LEGAL AFFAIRS

Some Thoughts on Liability and Damages in the Law of Libel

by Alan J. Hartnick

Liability

In the prehistoric days before the substantive rules of defamation were constitutionalized, the hornbook law was that each republication of a "libel" was a separate libel. Is this still the law?

What about the republication by a national news magazine of a clearly defamatory article from a foreign newspaper? Does it make any difference if a private person rather than a public figure was involved? Must the libel plaintiff look only to the source of the defamatory statement, the foreign newspaper, rather than seek a retraction and compensation from the republishing national news magazine, which may have magnified the harm?

If the libel plaintiff must look to the foreign source only, there is in effect a single publication rule. Alas-to the libel plaintiff, there may be a wrong without an effective remedy, because foreign remedies may differ from our law.

Constitutional Standard

In the landmark case of New York Times v. Sullivan, n1 the Supreme Court held for the first time that the Constitution delimits a state's power to award damages to public officials against critics of their official conduct. The higher standard was "actual malice" and over the years that standard was applied to "public figures" and "limited public figures." If the libel plaintiff is not a "public official," "public figure" or "limited public figure" the states may define an appropriate standard of liability for a publisher or broadcaster, providing that states cannot impose liability without fault. n2

New York Standard

What are the controlling standards in New York? What if the media merely republish? What rights, if any, does an innocent libel victim have?

Under New York law, when a private individual has been defamed in an article that is on a newsworthy topic, that individual, in order to recover, must establish by a preponderance of the evidence that the publisher of the defamatory information acted in a "grossly irresponsible" fashion in regard to publishing the falsehood. The seminal case is Chapadeau v. Utica Observer-Dispatch, n3 in which the New York Court of Appeals stated that, where the content of the article is arguably within the sphere of legitimate public concern that is reasonably related to matters warranting public exposition, the party defamed may recover. However, to warrant such recovery, he must establish, by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.

There is no clear standard to use in judging whether a defendant in a libel case was "grossly irresponsible."

"A wide variety of factors may enter into a determination of whether the 'grossly irresponsible' standard has been met, such as whether sound journalistic practices were followed in preparing the defamatory article whether normal procedures were followed and whether an editor reviewed the copy. . ., whether there was any reason to doubt the accuracy of the source relied upon so as to produce a duty to make further inquiry to verify the information, for example by checking secondary sources. . ., and whether the truth was easily accessible. . ." Hawks v. Record Printing & Publishing Co. Inc. n4

Defining Public Concern

New York courts have been most liberal in construing what is arguably within the sphere of legitimate public concern. Two cases in particular are of interest, Carlucci v. Poughkeepsie Newspaper Inc. n5 and Robart v Post-Standard, n6 indicating how far the New York courts have gone.

The court in Robart granted defendant's motion for summary judgment in a libel suit brought by a private individual. The suit was based on a newspaper story which falsely stated that plaintiff had been arrested and charged for driving an uninsured vehicle.

The court found that the article was of public concern, and dismissed plaintiffs complaint because, as a matter of law, the newspaper's behavior did not rise to a level of gross irresponsibility. Defendant's reporter gathered the false information by telephoning the public information officer at the New York state police barracks, who, in a daily and routine report, provided information regarding arrests and charges. The reporter did not double-check the information he was given, nor did anyone else at the defendant newspaper. However, the court noted "that the reporter would have no reason to doubt the accuracy of the information supplied, and relying upon it did not demonstrate gross irresponsibility, even though the report given by the officer later proved to be inaccurate."

What was newsworthy? The court stated that the plaintiff was engaged in conduct that falls within the criminal justice system, and the disposition of the charge against her was a matter of public concern. It was of no moment the newspaper article incorrectly stated that plaintiff was arrested and finally charged. All that happened was that plaintiff bears the cost of progress. There is no actionable libel at all. And what does incorrect information about a charge against the plaintiff have to do with robust police debate-the reason for the First Amendment?

In Carlucci, the court dealt with a similar set of facts. The plaintiff was a private figure suing a newspaper for libel. The article falsely stated that plaintiff was connected with an individual arrested by the police on gambling charges. The court held that, because the article covered a topic within the sphere of legitimate public concern, plaintiff could recover only if the defendant was "grossly irresponsible." Defendant's reporter had obtained the inaccurate story from an officer at the police barracks. No one doublechecked the story.

The court, relying on Robart, held that reliance on a police report did not demonstrate gross irresponsibility and, as a result, the court granted defendant's motion to dismiss the complaint.

And so, the New York "libel" plaintiff, even if he or she is not a public official or figure, under the euphemisms of "chilling effect" and "the public's right to know," may have no legal remedy at all-except to pay his or her attorneys and costs. Is the test of "grossly irresponsible" the appropriate balance?

Republication Privilege

There is still another privilege for the media. In Karaduman v. Newsday, n7 a private individual brought a libel suit against a book-publishing company that had reprinted, in book form, a series of magazine articles that had allegedly libeled plaintiff. The New York Court of Appeals dismissed the libel suit against the publisher, finding that the republisher was legally entitled to rely on the research of the original publisher unless, prior to the time of republication, there was substantial evidence that the previously published information was untrustworthy. Thus, in Karaduman, the court created a qualified privilege for defendants in libel suits who simply publish information collected by others. This qualified privilege may in some cases provide protection above and beyond the newsworthy privilege created by Chapadeau.

The qualified privilege has been used on a number of occasions to obtain summary judgments for defendants in libel cases. In Ortiz v. Valdescastilla, n8 for example, a Spanish-language newspaper ran an article written by an experienced free-lance author who had a good reputation for accuracy. Because the newspaper had no reason to think that the information in the author's story was incorrect, the newspaper was able to obtain summary judgment, dismissing plaintiff's libel claims against it.

In Zetes v. Richman, n9 one of the defendants was a newspaper that had reprinted an allegedly libelous article about plaintiff written by a United Press International reporter and disseminated by the UPI Wire Service. The court held that the newspaper was entitled to republish the UPI story without liability, because there was no evidence that the newspaper should have realized that the information contained in the UPI story was suspect.

In Davis v. Costa-Govras, n10 the court granted summary judgment to a paperback book publisher in a libel action. The text of the paperback had come from a third party's hardcover edition. This third party, a large and reputable publisher, sold the paperback rights to defendant who had published the work relying on the third party's reputation and the third party's assurances that the book contained no libelous or unlawful matter. The court held that the qualified privilege protected defendant from liability and dismissed plaintiffs libel claims against the paperback publisher.

The republication privilege recognized by New York courts is a logical corollary of the rule that liability in a libel case must be based on fault. A republisher can be at fault only if he had some reason to know that he was publishing a story based on untrustworthy sources. Republication of a libel is therefore permitted. But what about the right, if any, of the victim?

Media "Arrogance"

Renata Adler, in her excellent recent book "Reckless Disregard," highlights the "arrogance" of the media in connection with the celebrated Sharon and Westmoreland cases. The vice, if any, would appear to be the latitude allowed the media after New York Times v. Sullivan. A militant, perhaps revolutionary, point of view could have been that Sullivan and progeny should be reversed Ms. Adler did not take such view.

The journalistic accomplishment in the Watergate scandals should be enough to excuse many abuses. Certainly, most of the media acts with restraints. The New York Times, as a matter of policy, has a "Corrections" column. Time uses the "Letters to Editor" column "to set the record straight."

If the story is wrong, why should the media not apologize? n11 It is a common observation that, in criminal law, the law favors the accused and not the victim. Must it be the same for libel? The very least that a libeled plaintiff should have is an apology in the same prominence and location as the original story or program.

Although a required apology might unconstitutionally violate the media's First Amendment rights, if the media wrongfully refuse to apologize, then perhaps the present higher standards protecting the media should not be applied.

Bifurcated Trial Proposal

In short, I suggest a bifurcated trial could ensue. The first trial would be whether the libeled plaintiff was entitled to an apology and fair compensations. If yes, and if the media did not apologize or fairly pay, the second bifurcated trial would be a common law libel trial, without the benefits of the constitutionalizing of the substantive laws of defamation and the state cases, like Chapadeau and Karaduran that came after Gertz. The "actual malice," "grossly irresponsible" standards would not be applied in the second bifurcated common law trial. I suppose if Miranda may be overruled, so, too, Sullivan may be reformed.

It may be that the possibility, if constitutional, of a bifurcated trial will shorten rather than lengthen judicial and lawyers' time. The necessity for a retraction would serve as a self-policing mechanism for journalists. The legal costs may be less. The "deep pocket" of some of the media would be less important as a factor in litigation.

If the plaintiff is interested in money rather than principle, he or she should not request a retraction, and the case will be tried with the standards that appear to favor the media. If reputation is really the issue, the injured plaintiff can demand a retraction and equitable compensation (but not pain and suffering or punitive damages). Without compensation for actual harm, the proposed plan would be unfair to the victim and be capable of abuse by the media.

Perhaps arbitration is less awkward. I am aware that the media resent any libel claim. But the balance is somehow wrong. There should be concern for the aggrieved individual. If the plaintiff is really innocent and a victim, he of she is entitled to some recognition. He or she alone should not bear the social cost of the public's right to know.

The various questions asked of the jury by U.S. District Judge Abraham D. Sofaer in Sharon v. Time established falsity but not liability. I suspect that General Ariel Sharon would have preferred a retraction by Time to such jury findings.

Recent Examples

To take two recent examples:

Libel plaintiff Nelson was harmed when she was named in a Globe magazine article as being instrumental in preparing a marshmallow diet. n12 The statement was false, defamatory and of and concerning plaintiff. On summary judgment, the court held that the publisher was not "grossly irresponsible."

The reader can imagine the shock of plaintiff Nelson, a respected nutritionist, to learn that she had falsely been named in an article about a marshmallow diet. Can you imagine any nutritionist recommending a marshmallow diet? Plaintiffs horror was of no moment. She lost. It was a small matter in the price of progress.

She should have had a retraction and actual damages, if any. A perfect example: If the Globe did not permit a retraction, the applicable law for the bifurcated case would be the common law, and the Globe would lose. Without some inducement for an apology, and with teeth, the media had no reason to apologize. But the Globe should have apologized.

Another example: Quezada, the libel plaintiff, claimed that an illustration appearing in the New York Daily News wrongfully identified him as being a drug dealer. n13 In that case, a retraction would not be reasonably expected, because it was not clear whether the illustration was "of and concerning" plaintiff.

The test for retraction should favor the media. The burden of showing that the statements made about him or her were false is on the plaintiff. n14 A retraction should be necessary only if the story or program was clearly erroneous by the preponderance of the evidence. There must be clear proof that the plaintiff was indeed a victim. If so, it should be good manners to apologize - and my proposal puts the force of law behind civilized behavior.

Point of View

The reader must determine whether he or she perceives media libel from the point of view of the media or the victim. If from the victim's viewpoint, a policy favoring retractions should be in the public interest. State-retraction statutes should show the way.

Nonetheless, it is unlikely that any court or Congress will limit New York Times v. Sullivan or Chapadeau to permit retractions; it is unlikely that the libel protections for the media will be eroded. What group would sponsor such remedial legislation and have sufficient political clout to see the legislation through? It is a fact of legal life that individuals will lack realistic opportunities to counteract false statements by the media. Truth is not the issue. The public's right to know is the only issue.

It may be my proposal to have an alternative no-fault system for media libel is nostalgia for an era that needed reform. To quote Peter Stoler, n15 a senior correspondent for Time: "More important, the media must realize that, whether the American people likes them or not, the nation needs them."

And so, the wrongly accused nutritionist in the marshmallow diet bears the burden for us all.

Damages

On June 24, 1985, Representative Schumer introduced a bill n16 to protect the constitutional right to freedom of speech." That bill provided, among other things, that "Punitive damages may not be awarded in any action arising out of a publication or broadcast which is alleged to be false and defamatory." The bill was not passed by Congress, but does raise important issues.

Why is there such attention to punitive damages in libel cases? Punitive, or exemplary damages, are intended to solace the plaintiff for the aggravation of the original wrong or to punish the defendant for evil behavior or to make an example of him or her. n17 The purpose then is to punish and deter. Such an award must have a sufficient "sting" to be effective.

Punitive damages awards evolved, as an aspect of civil tort law, to enforce societal goals and objectives. Why should libel cases be treated differently from noncommunicative torts, such as malpractice actions?

The Practical Problem for the Media

The mass media typically prefer to defend content-based lawsuits rather than settle in the belief that such a position deters frivolous libel and privacy actions. n18 Such stonewalling helps if libel plaintiffs do not have "deep pockets." The risk in fighting to the death is defeat in some cases and thereafter punitive damages may be awarded. No one can win every case.

If punitive damages are awarded, punitive damages may not be recovered from the insurance carried by the media. Many states take the position that it would violate public policy to allow a wrongdoer to escape punishment for improper actions by obtaining insurance for punitive damages. n19

And so, it is the lady or the tiger. The media is unwilling to settle and does not want the risk of punitive damages. One way for the media to escape the possibility of punitive damages in libel cases is to eliminate punitive damages. And so, the standard media defendant's position is to oppose punitive damages. Inaccurate speech, deliberate or otherwise, is deemed to be an inevitable part of free debate. A First Amendment absolutist understands such positions. But what about the libel victim?

What if a corrupt newspaper knowingly libels Snow White? Must Snow White just turn the other cheek?

The State of the Law

In Gertz v. Robert Welch, Inc. n20 the Supreme Court held that punitive damages in libel actions contravened the guarantees of the First Amendment in cases in which the plaintiff failed to prove "constitutional malice" unless there was some fault on the part of the defendant. As developed by the Supreme Court, "constitutional malice" (or "actual malice") requires the speaker's or publisher's subjective awareness of its falsity.

In order to recover punitive damages under this high standard, a plaintiff is required to prove that the speaker or publisher entertained a subjective "awareness of probable falsity." n21 In theory, unless the defendant entertained serious doubts about the truth of the statement, punitive damages cannot be awarded.

To put the law another way, plaintiffs who are public officials and public figures must prove constitutional malice in order to prevail, n22 and those who are private figures must prove that the defendant was at least at fault in disseminating the defamatory statement, n23 Gertz changed the common law rule of strict liability for libel and held that states cannot impose liability without fault. In cases involving matters of "public concern," plaintiffs are required to prove constitutional malice in order to recover punitive damages. n24 In short, the Supreme Court has never held that punitive damages in libel cases as such are barred by the Constitution.

The construction of constitutional malice gave some breathing space to the media. The only speech on matters of public concern which may be subject to punitive damages is speech which is published with constitutional malicewith knowledge of falsity or with reckless disregard for the truth. n25 The issue then is whether such speech, insofar as punitive damages are concerned, is worthy of constitutional protection? What about the libel victim if the statement is made with knowing or reckless falsity? Is it just too bad?

The Committee Report of the City Bar Association Committee on Communications Law

The Record of the Association of the Bar of the City of New York recently published a report on "Punitive Damages in Libel Actions" by the Committee on Communications Law. n26 The chair was the esteemed First Amendment lawyer, Victor A. Kovner. There was one dissent by Mary K. O'Melveny. Without questioning in any way the clarity, scholarship or quality of the majority and dissent reports, it may be that several members of the majority of the Committee had media connections and that the dissent was a libel plaintiffs' lawyer. Notwithstanding lack of client identification (assuming the same were important), the reports by the majority and the dissent represent a marvelous and informative dialogue on the place of punitive damages in libel actions. The dialogue is not an update on the state of the law but concerns different views of public policy. And there is no reason for advocates to be impartial.

The majority believes that the present rules governing the availability of punitive damage awards in libel cases lead to excessive caution. The punitive damage award remedy, although it represents the societal interest in preserving individual reputation, is, to the majority, too blunt and drastic a weapon to achieve the desired objective, especially in the light of the vital countervailing First Amendment interests.

The dissent believes that not all speech is of equal First Amendment importance. The press and the networks should not be able to circulate knowing or reckless falsehoods damaging to private reputation without subjecting itself to liability for damages, including punitive damages.

And so, the issue is joined.

The Majority Report

The majority report believes that there should be no role for punitive damage awards under our system of free expression, not even to deter or punish knowingly or recklessly false speech. The majority understands the countervailing interests in preserving individual reputation, but believes that punitive damage awards are a constitutionally inappropriate remedy in libel actions and should be prohibited in all cases. The tendency of jurors to view the issues in a defamation action simply as whether or not the plaintiff has been treated "fairly" creates the potential for awards of punitive damages. The end result of such uncertainties create a substantial risk of self-censorship.

The majority writes that there is a fundamental inconsistency between the vision of First Amendment freedoms and the policy of deterrence through the award of punitive damages for the publication of false speech. n27 Juries and courts should not punish reprehensible speech, even if it is appropriate to award compensation damages for such speech.

The majority believes that some lower courts have shown an increased willingness to find constitutional malice based on evidence of negligence, which they have deemed to constitute "reckless disregard" under Sullivan. The majority considers this a dilution of the constitutional malice standard. The committee also considers that the tendency to shift the constitutional malice inquiry from subjective awareness of truth or falsity to "second guessing" the responsibilities of editorial decisions to be cause of grave concern.

The principal concern of the majority about permitting juries to award punitive damages in libel cases is that such practice allows juries to punish unpopular speech in amounts which are largely within the unbridled discretion of those juries. Reprehensible speech may be confused with mere unpopular speech-and the risk of such confusion may be too great.

Although the Committee considers various alternatives to abolishing punitive damages, the Committee urges that, because of the huge arbitrary awards, whether or not sustained on appeal, punitive damages should be abolished in all libel actions.

The Dissent

The dissent of Mary K. O'Melveny states that the asserted danger of self-censorship remains largely undocumented. Ms. O'Melveny characterizes the majority report as rejecting exemplary relief no matter what degree of recklessness or malicious motivation might be involved, or how egregious the defamation.

To the dissent, punitive damages serve a clear societal objective - the professional obligation to tell the truth. The main flaw in the majority report is that it treats the exacting burdens of the constitutional malice rule as of far less consequence than reality dictates. The libel plaintiff "faces overwhelming odds and inordinate delays" and "heavy odds against any ultimate victory." n28

The conclusion of the dissent is that punitive damages awards reflect public dissatisfaction with the perceived arrogance of the media. The suggestion is that libel defendants should re-evaluate their practices and attitudes towards the public whose interests are claimed to be served.

Evaluation

The positions in both reports of the City Bar Communications Committee are brilliantly argued. Whether or not the media should cease political efforts to limit or reduce punitive damage awards, I think the best advice is given to journalists by Bruce W. Sanford. n29 "Avoid slipshod, indifferent, or careless reporting. Whenever a statement can injure someone's reputation, treat it like fire. When in doubt whether a story is accurate, check it out." The social cost of the First Amendment need not be the humiliation of the libel victim.

And so, who is right? The majority or the dissent? Perceptions of libel depend on whether one takes the point of view of the media or the alleged libel victims. In my view, and as an attorney who generally represents the media, it does seem that the legal system, if appeals are considered, works well in the field of libel. The rule of constitutional malice appears to protect responsible libel defendants. Why protect defendants who have lied or behaved recklessly?

I am also aware, from trial experience involving punitive damages in torts as diverse as false arrest and libel, that evidence of wealth, which is allegedly necessary in order to "smart" the defendant, may inflame the jury. Therefore, I believe in retraction statutes which give the libel defendant an opportunity to limit damage awards by publishing a correction of the alleged defamatory statement. Alternatively, the award of punitive damages might be limited by a requirement that they bear a reasonable relationship to the amount of compensatory damages awarded to the libel plaintiff.

The majority report of the City Bar listed various alternative solutions proposed, including the above, but the Committee believed that each has shortcomings. Abolition of punitive damages in libel seems to me too extreme. n30 I would prefer to expand and perfect the other alternatives. If not, in an imperfect world, I would not tinker with the constitutional law of libel.

I doubt if the cry of "chilling effect" reflects the real success rate of libel defendants. Remember Oscar Wilde? It is hard to win a libel case; it is harder still if constitutional malice must be proved. The desire to change punitive damages so they would not apply to knowingly or recklessly false speech should not be a matter of great priority. It may be prophylactic to have an occasional win by a libel victim. n31 After all, journalists and their employers should not be libel-proof.

NOTES

1. 376 U.S. 254, 84 S.Ct. 710 (1964).

2. Gertz v. Robert Welch Inc., 418 U.S. 323, 347, 94 S.Ct. 2997, 3010 (1974).

3. 379 N.Y.S.2d 61, 64 (Ct.App. 1975).

4. 486 N.Y.S.2d 463, 466 (3d Dept. 1985).

5. 450 N.Y.S.2d 54 (2d Dept. 1982), aff'd on other grounds, 456 N.Y.S.2d 44 (Ct.App. 1982).

6. 425 N.Y.S.2d 891 (3d Dept. 1980), aff'd 437 N.Y.S.2d 71 (Ct.App. 1981).

7. 435 N.Y.S.2d 556 (Ct.App. 1980).

8. 478 N.Y.S.2d 895 (1st Dept. 1984).

9. 447 N.Y.S.2d 778 (4th Dept. 1982).

10. 595 F.Supp. 982, 987 (S.D.N.Y. 1984).

11. At least 33 states have various versions of libel retraction statutes. Sanford, Libel and Privacy, Sec.12.1. Some of such statutes are largely obsolete because of constitutional rulings. Some states deny a plaintiff a cause of action unless he or she demands retraction. Sanford considers that such a "condition precedent" statute may be used only to preserve the right to litigate. Several statutes require that retraction be published in a particular type size and location.

12. Nelson v. Globe Intern Inc., 626 F.Supp. 969 (S.D.N.Y. 1986).

13. Quezada v. Daily News, 501 N.Y.S.2d 971 (1st Dept. 1986).

14. Rinaldi v. Holt Rinehart & Winston Inc. 397 N.Y.S.2d 943, 950 (Ct.App. 1977). See Metcalf, Rights and Responsibilities of Publishers, Broadcasters and Reporters, Section 1.09 (McGraw Hill Inc. 1984).

15. Winship, Book Review of "The War Against the Press" New York Times Book Review, Jan. 18, 1987, p. 12.

16. H.R. 2846, 99th Cong. 1st Session.

17. Black's Law Dictionary (Third Edition).

18. Bezanson, Cranberg, Soloski, "Libel Law and the Press," 71 Iowa L. Review 217, 221 note 2 (1986) (hereafter "Iowa Libel Research Project").

19. See Employers Reinsurance Corp. v. National Enquirer, Inc., Civ. No. C-387419 (Cal. Sup. Ct., L.A. Cty., Sept. 3, 1982).

20. 418 U.S. 323 (1974).

21. Garrison v. Louisiana, 379 U.S. 64, 74 (1964).

22. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

23. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974).

24. Dun & Bradstreet Inc. v. Greenmoss Builders, 472 U.S. 749 (1985).

25. See the "Liability" section of this article, above.

26. Record of the Association of the Bar of the City of New York, January/February, 1987, p. 20 (hereinafter "Committee Report").

27. Committee Report, p. 29.

28. Iowa Libel Research Project, note 35.

29. Sanford, Synopsis of the Law of Libel, Second Revised Edition (Scripps-Howard Newspapers 1984).

30. See Jollymore, "The Constitutionality of Punitive Damages In Libel Actions," 45 Fordham L. Rev. 1382

(1977). Some state courts prohibit punitive damages even in cases where the plaintiff can prove constitutional malice. Committee Report, p.27. See Wheeler v. Green, 593 P.2d 777 (1979), in which the Supreme Court of Oregon banned punitive damage awards based upon the free press clause in its state constitution.

31. The conventional media position is that the threat of legal action and its attendant heavy costs could prevent the full exercise of First Amendment rights. Any libel win, to some, could result in censorship through intimidation. Query whether the cost of libel defense should be a trade-off for loss of reputation?

Alan J. Hartnick is partner in the New York firm of Colton, Hartnick, Yamin & Sheresky, an adjunct professor at New York University School of Law, and a regular columnist for the New York Law Journal (in which an

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[ELR 8:12:3]

RECENT CASES

Producer of the film MASH was entitled to accounting of a percentage of Twentieth Century Fox's profits from the spin-off television series "Trapper John, M.D.," rules New York trial court, but claim alleging breach of right of first refusal to produce television series is dismissed

A New York trial court has reached the "inescapable" conclusion that the television series "Trapper John, M.D. was a "spin-off" from the film "MASH" and that Twentieth Century Fox held the literary property rights in the series and in its title character as a trustee for Ingo Preminger, the producer of the 1970 film, and for his production company.

New York State Supreme Court Justice Martin Stecher, after reviewing the agreements among the parties, and after viewing the film MASH and the pilot television film of Trapper John, M. D. as well as three other episodes of the series, declared that the producer of the series intended to create a relationship with the film in the minds of viewers. Several documents also supported Preminger's contention that Fox's rights in Trapper John, M.D. arose from the company's acquisition of the novel MASH and of the rights to the characters and characterizations contained therein.

Fox argued that in a 1971 document, Preminger, in return for a payment of $500 for each television episode produced, yielded certain rights with respect to the MASH television series, and also waived any rights to participate in the Trapper John, M.D. series. But the document antedated any thought of the Trapper John series, noted the court, and thus did not provide the requisite identification of the purportedly waived right. Apparently Fox itself did not consider Trapper John, M.D. to be covered by the agreement until about three years after its initial presentation by CBS.

Justice Stecher then pointed out that Fox was entitled to realize on an opportunity stemming from its ownership of the novel, film or the characters or component parts thereof, only by sharing that benefit or opportunity with its fellow trust beneficiary. Fox claimed that Preminger's recovery should be reduced, as in the computation of film profits, by the amounts due Fox for the use of its facilities and by a distribution fee. But the television series was not a film and the "usual costs of and profits from distribution" did not apply in this case, particularly since CBS, not Fox, was responsible for any distribution activities.

Although the parties did not provide a method for calculating television profits, Preminger still was entitled to the contractually specified twenty-five percent of the benefit realized by Fox from Trapper John, M.D., stated Justice Stecher. Accordingly, Fox was declared a trustee for its own benefit and for the benefit of Preminger in a threeto-one ratio, of all sums, payments and benefits which it received from or by virtue of the Trapper John, M. D. television series and all sums, payment and benefits which it may subsequently receive, and was ordered to account for such amounts, and for any costs in acquiring the benefits from the series.

Accordingly to news reports, Fox has stated that a minimal amount may be due to Preminger; Preminger's attorney claims that the value of the twenty-five percent share could reach $15 million, based upon the recent sale of syndication rights for the series for $60 million.

Preminger also sought damages of $6 million, claiming that Fox failed to offer him the right of first refusal to act as the producer or executive producer of the Trapper John, M.D. series. But Preminger did not have an enforceable right to produce the series, declared the court in dismissing the claim; a contractual option concerning the production of the series was described as "an agreement to agree," and was only to be effective if the parties agreed to the terms, conditions and compensation relating to such services.

Preminger v. Twentieth Century-Fox Film Corporation, New York Law Journal, p. 12, col. 3 (N.Y.Cnty., April 24, 1987) [ELR 8:12:9]

Paul Newman and George Roy Hill did not establish antitrust injury in claim against Universal Pictures alleging conspiracy to minimize distribution of revenues from video cassettes of films "The Sting" and "Slapshot"

All "bee" references having appeared in the ELR's coverage of a dispute over the film "The Swarm" (see 7:12:12) ... we will proceed, without further bumbling, to the antitrust action filed by Paul Newman and director George Roy Hill against Universal Pictures in connection with the distribution of video cassette revenues from the films "The Sting" and "Slapshot."

In 1972, Newman and Hill entered agreements with Universal whereby the company agreed to pay them a specified percentage of the proceeds derived from "The Sting." In 1974, Universal agreed that part of Hill's compensation for directing three films, including "Slapshot," would consist of a percentage of the net profits from the film. Universal also agreed, in 1976, that Newman, who acted in "Slapshot," would receive, inter alia, a percentage of gross proceeds and net profits from the film.

In 1985, Newman and Hill sued Universal, alleging that the company had conspired with several other motion picture studios to minimize the profit participation revenue due them and other artists by classifying certain amounts received by the studios, such as video cassette revenues, as "distribution" revenue, rather than production revenue; under their contracts, Newman and Hill were not entitled to a percentage of distribution revenue. The complaint alleged that the purported agreement to restrict artist participation in video cassette revenues constituted a price fixing conspiracy in violation of sections 1 and 2 of the Sherman Act; pendent state law claims for breach of contract, breach of fiduciary duty, and for an accounting also were alleged.

A Federal District Court granted Universal Pictures' motion to dismiss the antitrust claim for failure to state a claim, and dismissed the remaining state law claims for lack of federal jurisdiction. A Federal Court of Appeals has upheld the rulings.

Federal Court of Appeals Judge Schroeder found that Newman and Hill failed to allege an antitrust injury with respect to the marketing of the films. The contracts involved were entered into before the alleged conspiracy arose in 1981. The conspiracy thus "could not have affected the competition for Newman and Hill's services at the time the contracts were made," stated the court. It also was pointed out that the alleged conspiracy could not have affected the artists' ability to negotiate with other studios for distribution of the video cassettes because the contracts covered the distribution of the films in all forms.

Furthermore, although an anticompetitive effect may be presumed with a price fixing conspiracy, a party alleging such a conspiracy still must show that his or her injury was caused by the anticompetitive acts.

Judge Schroeder concluded by pointing out that the alleged price fixing conspiracy "would clearly have affected competition" for film contracts entered into during the existence of the conspiracy, and that Hill and Newman might have other claims in connection with contracts made after 1980, but those claims were not presented to the court.

Newman v. Universal Pictures, Case No.85-6347 (9th Cir., April 6, 1987) [ELR 8:12:9]

Holder of service mark in the term "Starchasers" fails to obtain preliminary injunction to prevent distribution of feature film entitled "Starchaser: The Legend of Orin"

A Federal District Court in North Carolina refused to grant a preliminary injunction to John Lemmon Films, Inc. in its service mark infringement action against Atlantic Releasing Corp. in connection with the distribution of the full length feature film "Starchaser: The Legend of Orin."

Lemmon had obtained registration of a federal service mark for the term "Starchasers;" the company used the term to designate a proposed series of clay animated films about outer space adventurers.

While noting that the marks and the intended markets of the artistic works were similar, Federal District Court Chief Judge Robert D. Potter found that the absence of strong proof that Lemmon would suffer irreparable harm without a preliminary injunction and the likelihood that Atlantic would suffer substantial harm precluded the issuance of injunctive relief. Lemmon's full length movie featuring "The Starchasers" required two years of work prior to its release and "Fear of confusion between films marketed and shown two years apart ... is insufficient evidence that irreparable harm will be suffered" stated the court.

Furthermore, Lemmon waited about seven months after its initial unsatisfactory correspondence with Atlantic before filing its lawsuit just prior to the scheduled release date of the "Orin" film - a delay which did not support Lemmon's assertion that prompt action was required by the court to protect its rights. And Atlantic had presented evidence that if it were ordered to refrain from advertising and releasing its film with the chosen title, considerable changes would be necessary in the prints of the film, in the company's advertising campaign and in theater bookings. Atlantic already had spent about $470,000 on a promotional campaign, and while a large portion of this amount was spent with notice of Lemmon's claim, Judge Potter found it inequitable to cause Atlantic to lose much of its investment and "suffer injury to its goodwill" before a final decision on the merits and without a stronger showing of irreparable harm by Lemmon.

John Lemmon Films, Inc. v. Atlantic Releasing Corp., 617 F.Supp. 992 (W.D.N.C. 1985) [ELR 8:12:10]

Composer of Budweiser advertising jingle was not entitled to additional compensation because new jingle was not an "arrangement" of the original work, according to Federal District Court in New York

Beginning in 1970, Anheuser-Busch used a jingle entitled "Budweiser/You've Said It All" to advertise Budweiser beer. Steve Karmen composed the original music and, via his company Elsmere Music, entered into an agreement to license the jingle to Anheuser-Busch in return for an initial payment and additional compensation whenever "arrangements" of the work were used in Budweiser commercials.

Between 1970 and 1985, Anheuser paid Elsmere over $2 million. However, in late 1985, Anheuser began airing a new jingle "You Make America Work," written by another composer, and stopped further payments to Elsmere. When Karmen claimed that the new jingle was similar to his work, Anheuser sought a declaratory judgment that the new jingle was not an "arrangement" of the Karmen material.

In considering the meaning of the term "arrangement," a Federal District Court in New York first reviewed the parties' course of conduct in the 15 year period during which the Karmen jingle was used in Budweiser advertising. From 1970 to 1977, Karmen did most of the arrangements; he used significant portions of his original jingle in each arrangement. In 1978, for its "Worker Salute" campaign, Anheuser used new lyrics, a new slogan and a modified Karmen melody. Although Karmen did not arrange the Worker Salute commercials, "identifiable portions" of his music were incorporated in the commercials, and Elsmere received residuals when such "identifiable" or "substantive" portions of music were used.

The identifiable "arrangement" which defined the obligations of the parties, stated Federal Court of Appeals Judge Lumbard (sitting by designation) was a 3-4-5-6/6-4-2-1 melody. But the course of payments for this fragment did not entitle Karmen to residuals for the new jingle's 4-3-2-1 ending - the jingle did not contain eight "identifiable" Karmen notes, and was not an identifiable variation of Karmen's 6-4-2-1 ending. And Karmen's original rhythm for the jingle apparently was not used in the new work.

Judge Lumbard further observed that Anheuser and its advertising agency "erred on the side of generosity" to Karmen by paying him for commercials using very little of his music; the fact that such payments were made was inadequate evidence of a course of conduct requiring continued payments. Originality in advertising jingles is "severely restricted by the inherent nature of the art form," observed the court in ruling that the new jingle was not an arrangement of Karmen's work so as to entitle Elsmere to additional royalties. Elsmere's unjust enrichment claim also was denied.

Anheuser-Busch, Incorporated v. Elsmere Music, Inc., 633 F.Supp. 487 (S.D.N.Y. 1986) [ELR 8:12:10]

Publisher's insurer must indemnify author Joe McGinniss for legal fees and costs incurred in action brought by Jeffrey MacDonald, the subject of the book "Fatal Vision"

In 1983, G.P. Putnam's Sons published "Fatal Vision" a book written by Joe McGinniss about the 1970 murder of the family of Jeffrey MacDonald and MacDonald's conviction for the crimes. MacDonald had written to McGinniss in 1979 and promised to release the author from any cause of action "whether for libel, violation of right of privacy, or anything else - by reason of anything contained in the book." And in 1981, McGinniss and MacDonald signed a release agreement which granted the author broad rights to use MacDonald's story or a fictionalized version thereof in film or on television.

Nevertheless, in 1984 MacDonald sued McGinniss in a Federal District Court in California, claiming damages of $15 million for fraud, breach of contract, breach of the covenant of good faith and fair dealing, and intentional infliction of emotional distress. MacDonald also sued McGinniss and Putnam's in Los Angeles Superior Court, claiming that Fatal Vision was libelous.

Putnam's had entered an insurance contract with Employers Reinsurance Corporation which covered authors such as McGinniss. McGinniss notified Employers of MacDonald's federal court action and requested indemnification for defending the action. Employers responded that its policy did not cover the causes of action asserted against McGinniss by MacDonald.

Under the policy, coverage was provided for "injury sustained ... arising out of: (a) libel or slander or other defamatory or disparaging material; (b) invasion or infringement of the right to privacy ... " Applying New York law, Federal District Court Judge Sweet noted that that language "arising out of," as contained in an insurance policy, has been interpreted by the courts of New York to cover injury "originating from" or "having connection with" any of the specified torts contained in the policy.

MacDonalds' cause of action for fraud was grounded in an alleged libel, stated the court because any inquiry into whether or not McGinniss made the purported false representations to MacDonald concerning his plan to write the "true" story of the 1970 tragedy and its aftermath would necessarily involve an examination of the entire contents of the book and a determination as to its truth.

The allegations relating to the cause of action for breach of the covenant of good faith and fair dealing also "subsumed" a claim for libel, declared Judge Sweet, although the allegations were framed in contractual terms. However, the coverage of the Employer's policy did not extend to the portion of the cause of action alleging that McGinniss' dealings with producers concerning the television docudrama of the book compromised MacDonald's rights under his contract with the author and that McGinniss collected proceeds from the docudrama which were due to MacDonald.

With respect to the claim alleging intentional infliction of emotional distress, the court characterized the claim as being based on the allegation that McGinniss knew that if he wrote a "false" book, MacDonald would lose supporters, be mentally anguished, suffer physical reactions and be shamed and embarrassed. The complained-of conduct was that McGinniss held a personal opinion as to MacDonald's guilt and, acting upon that opinion, wrote a false book. The alleged injury to reputation, together with falsity formed "the core of a libel action," determined Judge Sweet.

In all, the pleadings in the federal action focused almost exclusively on the purported falsity of Fatal Vision and the resulting injuries to MacDonald, and the facts were "based upon, and at times indistinguishable from, an allegation of libel ... the torts alleged and the torts covered by the Policy [were] shown to be effectively the same." Employers therefore was required to indemnify McGinniss for legal expenses and any eventual judgment with respect to the causes of action discussed by the court, and the legal defense costs were to be paid as incurred by McGinniss.

The court concluded by denying McGinniss' claim for damages based on Employers' alleged "malicious" breach of the insurance contract.

McGinniss v. Employers Reinsurance Corporation, 648 F.Supp. 1263 (S.D.N.Y. 1986) [ELR 8:12:11]

Federal District Court denies USFL motion for new trial in antitrust suit against NFL; Court also denies USFL request that NFL be divided, limited to two networks, or forced to expand

As the clock runs down on the spring of 1987, professional football fans should have noticed something important: the United States Football League did not field teams last fall, and is not playing now. Once again, the National Football League is the only game in town for pro-football devotees. And thus far at least, the USFL has received less support from the courts than it did from customers and viewers.

The USFL was born in the spring of 1983 and played its games in the spring through 1985. In doing so, the new league avoided nose-to-nose competition for fans with the much older and better established NFL, whose games are played in the fall.

Though the USFL enjoyed some business and artistic success - its games were broadcast, for example, by ABC - the young league's owners decided that football was, in fact, a fall sport, or at least was perceived by Americans as being such. So the USFL voted to shift its season from spring to fall, beginning in 1986. When it did so however, it found that neither ABC nor NBC or CBS were interested in televising its games. As the USFL saw it, the refusal of all three networks to carry its games was the result of nothing less than Sherman

Act violations by the NFL, and the USFL alleged as much in an antitrust suit in Federal District Court in New York City.

The case went to trial last summer, and resulted in a jury verdict which seemed - at least at first - perplexing. For the jury found that the NFL has monopoly power in the market for professional football in the United States; that the NFL had willfully acquired or maintained that monopoly power; and that the NFL's monopoly power had in fact caused injury to the USFL. Yet despite these findings, the jury awarded the USFL only one dollar in damages. The following week, the USFL voted to "suspend" its 1986 season. It did not, however, throw in the towel on its case. It pursued post-trial motions, without success, and an appeal is now pending.

As noted in a Special Report published in these pages shortly after the trial's conclusion (ELR 8:4:7), one possible explanation for the surprising verdict was "juror confusion." Apparently, some of the jurors thought that if they found in favor of the USFL, and awarded it a token dollar, the judge would increase the amount of the award to a more adequate amount. One of the jurors in question disclosed her mistaken belief to the press, and "juror confusion" was one ground for the USFL's subsequent motion for a new trial. Judge Peter K. Leisure denied the motion, however, ruling (as anticipated in the ELR's Special Report) that the jurors' post-trial statements to the press were not admissible under the Federal Rules of Evidence to prove jury confusion.

Judge Leisure also rejected the USFL's contention that his jury instruction on nominal damages was in error and was the key source of the jury's confusion. The jury had been instructed that it could "award a nominal amount, say $1.00," if it was unable to compute the amount of the USFL's damages, or found that it could not separate the amount of losses suffered by the USFL as a result of its own mismanagement from the amount it lost as a result of NFL actions, or if it found that the USFL failed to prove the amount of its damages. This instruction was correct, Judge Leisure ruled, saying that it reflects the distinction between proof of antitrust injury on the one hand, and antitrust damages on the other. In other words, though the USFL apparently satisfied the jury that it had been injured, it must not have proved the amount of damage it suffered as a result of that injury.

Moreover, the judge rejected the USFL's contention that one dollar was so inadequate an award that a new trial was necessary for that reason. He briefly recounted the evidence offered by the NFL in support of its contention that the USFL's damages were the result of its own mismanagement, and concluded that the jury must have found this evidence to be "more compelling" than the evidence the USFL introduced to rebute the charge that it had been mismanaged.

Judge Leisure also denied the USFL's motion for a judgment notwithstanding the verdict, as well as an NFL crossmotion for judgment n.o.v. on the monopoly power issue.

In a later post-trial motion, the USFL sought an order dividing the NFL into two leagues, limiting the NFL to two (rather than three) network television contracts, or forcing the NFL to expand into USFL cities. According to news accounts, Judge Leisure denied this motion as well, though his opinion doing so has not been published as yet.

The USFL has appealed the judgment and oral argument is expected to be heard early this summer.

United States Football League v. National Football League, 644 F.Supp. 1040 (S.D.N.Y. 1986) [ELR 8:12:11]

NBA salary cap and player draft withstand antitrust attack in suit brought by Leon Wood, former rookie guard for Philadelphia 76ers; "labor exemption" applies, Federal Court of Appeals affirms

In 1984, Leon Wood was a star collegiate basketball player at Cal State Fullerton and a member of the United States' Olympic gold medal winning basketball team. He was drafted in the first round by the NBA's Philadelphia 76ers and was, no doubt, looking forward to earning a six-figure income. Unfortunately for him, his timing was just a bit off. For in 1983, the NBA and its Players Association had agreed upon a "salary cap" which was set to take effect the year Wood was drafted. Leon Wood was one of its first casualties.

The salary cap put a limit on the aggregate amount NBA teams could pay their players. For 1984-85, the 76ers were capped at $4.45 million, though if necessary, they could pay a first round draft choice $75,000 even if it took them above that cap. Because the 76ers' aggregate salaries did come to $4.45 million, they offered Wood $75,000-disappointing him mightily in the process. Wood responded with an antitrust suit challenging the legality of the cap, as well as the NBA player draft that had made him the property of the 76ers in the first place, and an NBA rule that prohibits players from using personal service corporations.

At first blush, Wood's case seemed to have little chance of success because of a doctrine known as the "labor exemption" The labor exemption has been called "an area of law marked more by controversy than by clarity." But in a nutshell, it provides that employment terms that would otherwise violate the Sherman Act are entirely exempt from the antitrust laws, if they are agreed to in a collective bargaining agreement negotiated between an employer (or group of employers) and a labor union. Since the salary cap, player draft, and player corporation rule all were agreed to in a collective bargaining agreement between the NBA and the NBA Players Association, they appeared to be exempt under the "labor exemption" doctrine.

Wood's lawyers, however, had some theories about why the labor exemption should not apply to their client. The most intriguing of their theories was that Leon Wood was still in college, and thus not a member of the Players Association, when the collective bargaining agreement was negotiated; and therefore, the agreement's provision should not be exempt as applied to him.

However, Federal District Judge Robert Carter disagreed with Wood's lawyers and dismissed the case, expressly ruling that the labor exemption does apply. (ELR 6:10:7) That ruling has been affirmed on appeal in an opinion by Circuit Judge Ralph Winter.

In Judge Winter's view, Wood's claim was a "wholesale subversion" of federal labor policy and therefore had to be "rejected out of hand" Judge Winter acknowledged that "the diversity of talent and specialization among professional athletes and the widespread exposure and discussions of their 'work' in the media make the differences in value among them as 'workers' more visible than the differences in efficiency and value among industrial workers." Nevertheless, he said, "High public visibility... is no reason to ignore federal legislation that explicitly prevents employees, whether in or out of the bargaining unit, from seeking a better deal where that deal is inconsistent with the terms of a collective agreement."

According to Judge Winter, "hardly a collective bargaining agreement in the nation" would "survive" if the court accepted Wood's grounds for striking down the salary cap and draft. The judge pointed out that collective agreements routinely set standard wages for employees with different skills; that industrial workers in a number of industries are assigned to particular employers through a hiring hall, without regard to the workers' preferences; and that newcomers in the industrial context routinely find themselves disadvantaged compared to those previously hired with respect to salaries, layoffs and promotions.

Finally, Judge Winter rejected Wood's argument that the draft and salary cap are illegal because they affect players who are outside the bargaining unit. This circumstance is a "commonplace consequence of collective agreements,' the judge pointed out. Furthermore, the National Labor Relations Act explicitly defines "employee" in a way that includes workers outside the bargaining unit.

Judge Winter also found the player corporation rule to be a mandatory subject of bargaining, because it concerns wages, and thus exempt from the antitrust laws under the labor exemption as well.

When Judge Winter was a Yale law professor, he coauthored a widely-cited article entitled "Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage," 81 Yale L.J. 1 (1971). And at the end of his opinion in Leon Wood's case, Judge Winter returned to a theme he first advanced in that article more than 15 years ago. He argued that the result in Wood's case is not only dictated by well-established precedents, but also - in the larger scheme of things - is a wise and even necessary result. Judge Winter seemed not to doubt that Leon Wood would have earned far more in the absence of the salary cap and player draft. But declaring them illegal, said the judge, would have eliminated "avenues of compromise" between the NBA and the Players Association, and thus would measurably increase the chances of a strike" "We decline to take that step," he ruled.

Although Wood lost his case, as things turned out, he did not have to settle for $75,000 after all. Instead, the 76ers were able to pay him more than $1 million over four years, despite the salary cap, by trading one player and not resigning another.

Wood v. National Basketball Association, 809 F.2d 954 (2d Cir. 1987) [ELR 8:12:12]

Federal District Court rules that offer made by New York Knicks to player Albert King violated NBA salary cap

In 1983, the National Basketball Association and the NBA Players Association agreed to a "salary cap" that was designed to insure the stability of financially troubled NBA teams. It took effect at the beginning of the 1984-86 season and will remain in effect through the end of the current 1986-87 season, now only weeks away.

The heart of the salary cap is quite simple. It provides that NBA teams may not pay their players, in the aggregate, more than an agreed upon amount. During its first year of operation, that cap was $3.5 million. The following year, the cap went up to $3.8 million. And this season, the cap increased to $4.0 million. Teams could allocate salaries among their players in any way they and their players agreed, but the total salaries payable in each year were not to exceed these amounts ... with some qualifications and exceptions.

Although the heart of the cap is simple, the qualifications and exceptions have made it almost byzantine. Among other things, five NBA teams already were over the cap on the day it was agreed to, and therefore exceptions had to be carved out for them from the start. The New York Knicks were one of these teams; their cap was $4.60 million. Other exceptions made the cap even more interesting ... and, some would say, "porous." Although the teams themselves wanted the cap - it certainly wasn't desired by the players - at least some teams have been enormously creative in devising ways to pierce the cap while remaining faithful to its letter. Two years ago, the Entertainment Law Reporter published a Business Affairs article, entitled "Playing with the NBA Salary Cap," describing one way in which teams had paid more than their caps without violating the rule. (ELR 6:11:3)

When the New York Knicks decided they wanted to hire veteran free agent Albert King away from the New Jersey Nets in time for the 1985-86 season, the Knicks devised yet another method for piercing their cap. This time, however, Federal District Judge Robert L. Carter ruled that the Knicks violated the rule.

King wanted a five-year, guaranteed contract totalling $3.3 million. Although $3.3 million over five years averages out to $660,000 per year, King was not insistent on earning $660,000 in each year, which was a good thing, because $660,000 would have put the Knicks over their cap-at least during the two seasons the cap was still to be in effect. Since King wanted a five-year contract, the last three of those years would have come after the expiration of the cap. Apparently, the Knicks concluded that even if the cap is extended, they would be allowed to meet their then-existing obligations to King, no matter what.

As a result, the Knicks made King an offer that would have paid him relatively little in salary for the 1985-86 and the 1986-87 seasons-while the cap was still in effectand quite a bit more for the 1987-88, 1988-89 and

1989-90 seasons - by which time the current cap would have expired. In order to ease King's financial burden during the first two seasons, the Knicks offered to pay him a very substantial signing bonus in 1985, at the time he signed the five-year contract. This signing bonus would have put the Knicks over their cap for 1985-86 if it had to be counted in full that year. But the NBA collective bargaining agreement provides that for salary cap purposes, signing bonuses are amortized over all of the years of a guaranteed contract. This means that the signing bonus the Knicks offered to King would have been averaged over five years, even though it would have been paid all at once in 1985. And in this fashion, the Knicks would have stayed within their cap for 1985-86 and 1986-87.

Although the Knicks' offer to King satisfied the strict letter of the salary cap rule, it clearly did not satisfy its spirit. The question was whether that mattered. The

NBA thought so and objected. Kingman Brewster was appointed Special Master to hear the dispute, and he ruled against the NBA and in favor of the Knicks and King. While he recognized that the ability to use signing bonuses to offset low initial salaries reduced the effectiveness of the salary cap, he concluded that the remedy for this defect was further negotiations (apparently between the league and the players association). The NBA appealed to Judge Carter (in accordance with procedures set forth in the collective bargaining agreement), and Judge Carter reversed.

Judge Carter noted that a contract must be interpreted to give effect to its overall purpose, which in this case included protecting the NBA's interest in financial solvency. As a result, he ruled that salaries cannot be structured so they are "artificially and formally within the salary cap limitations" if they "void the provisions designed to protect the NBA's interests." He explained that

"By sanctioning such empty formalism we would buttress the players' interests, but leave the league's in shambles."

Judge Carter's "rough guide" for cases of this kind is to determine whether an offer would come within the salary cap for each guaranteed year, even though some of those years may occur after the current salary cap expires.

Whether the salary cap will still he around next season remains to be seen. The current cap expires at the end of this season, along with the rest of the NBA Collective Bargaining Agreement; and negotiations between the NBA and the Players Association will take place this summer. The Players Association has indicated that it will not agree to extend the cap, saying that in its opinion, the NBA is now financially healthy and no longer needs a cap. The league on the other hand is just as likely to demand a salary cap, even though individual teams, like the Knicks, have worked hard to get around the one that has been in effect for the last three years.

In the Matter of the National Basketball Association, 630 F.Supp. 136 (S.D.N.Y. 1986) [ELR 8:12:13]

Dispute between National Basketball Association and Clippers franchise over team's relocation from San Diego to Los Angeles presented factual questions precluding summary judgment with respect to federal antitrust issues and state law claims

The National Basketball Association's rights with respect to the San Diego Clippers' relocation to Los Angeles involved genuine issues of fact precluding summary judgment, a Federal Court of Appeals has ruled in reversing a Federal District Court decision on behalf of the Clippers.

The NBA had sought a declaratory judgment that federal antitrust laws would not be violated if the Association attempted to restrain the movement of its member franchise and to impose a charge upon the Clippers for the "unilateral usurpation of the 'franchise opportunity' available in the Los Angeles market."

Federal Court of Appeals Judge Ferguson stated that the antitrust issues in the case were directly controlled by the opinions involving the relocation of the National Football League's Raiders team from Oakland to Los Angeles, Los Angeles Memorial Coliseum Commission v. National Football League, 726 F.2d 1381 (9th Cir.), cert. denied, 469 U.S.990 (1984); Los Angeles Memorial Coliseum Commission v. National Football League, 791 F.2d 1356 (9th Cir. 1986) (ELR 8:6:13). The Raiders opinions, collectively, held that the rule of reason governs a professional sports league's efforts to restrict franchise movement. But neither decision, emphasized Judge Ferguson, held that a franchise movement rule, in and of itself, was invalid under the antitrust laws.

According to the court, the NBA asserted several genuine issues of fact, such as: the purpose of the restraint; the market created by professional basketball - a market allegedly substantially different from that of professional football; and the actual effect the NBA's limitation on franchise movement might have on trade. In addition to an "entirely different" factual setting than that in the Raiders cases, the antitrust issue, as distinguished from the issue presented in the Raiders cases, was "whether the mere requirement that a team seek (NBA) Board of Governor approval before it seizes a new franchise location violates the Sherman Act." The NBA did not attempt to forbid the Clippers' move, and did indeed schedule the team in the Los Angeles Sports

Arena. The action for declaratory relief was filed in response to the Clippers' continued assertion of the NBA's potential antitrust liability, stated the court.

A "wealth of factual disputes" also were involved in the NBA's request for a declaration that the Association's constitution allowed the league to consider the Clippers' move, a request dismissed by the District Court.

Furthermore, several noncontract pendent state claims were improperly dismissed by the grant of summary judgment, found Judge Ferguson, including the NBA's claims that the Clippers violated fiduciary duties imposed upon joint venturers, and that the Los Angeles Memorial Coliseum Commission tortiously interfered with the joint venture. The NBA's claim for damages based on an alleged lost expansion opportunity also presented an issue of fact properly left to the District Court, concluded Judge Ferguson, in remanding the matter for trial.

National Basketball Association v. SDC Basketball Club, Inc., Case No. 86-5891 (9th Cir., April 21, 1987) [ELR 8:12:14]

Distributor of documentary film produced by National Film Board of Canada was required to comply with Foreign Agents Registration Act; designation of films as Political Propaganda did not violate distributor's First Amendment rights, rules United States Supreme Court

The use of the phrase "political propaganda" to identify a regulated category of expression under the Foreign Agents Registration Act of 1938 did not violate the First

Amendment rights of an individual seeking to exhibit three Canadian films, the United States Supreme Court has ruled, by a 5-3 vote. (Justice Scalia did not take part in the case.)

Barry Keene planned to exhibit three National Film Board of Canada documentaries; the films, including the Academy Award winner "If You Love This Planet," primarily focused on the environmental effects of nuclear war and acid rain.

A Federal District Court in California issued an injunction prohibiting the Department of Justice from designating the films as "political propaganda" and from subjecting them to the labeling and reporting requirements of the Act. Subsequently, the court granted summary judgment for Keene and entered a permanent injunction against the enforcement, with respect to the three films at issue, of any portion of the Act incorporating the term "political propaganda" (ELR 8:8:10).

In reviewing the Act, Justice Stevens noted that the registration requirement comprehensively applied to agents of friendly, neutral and unfriendly governments, and that the three Canadian films were classified as political propaganda because they contained political material intended to influence the foreign policies of the United States, or that may reasonably be adapted to be so used."

It was further found that Keene, a California legislator, possessed standing to challenge the labeling and reporting requirements because he had established that he would suffer cognizable injury to his reputation and political career if he were to exhibit the films as classified. Justice Stevens, citing a declaration of NBC News correspondent Edwin Newman, observed that the popular assumption is that the term propaganda is a form of "slanted, misleading speech that does not merit serious attention and that proceeds from a concern for advancing the narrow interests of the speaker rather than from a devotion to the truth." But the Act encompasses advocacy materials that are completely accurate, and Justice Stevens questioned the District Court's assumptions that the public would attach an "unsavory connotation" to the use of the term political propaganda, and that such "denigration" would make the material unavailable to potential exhibitors.

The court stated that requiring Keene to identify the films as political propaganda would not place the registered material "beyond the pale of legitimate discourse" - there was no prohibition or restraint on Keene's access to the material, but rather an attempt to require the disclosure of information that would better enable the public to evaluate the import of the material.

The District Court's conclusion also appeared to be contradicted by the 40 year history of the "broad, neutral" statutory definition of political propaganda - if a "fear of misunderstanding" the definition had actually interfered with the exhibition of a significant number of foreign-made films, such an effect would have been disclosed in the record.

Congress' use of the term political propaganda was not constitutionally prohibited, given the lack of pejorative connotation in the statute, concluded Justice Stevens, in reversing the judgment of the District Court and remanding the case for further proceedings.

In dissent, Justice Blackmun, joined by Justices Brennan and Marshall, questioned the court's failure to consider "the realities of public reaction to the designation 'political propaganda.'" The statutory categorization itself, by including communication that "instigates ... civil riot ... or the overthrow of... government ... by any means involving the use of force or violence" (as quoted by Justice Blackmun) was difficult to characterize as wholly neutral. The goal of the Foreign Agents

Registration Act was to control the spread of subversive material by foreign agents, and it appeared to Justice Blackmun that the designation continued to reflect its original connotations.

Even if the statutory definition were neutral, the dissent again stated that it was "the common understanding of the Government's action that determines the effect on discourse protected by the First Amendment." For Justice Blackmun, the practical effect of the classification was to create an indirect burden on expression by inhibiting the dissemination of the classified films. Individuals and institutions might decline to assume the risk of being associated with material officially classified as propaganda, and the official designation thus "taints the message of a classified film by lessening its credence with viewers." Justice Blackmun declared that the classification requirement "places the power of the Federal Government, with its authority, presumed neutrality, and assumed access to all the facts, behind an appellation designed to reduce the effectiveness of the speech in the eyes of the public," without demonstrating compelling governmental interests for so doing.

Meese v. Keene, Case No.85-1180 (U.S.Sup.Ct., April 28, 1987) [ELR 8:12:15]

United States Supreme Court rules that reasonable person test rather than community standards should apply in determining value of allegedly obscene material; Illinois appellate court is ordered to review convictions of two bookstore clerks on charges of violating state obscenity law

The proper inquiry in determining the value of an allegedly obscene work is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in the work, but "whether a reasonable person would find such value in the material, taken as a whole," the United States Supreme Court has announced, in a 6-3 decision.

The court was asked to review a case in which Richard Pope and Charles G. Morrison, part-time clerks in an adult bookstore in Rockford, Illinois, were found guilty of "obscenity" for selling certain magazines. The trial courts had instructed the respective juries involved to judge whether the magazines were obscene by determining how the magazines would be viewed by ordinary adults in the whole state of Illinois.

Justice White found that the instruction at issue was unconstitutional. However, the court declined to reverse the convictions outright but remanded the matter to an Illinois appellate court to consider whether the erroneous instruction was harmless error. It was noted that the statute challenged by the bookstore parties was repealed and replaced by a statute that does not require the application of community standards to the question of serious literary, artistic, political, or scientific value (the "third prong" of the obscenity test set forth in Miller v. California, 413 U.S. 15). If the reviewing court concludes that no rational juror, if properly instructed, could find value in the magazines, the convictions should stand, concluded Justice White.

Justice Scalia concurred with the majority opinion with respect to harmless error, stating that it would be "implausible that a community standard embracing the entire State of Illinois would cause any jury to convict where a 'reasonable person' standard would not." And while also joining in the court's opinion with respect to an "objective" or "reasonable person" test of value, Justice Scalia suggested that there is a need to reexamine the decision in Miller.

Justice Blackmun concurred in part in the court's opinion, but joined Justice Stevens' dissent on the harmless error issue. Justice Blackmun emphasized that the court's opinion stands for the proposition that the First Amendment "does not permit a majority to dictate to discrete segments of the population... the value that may be found in various pieces of work... even a minority view among reasonable people that a work has value may protect that work from being judged 'obscene.'"

Justice Brennan joined Justice Stevens' dissent (except for one footnote) but wrote separately to declare his view that any regulation of "obscene" material with respect to consenting adults is subject to question due to the difficulty of defining with sufficient specificity and clarity the concept of obscenity so as to provide fair warning to distributors of sexually oriented material and to avoid the substantial erosion of protected speech.

In dissent, Justice Stevens first stated that the juries that found the bookstore workers guilty of obscenity did not, due to the erroneous instructions, make the required finding that on the basis of roof beyond a reasonable doubt, the magazines lacked serious literary, artistic, political, or scientific value; the juries therefore did not find one of the essential elements of the crime with which the workers were charged. The constitutionally erroneous instructions thus could not have been harmless, according to Justice Stevens. Also challenged was Justice White's reasonable person standard; Justice Stevens expressed the view that communicative material is entitled to First Amendment protection if some reasonable persons could consider it as having serious literary, artistic, political, or scientific value.

Furthermore, reversal of the convictions was warranted, stated Justice Stevens, because the difficulties inherent in the reasonable person standard supported his position that government may not constitutionally criminalize mere possession or sale of obscene literature, absent some connection to minors, or obtrusive display to unconsenting adults. Concern with the vagueness of criminal obscenity statutes, and the possibility that such statutes might reflect a government attempt to control the moral content of a person's thoughts also raised constitutional objections from Justice Stevens.

Pope v. Illinois, Case No. 85-1973 (U.S.Sup.Ct., May 4, 1987) [ELR 8:12:16]

Oregon Supreme Court holds that state's criminal obscenity law violated state constitutional guarantee of free expression

The Oregon Supreme Court has held unconstitutional a state statute making it a crime to disseminate obscene materials.

When Earl Henry's adult bookstore in Redmond was searched almost the entire inventory of the store, including 73 magazines, 142 paperback books, seven newspapers, nine films, one film projector, six decks of playing cards, and business records were seize. A jury found Henry guilty of dissemination of obscene material and possession of obscene material with the intent to disseminate; in each case Henry was fined $1,000 and sentenced to imprisonment for 30 days, with the jail sentences to run consecutively (execution of the sentence was stayed pending appeal).

An Oregon appellate court's reversal of the convictions has been upheld (on different grounds) by the state's Supreme Court. Justice Jones stated that the indeterminacy of the crime created by the statute arose from tying the criminality of a publication to "contemporary state standards," particularly because in a law "censoring speech, writing or publication, such an indeterminate test is intolerable. It means that anyone who publishes or distributes arguably 'obscene' words or pictures does so at the peril of punishment for making a wrong guess about a future jury's estimate of 'contemporary state standards' of prurience."

Justice Jones noted that Henry conceded that the statute complied with the obscenity test set forth in Miller v. California, 413 U.S. 15. But the court declared that it was undertaking its own interpretation of the Oregon Constitution independent of any First Amendment analysis by the Supreme Court of the United States.

Article I, section 8 of the Oregon Constitution separately precludes laws "restraining the free expression of opinion" as well as laws "restricting the right to speak, write, or print freely," whereas the First Amendment restrains "abridging the freedom of speech, or of the press." Thus the text of Article 1, section 8 broadly covers any expression of opinion, and does not contain any express exception for obscene communications.

Justice Jones, after an intriguing review of the history of American obscenity laws and of Oregon history, found that "obscene" expressions did not fall within a wellestablished historical exception to the protection of Article I, section 8.

The court concluded by declaring that although the Miller test "may pass federal constitutional muster," the test amounted to censorship forbidden by the Oregon Constitution, and held that characterizing expression as "obscenity" under any definition, would not deprive it of protection under the Oregon Constitution. Obscenity, like other forms of expression, may be regulated in the interests of "unwilling viewers, captive audiences, minor and beleaguered neighbors," stated Justice Jones, but none of these issues were before the court. Justice Jones chose to add that the court did not rule out regulation, enforced by criminal prosecution, directed against the conduct of producers or participants in the production of sexually explicit material, nor reasonable time, place and manner regulations of the nuisance aspect of such material. But no law may prohibit or censor the communication itself, for "In this state any person can write, print, read, say, show or sell anything to a consenting adult even though that expression may be generally or universally considered 'obscene.'"

State v. Henry, 732 P.2d 9 (Or. 1987) [ELR 8:12:16]

Briefly Noted:

Copyright Infringement.

A Federal District Court in Illinois has determined that under the Copyright Act of 1976, the owners of several copyrighted musical compositions were not required to allege that the works were performed for profit. The copyright owners' complaint sufficiently alleged originality and authorship of the compositions, compliance with the statutory formalities, ownership of the copyrights, and unauthorized public performance. Thus, although the complaint did not state that the works were transmitted via a multiple receiving apparatus, or that the alleged infringers collected any direct charge from anyone in connection with the purported infringements, the court denied a motion to dismiss the complaint.

Almo Music Corporation v. 77 East Adams, Inc., 647 F.Supp. 123 (N.D.Ill. 1986) [ELR 8:12:17]

Copyright Infringement.

Owners of copyrights in the songs "Strut a/k/a Strutt," "Glory Days," "I'm Goin' Down" and "You May Be Right" sued the owner of Muff's, a private nightclub in Olathe, Kansas, seeking statutory damages for the unauthorized performance of their respective songs at the club. Even after being notified of potential liability for infringement, the club's owner failed to obtain an ASCAP license. The club owner contended that his club was considered a private establishment under state law and therefore no infringement occurred because the songs were not performed "publicly." A Federal District Court in Kansas disagreed, holding that performances at the club were indeed public, because Muffs was a "place where a substantial number of persons outside of a normal circle of a family and its social acquaintances" gather. The court also noted that although the club owner did not himself perform the copyrighted songs, he was still vicariously liable under federal copyright law for the infringements of a hired performer. The court granted the copyrighted owners' motion for summary judgment and enjoined the club owner from allowing performance of the songs at issue until he obtained proper authorization from the copyrighted owners or their agents. In addition, the court awarded the copyright owners $750 for each infringement, for a total of $3000 in statutory damages and attorneys' fees and costs in the amount of $1267.50.

Ackee Music, Inc. v. Williams, 650 F.Supp. 653 (D.Kan. 1986) [ELR 8:12:17]

University Athletics.

The Supreme Court of Georgia has held that reports and written documents relating to the assets, liabilities, income and expenses of the University of Georgia Athletic Association were subject to disclosure as "public records" under the state's Open Records Act. In April 1985, the Macon Telegraph Publishing Co. requested certain documents and records from the Athletic Association. When the request was denied, the Telegraph sought an order compelling production of the requested documents. The court, in reversing a trial court's grant of summary judgment to the University, noted that operation of the intercollegiate athletic program was a legitimate function of the University of Georgia, and concluded that regardless of whether the documents were prepared by employees of the private Athletic Association or by a University official acting on behalf of the Association it was clear the documents were "documents, papers, and records prepared and maintained in the course of the operation of a public office" and therefore were "public records" under the Open Records Act.

Macon Telegraph Publishing Co. v. Board of Regents of the University System of Georgia, 350 S.E.2d 23 (Ga. 1986) [ELR 8:12:17]

Previously Reported:

The following cases, which were reported in previous issues of the Entertainment Law Reporter, have been published: Baxter v. MCA, Inc., 812 F.2d 421 (8:10:12); New York Yankees Partnership v. Sports channel Associates, 510 N.Y.S.2d 870 (8:11:8). [ELR 8:12:17]

IN THE NEWS

Federal District Court jury finds that New York Daily News discriminated against black journalists

The New York Daily News discriminated against four black journalists, a Federal District Court jury has found. The newspaper's promotion and compensation practices and work assignments between 1979 and 1982 were racially discriminatory with respect to one reporter and three editors, according to the jury, and it was further found that two of the journalists incurred retaliation by the News when they complained of bias. [May 1987] [ELR 8:12:18]

Producer of "Hoosiers" and "Platoon" was not required to provide prints of the films to video distributor Vestron, Inc.

Los Angeles Superior Court Judge Ricardo Torres has refused to issue a preliminary injunction in connection with a lawsuit involving the video distribution rights to the films "Hoosiers" and "Platoon" Vestron, Inc. had sought to require Hemdale Film Corp. to deliver prints of the film to Vestron pursuant to the parties' contract, and to prevent Hemdale from negotiating with other video distributors. [May 1987] [ELR 8:12:18]

Heavyweight boxing match between Michael Spinks and Gerry Cooney may proceed because New York court has lifted injunction obtained by Home Box Office

A New York trial court has lifted a preliminary injunction obtained by Home Box Office that prohibited promoter Butch Lewis from presenting a heavyweight boxing match (scheduled for December 1986) between Michael Spinks and Gerry Cooney. Justice Elliott Wilk ruled that since Michael Spinks was stripped of his International Boxing Federation heavyweight title in February 1987, the fight with Cooney (rescheduled to June 1987 in Atlantic City) no longer will be a championship fight. HBO, which had a contractual commitment to televise Spinks' fights as long as he remained champion, had obtained a preliminary injunction in late December prohibiting Lewis from presenting a Spinks-Cooney boxing match in Madison Square Garden (ELR 8:9:5). [May 1987] [ELR 8:12:18]

Jury award to former San Diego Chargers owner Gene Klein is reduced to $2 million

Retired Superior Court Judge Gilbert Harelson has reduced to $2 million a jury award to former San Diego Chargers owner Gene Klein. Klein, who had been awarded $10 million by the jury in his malicious prosecution action against Los Angeles Raiders managing general partner Al Davis (ELR 8:9:14) may choose to accept the reduced award or seek a new trial. Judge Harelson, in finding the award excessive, cited the lack of a permanent injury to Klein and the lack of costs incurred beyond about $48,000 in medical expenses arising from the heart attack Klein suffered while testifying during the antitrust action brought by Davis against the National Football League and against Klein as an individual defendant. [May 1987] [ELR 8:12:18]

Writers Guild of America agrees to enter new contracts with ABC and CBS

The members of the Writers Guild have voted to end their strikes against Capital Cities/ABC and CBS and have approved new contracts with the networks.

The contract with CBS sets forth arbitration-of-discharge and layoff procedures for Writers Guild members, and provides for a three percent pay increase, followed by additional three percent increases at the end of the first and second years of the contract. And although the network can continue to hire temporary non-union employees, it has agreed not to hire such individuals to do the work performed by a Writers Guild member who has resigned or who has been fired or laid off.

The contract with ABC differs from the CBS contract in its length - 35 months - as opposed to a full three year term for the CBS contract. However, the contracts are similar with respect to pay increases, seniority rights, and the broadening of the number of non-Guild members permitted to perform certain writing assignments. Amnesty was granted to individuals who refused to cross the Writers Guild picket lines or who refused to do the work of Guild members. [May 1987] [ELR 8:12:18]

Broadcast Music Inc. reaches license agreement with radio stations

Broadcast Music Inc. has reached a license agreement with radio stations covering the period from January 1987 through December 31, 1991.

Under the agreement, smaller stations, including those with annual net billings under $150,000 will pay a lower percentage rate on their net cash billing; the lower rate also will be available to stations in the "start-up" phase and to certain other specified stations. A lower rate on per-program licenses also will be available to smaller stations.

Trade and barter revenue has been eliminated from station income used to compute BMI rates. In addition, program periods will be weighed according to the time of day in computing license fees on a per-program basis. [May 1987] [ELR 8:12:18]

American Federation of Musicians ratifies three year contract with Alliance of Motion Picture and Television Producers

The American Federation of Musicians has ratified a new three year contract with the Alliance of Motion Picture and Television Producers.

The contract includes a provision covering electronic music, whereby producers may choose to pay on either the regular "real time rate" or under a new "multi-tracking rate." The multi-tracking rate, according to news reports, is $200 per hour if one musician is employed or $175 if two musicians are employed. A new formula will cover dubbing music from multitrack sessions.

Other provisions of the contract concern: the allocation of the special payments fund; increased meal periods for sideline musicians; multiple electronic musical devices; the promotional use of portions of music soundtracks; an increase in the ceiling for low-budget theatrical films from $2.5 million to $6 million; and the classification of format music. Joint producer-musician committees will review the issue of rental fees and further review the special payments fund.

The musicians have agreed to postpone consideration of the question of supplemental market royalties, pending the conclusion of negotiations between the producers and other industry unions. [May 1987] [ELR 8:12:19]

American Federation of Musicians ratifies contract with recording industry

American Federation of Musicians members have ratified a three year contract with the recording industry. Most significantly, the contract provides for a substantial reduction in the contributions record companies must make to the union's Music Performance Trust Fund and Special Payments Fund. [May 1987] [ELR 8:12:19]

WASHINGTON MONITOR

Copyright Royalty Tribunal proposes adjustment in mechanical license royalty rate

The Copyright Royalty Tribunal plans to adjust the mechanical license royalty rate in accordance with an agreement reached by the National Music Publishers Association, the Songwriters Guild of America, and the Recording Industry Association of America. The agreement adjusts the royalty in proportion to changes in the Consumer Price Index every two years beginning in 1988 and continuing to 1996. However, the rate cannot decline below five cents per song or exceed the previous rate by more than 25 % for any two year period.

Public comments on the proposed changes must be filed with the Tribunal by June 5th; reply comments are due by July 6th. [May 1987] [ELR 8:12:19]

Federal Communications Commission review board recommends revocation of Fredonia, New York radio station license

The Federal Communications Commission review board has upheld an administrative law judge's decision to recommend the revocation of the license of radio station WBUZAM in Fredonia, New York. The board noted that the president of Catoctin Broadcasting Corp. was accused of engaging in racial discrimination and purportedly had repeatedly violated Commission rules, including refusing to grant access to the station's public file. The station owner has denied the charges. [May 1987] [ELR 8:12:19]

Federal Communications Commission broadens standards prohibiting airing of indecent material

The Federal Communications Commission has announced a broadened standard of indecency which prohibits broadcasters from airing "language or material that depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." For about ten years, the Commission has relied on a standard which essentially prohibited the use of the "seven dirty words" featured in a monologue by comedian George Carlin, and which provided a certain leeway for offensive material aired after 10 P.M.

The FCC has applied the new standard to KPFK-FM in Los Angeles (owned by the Pacifica Foundation) in connection with the station's post 10 P.M. broadcast of a program called "I Am, Are You,?" which presented allegedly obscene dialogue concerning homosexuality and AIDS from a play entitled "Jerker," the Justice Department has been asked to review the program for possible criminal prosecution.

The FCC also reviewed purportedly indecent material presented by disc jockey Howard Stern on programs simulcast in Philadelphia and New York on radio stations owned by Infinity Broadcasting, and issued a warning letter to the licensee. A warning also was sent to KCBS-FM, Santa Barbara, licensed to the Regents of the University of California. [May 1987] [ELR 8:12:19]

Federal Communications Commission adopts new regulations concerning broadcasters' obligations to provide equal employment opportunities

The Federal Communications Commission has adopted new rules which will emphasize the overall efforts of broadcasters to provide equal employment opportunities. Broadcast stations will continue to file an annual report of employment statistics by race and national origin and sex in nine job categories; renewal applicants will be required to file a new form citing practices undertaken by the license to insure equal opportunity in employment. [May 1987] [ELR 8:12:20]

Federal Communications Commission revises regulation concerning broadcast studio location

The Federal Communications Commission no longer will require radio and television stations to locate their main studios within their community of license; rather, the studios may be located within the principal community contours. And broadcasters will not be required to originate a majority of their non-network programming from their main studios or from other points within the principal community. However, public inspection files must be maintained within the community of license and every station must have a local or toll-free telephone number. [May 1987] [ELR 8:12:20]

Federal Communications Commission votes to terminate must-carry rule in 1992

The Federal Communications Commission has voted to terminate its must-carry rule in 1992. The must-carry rule required cable television operators to carry the signals of local television stations. The Commission's action was prompted by a Federal Court of Appeals decision, Quincy Cable TV v. Federal Communications

Commission (ELR 7:6:15), which found that the rule violated the First Amendment rights of cable television operators to select programming.

In contrast to an earlier proposal, the Commission will not require cable systems to provide free input-selectors/or A/B adaptors on all new subscribers' equipment. The A/B device allows viewers to switch between cable and broadcast programming in order to receive channels, such as local public television stations, not being carried by the cable system. Cable systems will be required to inform subscribers that they may need the A/B switch to receive offthe-air transmissions and to tell subscribers which local stations the system carries; subscribers then may decide whether to buy the $4-$5 switch.

During the next five years, a "sunset" provision will be in effect; the provision requires cable systems with 21 to 26 channels to carry up to seven broadcast stations within a fifty mile radius, and systems with more than 26 channels to set aside up to one-fourth of their channels for local broadcasts. [May 1987] [ELR 8:12:20]

DEPARTMENTS

Book Review:

"Law of Defamation" by Rodney A. Smolla

The importance of libel law to entertainment lawyers is readily apparent to every reader of this publication. The Entertainment Law Reporter regularly reports defamation decisions in cases involving books, articles, television broadcasts, motion pictures, and even art works and song lyrics.

Moreover, familiarity with the law of libel is important not only for those lawyers who litigate such cases, but also for those who advise publishers, producers and writers at the pre-publication and pre-production stage. Simply preparing an application for producer's liability insurance requires innumerable judgments to be made about the likelihood that a proposed project will trigger a defamation claim, and about the likely outcome of such a claim, if one is made.

Unfortunately, even though libel is a very specific and ancient tort, defamation law is confusing and ever-changing. Indeed, it has been said that the law of defamation is "a forest of complexities, overgrown with anomalies, inconsistencies, and perverse rigidities," and a "fog of fictions, inferences, and presumptions." There are several reasons why libel law is as difficult as it is. First, it is creature of state (rather than federal) law, which means that insofar as the elements of a libel claim are concerned, there may be as many as 50 rules, rather than simply one. Second, those rules are a blend of general common law principles and specific state statutes. Third, since the Supreme Court's 1964 decision in New York Times v. Sullivan, there has been a First Amendment overlay on state libel laws which has limited the reach of those laws as a federal, Constitutional matter. And fourth, the flow of new decisions in this area has been enormous, and, if anything, has increased in recent years, thus making it a job to simply keep up with developments and to appreciate their significance.

Assistance is now available, however. Clark Boardman Company, Ltd., has recently published an excellent book authored by Rodney A. Smolia, a law professor at the University of Arkansas. Descriptively entitled Law of defamation, this one-volume treatise will prove itself invaluable to entertainment and media lawyers. Two features of the treatise stand out immediately. Professor

Smolla writes with unusual grace and style, thus making the book a pleasure to read. And the material is extremely well organized, thus making the book quite easy to use.

The book contains 14 chapters in all. Following a brief Overview, there are chapters on: The Public Figure/Private Figure Dichotomy; Fault Requirements for Defamation; Defamatory Meaning; Truth as a Constitutional Defense; Opinion and Fair Comment; Special Harm - Libel and Slander Per Se Rules; Common Law Privileges; Damages and Other Remedies; Invasion of Privacy; Emotional Distress and Injurious Falsehood; Litigation; Counseling and Strategy; and Insurance.

A detailed table of contents enables the reader to easily see two important things: how sub-topics within the law of libel relate to one another; and where, within the law of libel, well-known precedents "fit" and have made a contribution.

Professor Smolla has written for a wide audience of lawyers, from the young associate whose only exposure to libel was one week (or less) in first-year Torts and another in Constitutional Law, to experienced media law litigators, and to judges and Supreme Court Justices. He has done so by including sometimes lengthy descriptions of the facts in the major precedent-setting cases, along with clear analyses of their meanings and significance. Where cases raise as many questions as they answer-as the Supreme Court's 1985 decision in Dun & Bradstreet v. Greenmoss Builders did-Professor Smolla points out these questions at every significant place in the treatise, and he offers his opinions as to what the answers may be and why.

Chapters are sub-divided to make the material immediately accessible to researchers looking for particular kinds of cases. Suppose, for example, that an entertainment lawyer needs to know whether song lyrics or fictional works have ever been the basis for a defamation claim. A glance at the Index or the Table of Contents reveals that one subsection of the chapter on Defamatory Meaning is devoted to "Song Lyrics" in particular and two other subsections cover "Fictional Works" as libelous and as "false light" invasions of privacy. Or suppose that an entertainment lawyer needs to know whether entertainers and sports figures are "public figures," and if so, which kind. Again, the treatise devotes subsections to those questions in particular, as well as to the question of whether literary and artistic criticism may he defamatory fact or privileged opinion. The real value of this book, for readers of the Entertainment Law Reporter, is that in addition to isolating and addressing specific questions that may be of interest to entertainment lawyers, it also places those questions in the larger context of libel law, so that related but less apparent issues also can be considered.

The treatise is 686 pages, and is published in looseleaf, post-binder, format so that it can be updated as future developments require. It belongs not only in the library of every entertainment lawyer, but in a readily accessible location in that library, or on the credenza, where it is certain to become well-thumbed and studied, quickly and for a long time.

Law of Defamation is published by Clark Boardman Company, Ltd., 435 Hudson Street, New York, N.Y. 10014; phones 800/221-9428 and 212/645-0215. It is $85 (though a 10% discount is available for payment with an order).

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[ELR 8:12:21]

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