greek television series, the High Court of London has ruled. Vangelis stated that he wrote the score for the film before he heard Logarides' work. Judge John Whitford ordered Logarides' publisher, EMI Music Publishing, to pay court costs. [Mar. 1987] [ELR 8:10:19]

MCA Records' lawsuit alleging that Scorpio Records manufactured and distributed counterfeit cassettes is dismissed

A Federal District Court in Los Angeles has dismissed MCA Records' $10 million lawsuit against Scorpio Music.

MCA had claimed that Scorpio manufactured and distributed counterfeit cassettes by artists such as The Who, Tom Petty and Jimmy Buffet. But Judge Stephen

Wilson stated, following closing arguments by the parties, that MCA did not establish that three allegedly counterfeit cassettes of the album "Odds & Sods" by The Who indeed were counterfeit; that the cassettes had been supplied to local retailers by Scorpio; or that MCA actually held the copyright to the album.

The trial of Scorpio's breach of contract action against MCA has been set for July 14, 1987. [Mar. 1987] [ELR 8:10:19]

NCAA's mandatory drug test requirement is ruled unconstitutional by California trial court judge

Stanford University diver Simone LeVant has obtained a preliminary injunction barring the National Collegiate Athletic Association from requiring LeVant to submit to

urine tests in connection with her participation in upcoming NCAA championship qualifying events.

Santa Clara County Superior Court Judge Peter G. Stone, according to news reports, ruled that mandatory urine tests are an "obtrusive, unreasonable and unconstitutional invasion of privacy;" the ruling was based on the California Constitution, which specifically includes, as the federal Constitution does not, the right of privacy. [Mar. 1987] [ELR 8:10:19]

Producers of "Frankenchrist" record album may be prosecuted for including allegedly pornographic poster in album package

A Los Angeles Municipal Court judge has refused to dismiss misdemeanor pornography distribution charges against the producers of the Dead Kennedys'

"Frankenchrist" album and against the group's lead singer, Jello Biafra.

The Dead Kennedys' album included a poster by artist H.R. Giger showing ten sets of male and female genitals engaged in sexual intercourse.

California law bans the sale of "harmful material" to minors. Judge Sherrill D. Luke rejected the argument that the statute did not apply to the musicians, producers, manufacturers and distributors of the album. And the First Amendment did not necessarily protect the album parties if no measures were taken to prevent the sale of such material to minors, stated the court.

If convicted, the album parties could be sentenced to a maximum penalty of one year in jail and a $2,000 fine. [Mar. 1987] [ELR 8:10:19]

Los Angeles trial court dismisses journalist's action against the National Enquirer involving story about John Belushi's death

Los Angeles Superior Court Judge Miriam Vogel has dismissed writer Christopher Van Ness' $1.1 million lawsuit against the National Enquirer.

Van Ness alleged that the Enquirer "stole" his story about Cathy Evelyn Smith's involvement in comedian John Belushi's death. According to news reports, Van Ness claimed that the publication agreed to pay him $25,000 in May 1982 if his information from interviews with Smith would support the headline "Was John Belushi Murdered?" Van Ness apparently received a $1,000 lead fee. The Enquirer stated that the June 1982 article "I Killed John Belushi" was based on interviews conducted with Smith in Toronto by two of its reporters.

Judge Vogel found that the Enquirer was not notified until October 1986 of the August 1983 lawsuit; under state law, the publication should have been notified of the complaint within three years.

It also was observed that the publication was given a copy of the lawsuit stamped "Original Filed, April 19, 1985;" Van Ness' attorney stated that the stamp was due to an attorney service's mistake. [Mar. 1987] [ELR 8:10:19]

Federal Communications Commission proposes review of syndicated exclusivity rules, but decides not to proceed on issue of cable television program signal scrambling

The Federal Communications Commission has agreed to consider, via an inquiry and notice of proposed

rulemaking, whether its deleted syndicated exclusivity rules should be reinstated, and has undertaken a notice of inquiry as to the effect on the cable television industry of compulsory licensing.

However, the Commission has rejected the request of the home satellite dish industry to review the issue of signal scrambling by cable television programming companies. About 34 of the approximately 70 satellite cable services have announced plans to scramble their signals. The Commission stated that government intervention would be premature because the satellite dish industry still is developing, but did agree to have the FCC staff prepare quarterly reports on scrambling. [Mar. 1987] [ELR 8:10:20]

DEPARTMENTS

Book Notes:

Legal and Business Problems of the Theater by Franklin R. Weissberg and Stanley Rothenberg (editors)

Each year, the Practising Law Institute devotes a portion of its three-day program on Counseling Clients in the Entertainment Industry to the theater. Every once in a while, however, PLI conducts a separate two-day program devoted exclusively to the theater. Legal and Business Problems of the Theater was the handbook compiled for distribution at the most recent of those programs.

The book contains copies of a wide assortment of contracts used in the production of stage plays and

musicalsincluding the Approved Production Contract that is the subject of the Business Affairs article in this issue. Also included are copies of the documents used in connection with theater production financing; and materials on the right of publicity and copyright.

Legal and Business Problems of the Theater is Course Handbook Number 212, Catalog Number G4-3777, in PLI's Patents, Copyrights, Trademarks, and Literary Property Series. It is priced at $40 and may be ordered directly from the Practising Law Institute, 810 Seventh Avenue, New York, N.Y. 10019; phone (212) 765-5700. [ELR 8:10:20]

A Guide for Legal Assistants by Michele C. Gowen (editor)

A Guide for Legal Assistants: Roles, Responsibilities, Specializations, a multi-authored text edited by Michele C. Gowen, who is also a contributor to the volume, has just been published by Practising Law Institute.

This guide, written by both attorneys and legal assistants, details the roles, responsibilities, and specializations of legal assistants - a rapidly expanding field. It discusses the major practice areas for legal assistants and the basics of the law underlying them, spelling out exactly what a legal assistant does in the delivery of legal services. Where appropriate, sample forms are included. The book also describes how to set up and manage an efficient legal assistant program.

Chapters include the development of a legal assistant program; and the role of the legal assistant in: the corporate law department; bankruptcy practice; federal pension law and employee benefits; estates and trusts; antitrust litigation; securities litigation; construction

litigation; products liability and negligence litigation; trial preparation and trial; and legal research.

Though not geared to entertainment practices in particular, it does include a short section on the role of corporate legal assistants in preparing copyright and trademark registration applications.

Michele C. Gowen is a litigation specialist with the Philadelphia law firm of Pepper Hamilton & Scheetz, and has co-chaired the Practising Law Institute's Workshops for Legal Assistants for the past ten years.

This 380-page book, priced at $55, is available on 10-day approval. For further information contact June E. McDonald, Sales Manager, Practising Law Institute, Dept. AG, 810 Seventh Avenue, New York, New York 10019,(212) 765-5700. [ELR 8:10:20]

Piracy of Phonograms (Second Edition) by Gillian Davies

The problem of record piracy is not confined to the United States. It is, unfortunately, a worldwide phenomenon. In 1980, the results of a comparative study of piracy in countries belonging to the European Economic Community (EEC) were published in book form by ESC Publishing Limited. That study has now been updated by Gillian Davies, a Barrister and the Associate Director-General and Chief Legal Adviser of the International Federation of Phonogram and Videogram Producers.

The Second Edition of Piracy of Phonograms describes the nature and the extent of the piracy problem in Europe; international conventions that address the problem; existing national laws of EEC members that may be used to combat piracy; and recommendations and proposals for further action.

The 150-page, paper-bound book is published by and available from ESC Publishing Limited, 25 Beaumont Street, Oxford OXI 2NP, United Kingdom, at a cost of 17.95 British pounds. [ELR 8:10:20]

In the Law Reviews:

The Loyola Entertainment Law Journal, Volume Seven, has been published by Loyola Law School, Los Angeles, and contains the following articles:

The Enforceability of Spoils Contracts: A Practitioner's Playbook by Gary A. Uberstine and Richard J. Grad, 7 Loyola Entertainment Law Journal 1 (1987)

New Remedial Developments in the Enforcement of Personal Service Contracts for the Entertainment and

Sports Industries by Kevin W. Yeam, 7 Loyola Entertainment Law Journal 27 (1987)

From Tin Pan Alley to Title 17: Distinguishing Dramatic from Nondramatic Musical Performance Rights by Marilee Bradford, 7 Loyola Entertainment Law Journal 45 (1987)

Conflicts of Law: Conflicts Bring Harmony to the Picture Ken Focusing Upon Publicity Rights, Bi-Rite Enterprises v. Bruce Miner Co., 7 Loyola Entertainment Law Journal 79 (1987)

Constitutional Law: Death of an Ordinance: Pornography Unconstitutionally Defined as Sex Discrimination, American Booksellers Association v. Hudnut, 7 Loyola Entertainment Law Journal 89 (1987)

Constitutional Law: Should the Law Be Black and White When It Comes to Money? Regan v. Time, Inc., 7 Loyola Entertainment Law Journal 97 (1987)

Constitutional Law: Taking a Soft Look at Probable Cause: An Obscene Result for First Amendment Protections, New York v. P.J. Video, Inc., 7 Loyola Entertainment Law Journal 111 (1987)

Copyright Infringement: Infringer's Bad Faith Conduct and Commercial Gain Negates Fair Use, Harper & Row Publishers v. Nation Enterprises, 7 Loyola Entertainment Law Journal 123 (1987)

Copyright Infringement: Copyright Violations in a Catholic Archdiocese- "The Sins of the Fathers," E. E. L. Publications v. Catholic Bishop of Chicago, 7 Loyola Entertainment Law Journal 145 (1987)

Defamation: A Case of Mistaken Identity, Lerman v. Flynt Distribution Co., 7 Loyola Entertainment Law Journal 159 (1987)

Sex Discrimination: Another Hurdle on the Road to Equality, Martin v. International Olympic Committee, 7 Loyola Entertainment Law Journal 167 (1987)

Trademark Infringement: Pursuing Colorable Claims May Result in Paying "King" Size Damages, Universal City Studios v. Nintendo Co., 7 Loyola Entertainment Law Journal 177 (1987)

Unfair Competition: Copy Cats Can No Longer "Take the Money and Run," Allen v. National Video, Inc., 7 Loyola Entertainment Law Journal 191 (1987)

Victims' Compensation: Congress Acts to Make Sure That Crime Doesn't Pay- Sometimes, United States v. MacDonald, 7 Loyola Entertainment Law Journal 201 (1987)

Columbia University-Volunteer Lawyers for the Arts Journal of Law and the Arts, Volume It, Number 2 has been published with the following articles:

Source Licensing: The Latest Skirmish in an Old Battle by Ralph Oman, 11 Journal of Law and the Arts 251 (1987)

Charitable Contributions after the 1986 Tax Act and Problems in Valuation of appreciated Properly by Robert Anthoine, 11 Journal of Law and the Arts 283 (1987)

World Intellectual Properly Organization Report of Governmental Experts on Model Provisions for National Laws on Employed Authors, 11 Journal of Law and the Arts 315 (1987)

Model Provisions for National Laws on Employed Authors, 11 Journal of Law and the Arts 323 (1987)

Comment on Model Provisions for National Laws on Employed Authors by Mario Fabiani, 11 Journal of Law and the Arts 325 (1987)

Dispute Resolution for the Arts Community, by Alma Robinson, 11 Journal of Law and the Arts 333 (1987)

Memorandum of Support for S. 2796 Introduced in the 99th Congress by Senator Edward M. Kennedy by John B. Koegel, 11 Journal of Law and the Arts 347 (1987)

The NCAA and Its Student-Athletes: Is There Still State Action? by Gordon A. Martin, Jr., 21 New England Law Review 49 (1985-86)

Of Hoops, Labor Dupes and Antitrust Ally-Oops:Fouling Out the Salary Cap, 62 Indiana Law Journal 95 (1986)

The California Law Review has published a Symposium: New Perspectives in the Law of Defamation with the following articles:

Foreword: The Sociological Tort of Defamation by Jerome H. Skolnick, 74 California Law Review 677 (1986)

The Social Foundations of Defamation Law: Reputation and the Constitution by Robert C. Post, 74 California Law Review 691 (1986)

The Meaning of Reputation in American Society by Robert N. Bellah, 74 California Law Review 743 (1986)

Reputation and the Modem Journalistic Imperative by James Reston, 74 California Law Review 753 (1986)

The Role of the People in First Amendment Theory by Frederick Schauer, 74 California Law Review 761 (1986)

The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get by Randall R Bezanson, 74 California Law Review 789 (1986)

A Declaratory Judgment Alternative to Current Libel Law by Marc A. Franklin, 74 California Law Review 809 (1986)

Declaratory Judgments for Libel: A Better Alternative by David A. Barrett, 74 California Law Review 847 (1986)

Libel Regulatory Analysis by Martin M. Shapiro, 74 California Law Review 883 (1986)

Government Control of Information by Cass R. Sunstein, 74 California Law Review 889 (1986)

Comment: Government Secrecy and the Constitution by Gerhard Casper, 74 California Law Review 923 (1986)

Statements of Fact, Statements of Opinion, and the First Amendment by Jeffrey E. Thomas, 74 California Law Review 1001 (1986)

When "Fair is Foul": A Narrow Reading of the Fair Use Doctrine in Harper & Row, Publishers, Inc. v. Nation Enterprises, 72 Cornell Law Review 218 (1986)

The Craft of Drafting Plain-Language Jury Instructions: A Study of a Sample Pattern Instruction on Obscenity by Jamison Wilcox, 59 Temple Law Quarterly 1159 (1986)

Private Monopoly and the Public Interest: An Economic Analysis of the Cable Television Franchise by Thomas W. Hazlett, 134 University of Pennsylvania Law Review 1335 (1986)

Moral Rights in English Law - The Shape of Rights to Come by Gerald Dworkin, 8 European Intellectual Property Review 329 (1986) (published by ESC Publishing Limited, Sales Department, Mill Street, Oxford OX2 OJU, England)
[ELR 8:10:21]