BUSINESS AFFAIRS

Syndicated Television Music: The Source Licensing Debate Rages On (Part 2)

by Kyle-Beth Basson

Source Licensing legislation

Dissatisfied with the outcomes in the CBS and Buffalo Broadcasting cases, the broadcasters turned to Congress in another attempt to eliminate blanket licensing. Broadcasters lobbied the legislative branch, and in 1986, Congressmen Frederick Boucher (D-Va.) and Henry Hyde (RIll.) and Senator Strom Thurmond introduced H.R.3521 and S. 1980 which, if they had passed, would have mandated source licensing for syndicated programs on non-network television.

In this session of Congress, Congressman Boucher and Senator Thurmond have reintroduced their bills, now numbered H.R.1195 and S.698, entitled "The Syndicated Television Music Copyright Act." These new bills contain provisions, which the earlier bills did not, for a composers' union and a residual system. Before examining these new features, however, the debate over the original versions deserves attention.

In a statement issued on March 19, 1986, Boucher alleged that blanket licensing "prices the music at a value disproportionate to its contribution to the total work" and that syndicated programming "contains a relatively small number of music titles, readily identifiable in advance," thus alleviating the need for a blanket license. Boucher concluded that under his bill, "the television station would pay only for the music it uses. In the absence of the blanket license, new opportunities would be presented for the vast majority of American songwriters who presently have no opportunity to participate in this exclusive market." n24

Are Boucher's premises correct? Would mandated source licensing be a boon not only to the stations but also to composers? Would it dissolve what the broadcasters perceive to be a tightly controlled monopoly over syndicated television? ASCAP, BMI, publishing companies, producers, and many composers instead allege that mandated source licensing would have catastrophic consequences for the entire music industry and that the broadcasters are merely trying to obtain music for free. Statements in March of 1986 in hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House and Senate Judiciary Committees show that both sides feel passionately that the other side is not dealing in good faith.

Source Licensing in Motion Pictures

Mandated source licensing already exists in one corner of the music industry. Pursuant to a 1950 consent decree stemming from Alden-Rochelle v. ASCAP, 80 F.Supp. 888 (1948), motion picture theater owners currently receive films with all rights intact. ASCAP and BMI largely consider Alden-Rochelle to be an historic anomaly. Every other country in the world recognizes a separate payment for performance rights of motion pictures. The court in Alden-Rochelle delivered its opinion based on allegations of conspiracy since many of the motion picture producers owned publishing companies which belonged to ASCAP. The producers therefore shared in the publisher members' half of ASCAP's collected fees. The court was most distressed though because ASCAP membership at that time was predicated on the exclusive grant of licensing rights, and so, the theater owners could not negotiate directly with the copyright owners.

The 1950 consent decree modified ASCAP's membership requirements so the organization can only receive nonexclusive grants. Alden-Rochelle remained unchallenged, though, mostly because of the political climate, and source licensing for motion pictures remains as an aberration in both the United States and abroad. Indeed, Professor Lionel Sobel notes that "given ASCAP's compliance with the 1950 amendment's prohibition against pooling fees received from direct licenses, and given the right that music users now have to apply for a court-determined reasonable fee, it is doubtful that Alden-Rochelle ... would be decided again today the way [it was] in 1948." n2)

Nonetheless, the broadcasters contend that AldenRochelle should be made the rule rather than the exception and that syndicated television should be treated the same way as motion pictures. ASCAP and BMI point out several differences though between theaters and television:

"Alden-Rochelle was, in effect, a penalty levied against the guilty party. The copyright law was not changed in 1948 nor when it was rewritten in 1976 was there a prohibition added against licensing theaters.

"With that background in mind, it seems highly unjust that ASCAP members who weren't even born at the time of the suit should, today, have to share in the punishment. To then seriously consider extending this "punishment" to still another, completely unrelated group is unthinkable." n26

Aside from the fact that ASCAP has corrected its wrongdoing, ASCAP and BMI also allege that studios have a different economic relationship with theaters than they do with television broadcasters. Film distributors generally will deliver films with all the rights intact only in exchange for a percentage of each ticket sold. In effect, then, distributors pass on to the theaters the performance costs for which they paid in the first place. No similar practice presently exists in the television business, and even if source licensing were mandated, producers have no guarantees that stations would compensate them for the additional burden of purchasing performance rights. Given already high production costs and risks inherent in producing syndicated television shows, it is unlikely that producers would be able to shoulder the costs of performance licenses the way film distributors can.

Furthermore, upfront payments to composers for motion pictures are fairer than they would be to television composers. Film composers know that a strong likelihood exists that the film will make it to television and they will receive performance royalties. The composer of a television show has no guarantee that the show will succeed past the pilot. The film composer also can anticipate performance royalties from theaters abroad. Most importantly, the film composer can be more confident than the television composer that he will receive additional income from soundtrack albums and radio performances. Generally, then, the film composer is in a better position than the television composer to accept the burden of negotiating upfront payments with producers, because he knows he will more than likely be rewarded for his artistic efforts by some sort of performance royalties. The television composer who accepts an upfront payment takes more risks. As such, the AldenRochelle concept of mandated source licensing does not easily transfer from films to television.

Arguments for Source Licensing in Television

The broadcasters do not rely solely though on the Alden-Rochelle precedent. They argue within the context of television as well. Because syndicated television is largely in a prerecorded format, broadcasters feel that the blanket license is unfair. They contend that music is overvalued and that they only want to pay for the music they use. Eugene H. Bohi representing the Association of Independent Television Stations before the House Judiciary Subcommittee on July 23, 1986 declared:

"The blanket music license is a smirch on the democratic free enterprise system that has built this country into the model for the world. The arbitrary blanket license removes a primary element of market control any struggling business needs under our system of government-the ability to bargain freely in an open marketplace in competition with others." n27

Abiah Church on behalf of Storer Communications explained it differently:

"The broadcaster who bought rights to [a] ... program ... cannot negotiate in a free market for music to include in the program. The music is already embedded in the soundtrack. The television broadcaster either gives up the program entirely (and he can't give up all syndicated programming and stay in business) or he antes up the non-negotiable price of the music licensing societies. Result: the cost of the music is a television program is disproportionately higher than the cost of the other essential creative and artistic elements. The difference between the price collected by the societies and the free market economic value of the music is nothing more than a monopolist's premium." n28

Opponents of source licensing have several responses to these charges. First, the broadcasters are hardly the "struggling" businesses to which Bohi refers. Then, too, even if syndicated television is largely in a prerecorded format now, production in television often takes only a few days. This is too short a period of time to track down the composer/publisher owners of music for licensing rights. Furthermore, the broadcasters ignore one key reason for the split between performance and synchronization rights. The split enables a purchaser to buy just what he needs. In the case of a producer, he only buys the synchronization rights because he is only recording. The stations actually perform the shows, and so, they pay for the performance rights.

The broadcasters still object to the blanket license of performance rights as monopolistic, and they say they want to pay only for the music they use. The broadcasters forget that the Copyright Act has conferred monopoly power on the copyright holder. In that sense, any licensing system which composers endorse will reflect this legal monopoly. To abolish blanket licensing is to alter the foundations of copyright and to prevent the copyright owner from selecting a method of marketing his monopoly. In addition, in objecting to blanket licensing, broadcasters ignore its major practical advantage, that neither they nor composers need keep detailed records of programming. Once the stations purchase the license, they can use anything in the repertoire without fear of infringement litigation. Furthermore, the cost is only about 1% of their annual gross revenues for all this music, an amount which the rate court has deemed fair.

The All-Industry Television Station Music License Committee points out that the actual dollar figure for payment has radically increased in the last ten years. This may be so, but the percentage of revenues affixed to the blanket license has steadily decreased from 2.5% in 1949 to 1.15% today. Furthermore, in the aftermath of Buffalo Broadcasting, the rate court restricted the percentages to 1980 revenue figures which were far below current revenue. Consequently, if the dollar payments have increased, it is because the broadcasters are making more money, a fact which undercuts their next argument about lack of bargaining power.

Broadcaster Bargaining Power

Broadcasters complain that they have no bargaining power to change the system and that no real choices exist. They contend that "two-thirds of the current top-rated syndicated shows are distributed by seven major companies" and that the "distribution rights to twenty-seven of forty network series ... slated for syndication in the next five years are controlled by six of the major producer-syndicators." n29 They believe that "there is simply not enough desirable syndicated product to go around-creating the quintessential "seller's market." n30 The broadcasters conclude that they do not have the clout to change the system and thus other license types are unavailable.

The CBS and Buffalo Broadcasting courts were unpersuaded by these arguments when they upheld the blanket license and declared other licenses available. Professor Sobel goes further to underscore that stations do have bargaining power because syndicators are responsive to local stations. "First-run programming rarely goes into production at all until a sufficient number of local stations have agreed to purchase the program to cover its anticipated production costs." Furthermore, the market's concentration is irrelevant since the "syndicator of each program enjoys a complete but perfectly legal monopoly as to that particular show." n31

Then, too, the Register of Copyrights Ralph Oman points out that the decrease in rates from 2.5% to 1.15% shows that the stations do have bargaining power. Oman gives some credence to the stations' point of view but still concludes that they have, in effect, chosen the blanket license:

"It is not clear how realistic `choice' is under either the current system or the proposed legislation. The first favors blanket licensing through custom and practice; the second mandates source licensing. Recent court decisions suggest that the blanket license is used because it is the customer's preference." n32

Despite broadcasters' accusations concerning ASCAP's and BMI's refusal to abandon blanket licensing, Oman's statement about customer preference seems valid. The Buffalo Broadcasting court found the stations' sudden negotiation attempts at the time of the litigation to be a mere paper trail, an effort to dupe the court into thinking ASCAP was intransigent. In addition, ASCAP and BMI have nonexclusive grants, leaving stations free to negotiate directly with composers. They have not done so. Instead, the AllIndustry Committee made the following statement jointly with BMI in a letter on October 4, 1985:

"We are pleased to enclose copies of the new form of BMI local television station blanket license agreement which is the result of many months of negotiation between BMI and the All-Industry Television Station Music License Committee .... We think it is a good agreement and therefore strongly endorse it and urge that you execute and return it to BMI promptly."

Clearly, the broadcasters can negotiate but they have not made any serious effort. They claim that ASCAP and BMI officials are intransigent. While there may be an element of truth in that statement, the courts and the Copyright Office have distinctly said that the stations have the burden of "showing the unfairness, unreasonableness, or inefficiencies of the present licensing system." n33 The stations have not met this burden. ASCAP and BMI officials insist that they will consider any concrete proposals seriously, but none has materialized. Indeed, Don Biederman, Vice President of Legal and Business Affairs at Warner Bros. Music, wrote Congressman Barney Frank on August 1, 1986 describing the "negotiations" between Warner Bros. Music and Storer Broadcasting over licensing alternatives:

"The broadcaster representatives assured us that they were eager to deal directly with us, and in each instance the broadcaster representatives had absolutely no suggestions as to how to accomplish direct licensing. Instead, they demanded that we come up with concrete proposals. Additionally, they seemed highly uncomfortable with our position that payment would have to be based upon usage (i.e. not a `buyout') and that they would have to keep records of what they used and when they used it."

Biederman again indicated that the broadcasters have not pursued a meaningful dialogue on source licensing when he wrote Bernard Korman, General Counsel of ASCAP, on March 9, 1987:

"We have not been inundated with inquiries for direct or source licenses. The volume of such requests does not even rise to the dignity of a trickle. The local broadcasters have talked ... but they have yet to write anything to us, although we have invited them to do so on numerous occasions. It seems to suit their purposes to pretend that we are stonewalling them, but they have yet to make anything approaching a concrete dollar offer (or even a methodology by which a concrete dollar offer could be derived), and if we are correct in our interpretation of ... Buffalo Broadcasting, the shoe is definitely on the other foot; it is up to the local broadcasters to make an offer to us."

If Biederman's observations are representative of the current state of affairs throughout the industry, it seems clear that the stations want Congress to do their work for them. Yet it seems unrealistic for the stations to think that Congress would step in and mandate a system of licensing before it has been definitively shown that the stations cannot, rather than will not, negotiate with ASCAP, BMI and the publishing industry. In fact Congress cannot responsibly take action while the market still has potential to operate effectively. Buffalo Broadcasting ruled that blanket licensing is an effective system and the market has selected it over three other licensing techniques. Congress should not mandate source licensing and deprive music users of their right to choose among the four systems presently available. Such a move would be clearly anticompetitive. If the broadcasters want source licensing, they should negotiate for it rather than ask Congress to squelch the market. Their claims that they have no bargaining power are unfounded when they have not even tried to negotiate.

The Public Interest

Broadcasters do not rest their case solely on their supposed lack of bargaining ability. They also appeal to the "public interest," alleging that the present system of distributing royalties is unfair to composers and overly generous to music publishers. The performing rights organizations presently pay 50% of their distributions to the composer and the other 50% to the publisher. The broadcasters cry foul because many of the publishers are affiliated with producers. They declare that "the typical producer not only avoids having to bargain for music performing rights, but it also stands to earn a tidy profit from the blanket license payout it (or its music publishing affiliate) will receive from ASCAP and/or BMI." n34

The broadcasters ignore that the publisher, whatever its affiliation, has earned its percentage. Jay Morgenstern, Executive Vice President and General Manager of

Warner Bros. Music, explained to the House Subcommittee on May 30, 1986:

"There has been a charge made by the proponents of this bill that music publishers are no more than coupon clippers and movie studios' alter egos, living off `kickbacks' from public performance royalties. This statement can't be further from the truth. The fact is that a full-service music publisher acts as a financier, creative force, administrator and licensor. Music publishers such as Warner Bros. Music underwrite the creative efforts of songwriters by paying them non-refundable, but hopefully recoupable weekly or monthly advances or subsidies, chargeable against royalties, in degrees based upon an assessment of their ability to generate future earnings, considering their past success and other motivating factors."

The stations also contend that "the current system favors a few, elite composers" and that 85% of composers and 86% of publishers belonging to the ASCAP and BMI never see performance royalties. This argument also fails. First, as in any other creative field, only a relatively small number of people can be very successful. The art form is too demanding for everyone to excel. Then, too, television is a difficult field for young composers to enter. Rob Light of the Rob Light Agency says that young composers have an easier time getting into film, since television producers will not take chances on unknowns when they know that the success of any television show is speculative at best. n35 Perhaps, then, the system does favor a few composers in that it rewards quality, but would anyone prefer a system which did not reward quality? Only a handful of available composers can meet the demands of television. Combining this factor with the fact that the performing rights societies have lax membership requirements, it is understandable that only a small percentage of ASCAP's and BMI's members receive performance royalties.

Composers Under Source Licensing

Certainly, composers would not fare any better under source licensing. In fact, they stand to be considerably worse off. If producers have to pay for performance rights, they are likely to either use public domain music

Representative Howard Berman decried this potential attack on the "artistic integrity of creative works" in his July 23, 1986 remarks before the House Subcommittee:

"That blithe willingness to eliminate music intended for a program or film and to substitute other music offends all of my notions of the integrity of artistic creations, and what is more, it would mean that the songwriter or composer whose music is replaced would lose income that rightfully should be his or hers."

More importantly, even if producers were willing to negotiate with composers, what kind of bargaining power would composers have to negotiate up-front fees? They would be forced to value their music prematurely, before performance, before they know their music's popularity. Arthur Hamilton, Vice-President of ASCAP, estimates that under source licensing, composers would lose 75% to 80% of their current income generated by performing rights. Even if the composers received increased upfront payments, Hamilton pointed out that these payments are "one-shot deals" and thus less valuable than performing rights which appreciate over time. Besides, there is no realistic way to arrive at a fair up-front payment since only time determines music's worth. n36

The Songwriters Guild of America elaborated on this point in its position paper on H.R. 3521:

"There must be continued performance of music in order for it to achieve success. It is only after continued use that the public comes to recognize certain merits and values in music. Naturally, a song (theme or background) which is part of a successful television series will come to be recognized more often than one which appears on a pilot program and then goes out of existence. However, that does not mean that the successful television program will ipso facto produce a successful song. That is only determined by the marketplace. However, since [Boucher's] bill would no longer require payment for performance. it is a disincentive for people to write in this field." n37

It is not surprising, then, that the stations could not find one composer to testify on their behalf before Congress. On the other hand, composers did testify outspokenly on the merits of the blanket license. Mike Post (Hill Street Blues, L.A. Law,, Magnum, PI.) fears that the end result of source licensing would be that composing will become a "haphazard hobby, rather than an artistic profession" because composers will be unable to support themselves. He asked the House Subcommittee how he could possibly predict "before the pilot has even been produced, whether the show will get on network television, whether it will be successful enough to be renewed for four or five seasons, will sell in syndication and will last in syndication?" Source licensing ignores music's appreciation in value over time and causes composers like Mike Post "to gamble with what could be ten years of income." n38

Composers and lyricists virtually unanimously support Post's statement. Kent Klavens, Chairman of the Board of Directors of the National Academy of Songwriters, explained:

"[I]t is not the incentive for local broadcasters to hire songwriters that is critical ... [I]t is the incentive for motion picture and television producers (as well as record companies, of course) to utilize the services of songwriters and the incentive for songwriters to license their works that is critical. It is these incentives that are maintained by the current system of performing rights payments. Songwriters can license the rights to their works for often minimal payments, knowing that their potential financial rewards justify their risks .... They wish to preserve this system of incentives, rather than rely on an occasional local television station that wants to use their music for local purposes at minimal cost." n39

The broadcasters' argument that blanket licensing hurts composers fails in the face of composers' overwhelming support for the blanket license and opposition to source licensing.

The vast majority of the music industry joins the composers and lyricists in opposing source licensing. Producers, syndicators, and publishers also stand to lose if this legislation passes. These groups raise several other arguments against source licensing. The first, simply, is that they like the current system. Any new system would have to be duplicative to function properly and would therefore unnecessarily disrupt the music industry. At the same time, the legislation poses a huge retroactivity problem by proposing to set aside one year from its effective date all existing long-term blanket licensing contracts. Such a provision may be unconstitutional as an impairment of contract. Opponents also suggest it would create chaos in the market and leave unprotected estates which have relied on performance rights royalties. If the drafters of the legislation changed the bill so that it left existing contracts intact and only affected future contracts, opponents contend that the bill would create an inequitable caste system because two systems would exist at once and composers would fare considerably better under one than the other.

Foreign Market Effects

Another important ramification of this legislation is its effect on the foreign market. Opponents point out that the foreign music performance societies are already angry that their members lose royalties when their music is performed in American theaters. They fear that if source licensing were to pass in syndicated television, it would spread through the whole system and foreign composers would always work at a loss in the United States. Opponents of the legislation therefore find the bill threatening, believing that the foreign societies will retaliate by rescinding the reciprocal agreements now existing with American societies. American composers would lose income both at home and abroad, and current amicable relations with foreign societies would disintegrate.

Unionization of Composers

In short, opponents of mandated source licensing declare that everyone except the broadcasters stands to lose if their legislation passes. Jim DiPasquale comments that the bill chips away at the concept of intellectual property" while leaving composers' interests vulnerable. n40 Congressman Boucher recognizes that if his legislation is to pass in this Congressional session, he has to offer the composers some protection. Consequently, he has prepared H. R. 1195 which would create an exception to the National Labor Relations Act to allow composers to unionize.

The new bill also vaguely provides for some form of residual payments to composers, promising them an "interest in any compensation paid to the owner of the copyright in such motion picture or other audio-visual work." Boucher hopes this will save his legislation. He believe's that once composers can collectively bargain and strike, they will be able to represent themselves adequately in negotiations with producers. Boucher also believes residuals can provide a form of continuing payment to reward future success. Opponents of source licensing ask whether a composers' union could operate effectively and if any residual system would be appropriate and fair compensation for composers.

The history of the CLGA does not suggest that composers are very interested in supporting a union. Yet even after the CLGA's demise, some composers thought uniting was important, and they formed the Society of Composers and Lyricists (SCL). Arthur Hamilton, retired chairman of the SCL, says that the main goal of the organization is to provide a unifying instrument for composers so they can improve work conditions. n41 Hamilton believes that if Congress takes away performance rights, the SCL's membership would grow out of necessity. The composers would forget the failures of the CLGA and unify out of fear for their futures. At the same time, though, Hamilton opposes the unionization concept and the source licensing bill because "Congress should not be dictating to us how we should do business." n42

Jim DiPasquale also questions the validity of making a legislative exception for composers. He asks, "Why should composers be singled out by Congress for unionization? This union would be of limited value anyway since it would only represent the five hundred or so people working in the television industry" He feels that such a union would actually divide composers and undermine the SCL's push for unity. n43 In fact, Boucher may want to divide composers because if they find any composers to support their legislation, it stands a much better chance of passing.

Boucher does not explain how this composers' union would survive. Max Herman, the former President of the American Federation of Musicians, believes that composers are not numerous enough to have any real strength in a union. He predicts that a composer's union would be too poor, just as the CLGA was, to effect major changes. n44 Indeed, it is unclear where composers will suddenly acquire the leverage to bargain effectively with producers. The most they could hope to obtain would be minimum wage which would not solve the problem of lost performing rights. Congressman Howard Berman commented on the union provision of H.R. 1195 and summarized popular sentiment:

"Songwriters view this proposed revision as an effort to entice them to give up their most valuable copyright in exchange for a `pig in a poke,' and I must say, I strongly agree with them. Moreover, the residuals and collective bargaining rights would be nothing for the vast majority of songwriters who are not employees, for those whose songs on syndicated television were previously written or for the spouses and children of the deceased who depend on continuing royalties for their living. Nor would it do anything for songwriters who live abroad or for music publishers who own and promote copyrights." n45

In short, a union would not provide any guarantees for composers. Its existence would not change the fact that the industry under-values music in any project, adding it almost as an after-thought once the rest of the product is complete. A composers' union would be weak financially and small in numbers. It would be unable to persuade producers to increase their financial risk and pay more for music. Even if the producers were to agree philosophically, as a practical matter they could not afford to pay composers what they are worth without some promise of compensation from broadcasters.

As a result, a union would not allow composers to rectify any of the damage done to their performing rights by source licensing. The ability to bargain collectively would not secure them any increased upfront payments. It is a mere carrot thrown to composers by Boucher which would be meaningless in affecting compensation. Collective bargaining would not enable composers to predict the value of their works in advance. In the end, composers would lose permanently their right to continued payment through performance rights, and instead they would receive arbitrary compensation in advance of performance.

Residuals in Lieu of Performance Rights

Boucher believes some sort of residual system would be a fair replacement for performance rights. He cites the fact that every other group in the industry, actors, writers and directors, all receive residual compensation. This statement ignores an underlying philosophical difference between residuals and performance rights. Residual systems devalue the product over time. The writer, actor, or director does receive money for repeated future performances, but he receives less and less as time passes, the theory being that the television show is worth less after ten viewings than five,, that the public grows tired of watching the same television show time and time again. The opposite premise underlies the performance right. Music appreciates with repeated performance because if it can stand the test of time, if people still want to listen to a song after repeated performances, then it is a valuable copyright which deserves compensation. Consequently, with multiple performances of a composition, the composer receives more royalties.

An additional distinction separates composers from actors, writers and directors. The latter groups have clout before their work is displayed to the public. An audience will go to a movie or watch a television show in anticipation of seeing Larry Hagman perform or hearing the jokes of Steven Bochco. Very few people, however, will watch a new show to hear the new composition of Mike Post or Jim DiPasquale. It is only after the program has attained a level of success that the music becomes a shorthand for the show itself. Only after Miami Vice became popular could its highly rhythmic theme conjure up an image of Don Johnson without the listener turning on the television. Only after Star Trek became a national phenomenon could a simpie four note sequence lead the viewer to think automatically, "Space, the final frontier. These are the voyages of the Starship Enterprise. . " In other words, actors, writers and directors can be compensated in advance for the value their names bring to a product. Composers, on the other hand, are largely anonymous to the public and their works must have a chance to burrow into the public consciousness before they can be valued accurately.

Residuals which actors, writers, and directors receive are based on a depreciating payment scale. How then can they fairly replace the current system of performance royalty payments for composers? Residuals would provide some continued payment, but composers would still lose money that they now receive through performance rights. Although Boucher to date has not formally announced what kind of residual system he has in mind, it is clear that no system would provide composers with their current level of income since residual systems are generally based on profitability rather than audience appreciation.

Only one system of residuals comes close to promoting the concept of appreciation over time. In pay television, directors receive royalties for the first year based on the number of subscribers. The bigger the pay television service, the more people who watch it, the more residuals the director receives. This system is analagous to the performance right which says that the more people listen to a composition, the more royalties the composer receives. Yet, the pay television system also entails the onerous task of tracking audience size and convincing stations to release this information. Even with a union, composers would have difficulty monitoring performances of their works and obtaining reliable information. Ron Anton of BMI points out that a lot of television production is done by small, one-time producers who are hard to locate. He praises the current system because broadcasters are always visible and the performing rights societies have the ability to police them. n46

Furthermore, even if composers could find a residual system which they liked, their union would have a hard time negotiating with producers for residuals. It has taken actors, writers, and directors years to work out the details of fair residuals systems. The system for composers will not appear overnight and during the negotiating time, composers will lose considerable revenue. Jim DiPasquale asserts that a fair residual system will never appear. He predicts that as a condition of employment, producers will insist on virtually no residuals and the composers, holding no bargaining chips, will have no choice but to acquiesce. n47 It is true that the current climate in Hollywood is not particularly amenable to discussing residuals, and so, the composers would face an uphill battle. The bottom line though is that no residual system would be an appropriate replacement for performance rights. In fact, residuals would completely alter current practice by negating performance rights entirely. Music would become a commodity which had to be judged unnaturally at first hearing instead of over-time. Composers would have to guess at the value of their music in advance, and they would lose countless amounts that they currently receive through performance royalties.

Conclusion

Unionization and residual provisions are not going to save the source licensing legislation. Only the broad-casters Support H.R. 1195 and S.698. Composers, pub-lishers, producers, and the performance rights societies, on the other hand, all stand to lose financially if the leg-islation passes, and they say it would take years for the music industry to return to stable business dealings.

One other group also will suffer if Congress mandates source licensing, the American public. Stripped of financial security, composers will not be able to devote themselves as completely to their art. Forced to assume new monetary risks, producers will not be able to afford quality music or to commission the best composers to write new works. The net results will be disincentives to create and less quality music reaching the public. Surely this is not what the drafters of the Copyright Act had in mind. They wanted to encourage creation and to fairly compensate the composers who brought more quality musical expression to the public. Mandated source licensing would not only hurt the members of the music industry financially but it would also erode some fundamental tenets of American copyright law.

People must realize that composing is difficult work which deserves compensation. Music is not free. Professor John Kenochan explains that "use of art, including music performance, is the use of a product of labor, and. . . it must be paid for." He also comments that copyright is undervalued in the United States, and therefore, the market can potentially abuse the copyright holder:

"It is probably natural in a competitive system that industry should try to pay as little as possible for what it buys-whether it be performing rights or any other commodity. So also that it should then charge as much as possible, with as little sharing of revenue with creators as can be managed. It is expected that what performing rights organizations deem a fair price should be deemed unfair by the buyers. Which is right-considering the market and the objective? To resolve this question, some generally accepted standard would help. It should be based on impartial study of what is needed and viable to attain the objective of copyright: self-sufficiency for the meritorious artist so that he can live by his art at least as decently as other professionals - e.g., teachers - in our society. n48

Congress cannot justifiably pass bills like H.R. 1195 and S.698 which tip the market markedly in favor of buyers while hurting the "meritorious artist" The problem of licensing performance rights simply does not belong before the legislature. Rather, it belongs in the marketplace.

In settling the dispute over source licensing, two major goals deserve attention. The American public wants quality music, and the American composer deserves compensation for producing the music. Unfortunately, art and business have become intertwined, and the Boucher and Thurmond bills demonstrate how business can impede and irrevocably damage art. The dispute over licensing must instead be left in the open market. Congress should not succumb to the pressure of a powerful interest group at the expense of the rest of the music industry. Congress should not mandate source licensing, but should instead leave the market as the primary force to settle the dispute. If both sides would approach each other with less skepticism and in the spirit of cooperation and negotiation, progress could be made. Composers will continue to be rewarded for their hard work and quality music will not stop in America.

NOTES

24. Statement of Congressman Rick Boucher on Television Music Licensing Reform Legislation, Wednesday, March 19, 1986.

25. Lionel S. Sobel, "The Music Business and the Sherman Act: An Analysis of the 'Economic Realities' of Blanket Licensing," Loyola Entertainment Law Journal, 1983, p. 14.

26. BMI Responses to Questions from Senator Specter, March 1986.

27. Statement of Eugene H. Bohi on Behalf of the Association of Independent Television Stations, Hearings Before the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice, July 23, 1986, p. 6.

28. Statement of Abiah Church on Behalf of Storer Communications, Inc. on H. R. 3521, Hearings Before the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice, July 23, 1986, p. 4.

29. Statement of the All-Industry Television Station Music License Committee; the National Association of Broadcasters; and the Association of Independent

Television Stations on S. 1980, Hearings Before the Senate Subcommittee on Patents, Trademarks, and Copyrights, April 9, 1986, p. 14.

30. Ibid., p. 18.

31. Sobel, Ibid., p. 32.

32. Statement of Ralph Oman, Register of Copyrights, Assistant Librarian for Copyright Services, Hearings Before the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice, March 19, 1986, p. 32.

33. Ibid., p. 40.

34. All-Industry Television Statement, Ibid., p. 23.

35. Interview with Robert Light, January 12, 1987.

36. Interview with Arthur Hamilton, January 20, 1987.

37. Statement of the Position of the Songwriters Guild of America Regarding H. R. 3521, Hearings Before the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice, March 4, 1986, p. 5.

38. Statement of Mike Post, Hearings Before the House Judici ary Subcommittee on Courts, Civil Liberties, and the Administration of Justice, March 19, 1986, p. 6.

39. Statement of Kent Klavens, Chairman, Board of Directors, National Academy of Songwriters, Hearings Before the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice, p. 2.

40. Interview with James DiPasquale, January 21, 1987.

41. Interview with Arthur Hamilton, January 20, 1987.

42. Ibid.

43. Interview with James DiPasquale, January 21, 1987.

44. Interview with Max Herman, January 28, 1987.

45. Howard Berman, "Trading Copyrights for 'A Pig in a Poke,'" Billboard, December 20, 1986.

46. Interview with Ron Anton, January 20, 1987.

47. Interview with James DiPasquale, January 21, 1987.

48. Kernochan, Ibid., pp. 66-67.

Kyle-Beth Basson received her B.A. degree from Yale in 1984 and her J.D. degree from Harvard Law School in June 1987. She will be joining the law firm of Proskauer, Rose, Goetz and Mendelsohn in New York City in September 1987. She conducted the research for this article in January 1987 while serving as an extern for Warner Bros. Music in Los Angeles. The author thanks Professor David Wilkins of Harvard Law School and Don Biederman, Esq., of Warner Bros. Music for their advice in connection with her work on this article.
[ELR 9:3:3]

RECENT CASES

United States Supreme Court upholds decision granting permanent injunction to United States Olympic Committee barring San Francisco organization from using the word "Olympic" in conjunction with gay athletic competition

The United States Supreme Court has affirmed a Federal Court of Appeals decision (ELR 8:3:9) granting summary judgment and a permanent injunction to the United States Olympic Committee in an action against San Francisco Arts & Athletics, Inc. involving the use of the word "Olympic" in connection with the corporation promotion of the "Gay Olympic Games."

The Amateur Sports Act of 1978 authorized the United States Olympic Committee to prohibit certain commercial and promotional uses of the word Olympic. San

Francisco Arts & Athletics argued that the Committee possessed only a normal trademark in the word; that the Committee was required to prove that the alleged unauthorized use was confusing; and that the corporation was entitled to raise the defenses available to an entity sued for trademark violation under the Lanham Act.

Justice Powell examined the language and legislative history of section 110 of the Act, and concluded that Congress intended to provide the Committee with exclusive control of the use of the word Olympic without regard to whether an unauthorized use of the word tended to cause confusion and without regard to the defense available under the Lanham Act.

The court then rejected San Francisco Arts & Athletics' argument that the First Amendment prohibited Congress from granting the Committee a limited property right in the word Olympic, finding that Congress reasonably could have concluded that the commercial and promotional value of the word resulted from the Committee's expenditure of time, effort and funds, and thus was within the scope of trademark law protection.

Furthermore, the application of the Act to San Francisco Arts & Athletics' commercial speech was no broader than necessary to protect the value of the Olympic trademark, stated Justice Powell. It was noted that the corporation sought to sell T-shirts, buttons, bumper stickers and other items bearing the title "Gay Olympic Games," and that "the possibility for confusion as to sponsorship [was] obvious." The Act's restrictions on the corporation's claimed expressive use of the word Olympic to promote an athletic event also did not violate the First Amendment - the image the corporation planned to convey for its games was exactly the image carefully cultivated by the Committee, and was at the "core" of its legitimate property right.

Justice Powell concluded by finding that the Committee was not a government agent, and thus was not subject to a claim of discriminatory enforcement of its rights under section 110.

Justice O'Connor, with whom Justice Blackmun joined, concurred in the court's construction of section 110 and in the holding that the Act was constitutional, but would have reversed the Court of Appeals' finding that no governmental action was involved and remanded the matter for a determination of San Francisco Arts & Athletics' claim of discriminatory enforcement.

In dissent, Justice Brennan, with whom Justice Marshall joined, stated that the Committee indeed did engage in governmental action, first in performing important governmental functions, and second, because there existed a "sufficiently close nexus" between the government and the challenged action of the Committee so that the Committee's action fairly could be treated as that of the government. The Committee represents the United States to the International Olympic Committee, noted Justice Brennan, and every phase of the Olympic games reflects significant national interests. Congress granted the Committee the authority and ability "to govern national amateur athletics related to international competition," with inherently public powers and responsibilities.

With respect to the "close nexus" basis for governmental action, Justice Brennan noted the "symbiotic relationship" between the Committee and the federal government, given the mutual benefits to the parties, the "profound" connection between certain government decisions and those of the Olympic Committee, and the close financial and legislative link between the Committee's "allegedly discriminatory exercise of its word-use authority and the financial success of both the USOC and the Government."

Justice Brennan also questioned the court's rejection of San Francisco Arts and Athletics' First Amendment claims, viewing section 110 as overbroad on its face, given the possibility that the section might be applied to a substantial amount of non-commercial speech, and the possibility that the Olympic Committee might have unguided discretion as to the noncommercial use of the word Olympic. For Justice Brennan, the statute did not serve any government purpose that would not be effectively protected by giving the Committee a standard commercial trademark. And by failing to incorporate the defenses to trademark infringement provided in the Lanham Act the statute removed "essential safeguards which prevent trademark power from infringing upon constitutionally protected speech." The Amateur Sports Act gave the Committee exclusive control over a wide range of uses "of a word with a deep history in the English language and Western culture," and in so doing, substantially infringed upon San Francisco Arts & Athletics' right to communicate ideas, and infringed such right in a manner that was not content-neutral, and was greater than necessary to further a substantial government interest. Justice Brennan would have allowed the corporation to use the word Olympic in a nonconfusing and nonmisleading manner in the noncommercial promotion of a theatrical or athletic event, absent proof of harm to the Olympic Committee.

San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, Case No. 86-270 (U.S.Sup.Ct., June 25, 1987) [ELR 9:3:11]

Arkansas statute under which newspapers and certain magazines were exempt from paying sales taxes violated the First Amendment, rules United States Supreme Court

An Arkansas statute under which general interest magazines such as the monthly Arkansas Times, published by the Arkansas Writers' Projects, Inc., were subject to a sales tax, but which exempted from taxation newspapers and religious, professional, trade and sports journals, violated the First Amendment, the United States Supreme Court has ruled.

The Arkansas Supreme Court had concluded that the sales tax was a permissible "ordinary form of taxation" (ELR 8:6:19). In reversing this ruling, Justice Marshall cited Minneapolis Star & Tribune Co. v. Minnesota Commission of Revenue, 460 U.S. 575 (1983), in which the court held unconstitutional a Minnesota tax on paper and ink used in the production of newspapers, while indicating that a genuinely nondiscriminatory tax on the receipts of newspapers would be constitutionally permissible. But the Arkansas sales tax was not evenly applied to all magazines, and indeed involved a "more disturbing" use of selective taxation than Minneapolis Star, because the basis on which Arkansas differentiated between magazines was "particularly repugnant" to First Amendment principles. A magazine's tax status depended entirely on its content; allowing state official to review the content of publications as the basis for imposing a tax was found incompatible with the First Amendment's guarantee of freedom of the press.

Furthermore, the state did not show that the regulation was necessary to serve a compelling state interest and was narrowly drawn to achieve that end. The asserted state interest in raising revenue did not justify imposing the sales tax on some magazines and not others based solely on their content, nor did an interest in encouraging "fledgling" publications. The matter was remanded for further proceedings, presumably including an order refunding to the Arkansas Writers Project about $15,800 in tax paid on sales of the Arkansas Times.

Justice Stevens concurred in that part of the court's decision holding that Arkansas had the burden of justifying its content-based discrimination and failed to do so.

Justice Scalia, with whom Chief Justice Rehnquist joined in dissent, stated that the tax exemption at issue was reasonably related to the legitimate goals of encouraging small publishers with limited audiences and advertising revenues. Applying the strict scrutiny test to the Arkansas statute was based on the premise that for First Amendment purposes, the denial of exemption from taxation was equivalent to regulation; that premise was "demonstrably erroneous," according to Justice Scalia. Tax exemptions, credits and deductions have been recognized as a form of subsidy administered through the tax system. The denial of participation in a tax exemption or other subsidy scheme does not necessarily "infringe" a fundamental right because such a denial usually does not have any significant coercive effect. In this case, stated the dissent, it was "implausible" that the 4% sales tax, generally applicable to all sales in the state with the few specified exemptions, was meant to inhibit, or had the effect of inhibiting, the Arkansas Times.

The dissent pointed out that the court's opinion would cast doubt upon a wide variety of tax preferences and subsidies that draw distinctions based upon subject matter, such as bulk postal rates for certain nonprofit organizations, federal government funds expended on the Kennedy Center for the presentation of specified artistic programs, and research grant programs which provide money for the study of some subjects but not others, and concluded that the decision wrongly placed the granting or denial of First Amendment protection within the court's own "idiosyncratic discretion."

Arkansas Writers' Project, Inc. v. Ragland, Case No. 85-1370 (U.S.Sup.Ct., April 22, 1987) [ELR 9:3:12]

Producer of PG-rated film "The Junkman" was not entitled to bring unfair competition claim against theaters for advertising the film as R-rated

A Federal Court of Appeals in California has refused to extend the scope of section 43(a) of the Lanham Act to a claim brought by a film producer against various theaters which incorrectly advertised his film as rated R.

H.B. Halicki produced "The Junkman," an adventure film featuring car chases and collisions. The film, which was designed to appeal to teenagers and young adults, obtained a PG rating from the Motion Picture Association of America. However, the theaters advertised the film as rated R, indicating that it was unsuitable for children and young adults and that no one under the age of 18 should be admitted to the theater unless accompanied by an adult. Halicki argued that the theaters had made a false representation about the film, and that he was injured by the representation.

Judge Noonan, describing the question presented as one of first impression, has upheld a Federal District Court decision granting summary judgment to the theaters. Judge Noonan stated that a complaint under the Lanham Act must allege not only that certain conduct was unfair but also that the conduct was competitive, declining to follow the "reverse passing off" view of Smith v. Montoro, 648 F.2d 602 (ELR 3:6:1) or the false representation claim presented in Gilliam v.

American Broadcasting Co., 538 F.2d 14 (2d Cir.1976; "Monty Python" case).

The court, while finding that Halicki failed to show injury by a competitor, noted that the producer might have a remedy in contract against the theaters in that it was agreed that all advertising of the film would reflect the PG rating.

Halicki v. United Artists Communications, Inc., 812 F.2d 1213 (9th Cir.1987) [ELR 9:3:12]

Songwriter John Fogerty's status as beneficial owner of copyrighted work did not preclude copyright infringement action brought by song's legal owner against Fogerty and Warner Bros. Records

Songwriter John Fogerty granted the exclusive rights in the copyrighted work "Run Through the Jungle" to Cireco Music and Galaxy Records, the predecessors of Fantasy, Inc. In return, Fogerty was to receive a sales percentage and other royalties derived from the exploitation of Jungle. In 1984, Fogerty wrote the song "The Old Man Down the Road," and authorized Warner Bros. Records to distribute copies of Fogerty's performance of the song. Fantasy proceeded to sue Fogerty and Warner Bros. for copyright infringement, alleging that Old Man was Jungle with new words.

Federal District Court Judge Conti noted that a "beneficial owner" of a copyright includes an author who has transferred legal title to the copyright in exchange for percentage royalties based on sales or license fees. As described by the court, Warner's claim was that since a beneficial owner has a property interest in a copyright and can enforce that interest through an infringement suit, then "prohibitions against infringement suits between copyright coowners should also apply to suits between a copyright's legal owner and its beneficial owner." Thus, since Fogerty was the beneficial owner of the Jungle copyright, Warner, as Fogerty's authorized licensee, could not infringe upon Fantasy's interest in the Jungle copyright.

Judge Conti, however, stated that beneficial owners do not have an independent right to use or license the use of the copyright-a beneficial owner has only an economic interest in the copyright (emphasis by court) and this economic interest extends to the proceeds derived from the use of the copyright by its legal owner. If a beneficial owner attempts to exercise the transferred "use" rights, the legal owner of those exclusive rights may bring an action for infringement, declared the court.

In this case, if Fogerty's Old Man song derived from Jungle, then Fogerty may have exercised an exclusive right already granted to Fantasy, and Fantasy could sue Fogerty, and Warner, as Fogerty's licensee, for infringement. Warner's motion for summary judgment was denied accordingly.

Fantasy, Inc. v. Fogerty, 654 F.Supp. 1129 (N.D.Ca.1987) [ELR 9:3:13]

Federal jurisdiction was present in declaratory judgment action seeking to establish coauthorship of the copyrighted song "Let the Good Times Roll"

Shirley Goodman's action for declaratory judgment to establish that she coauthored the song "Let the Good Times Roll," was within federal jurisdiction, a Federal Court of Appeals has ruled.

Goodman alleged that she wrote Let the Good Times Roll with Leonard Lee, the deceased husband and father, respectively, of Audrey Lee and Nikki Lee. A Federal District Court granted summary judgment to the Lees on the ground of lack of subject matter jurisdiction.

In reversing the District Court's judgment, Judge Jerre S. Williams noted that Leonard Lee, who managed the business affairs of "Shirley and Lee," registered many songs only in his name, although the songs were co-written by Goodman. Goodman did not receive any publishing royalties from the songs registered solely under Lee's name.

In 1984, when the original copyrights were up for renewal, Goodman apparently learned that the songs were registered only in Lee's name, and filed an application to have the registration renewed in the names of Shirley Goodman and Leonard Lee as co-authors. However, Copyright Office regulations provide that registrations can only be changed by copyright proprietors.

Goodman's declaratory judgment action requested the court to include her name as a co-author with Lee, and to order an accounting of all income from the use and exploitation of the song,

Judge Williams held that the case clearly involved the application and interpretation of statutory copyright ownership provisions, and that federal jurisdiction over the case was proper. The court declined to follow several cases decided by a Federal District Court in New York (including Rotardier v. Entertainment Co. Music Group, 518 F.Supp.919; ELR 3:14:7; and Keith v. Scruggs, 507 F. Supp. 968; ELR 3:7:7) which held that an action to establish title is not one which "arises under" the Copyright Act. Furthermore, Goodman's claim was distinguishable from the cases cited by the District Court since those cases involved contracts, the subject of which were copyrights; Goodman's claim involved the validity of the copyright itself.

Goodman v. Lee, 815 F.2d 1030 (5th Cir.1987) [ELR 9:3:13]

Hustler Magazine was not liable for damages allegedly arising from death of adolescent who engaged in autoerotic asphyxiation after reading magazine article, rules Federal Court of Appeals in reversing judgment entered on jury verdict

The publisher of Hustler Magazine was not liable for damages in connection with the death of a young man who engaged in the practice of autoerotic asphyxiation after reading an article in Hustler, a Federal Court of Appeals has ruled.

Diane Herceg, the mother of fourteen year old Troy D., sued Hustler to recover damages for emotional and psychological harm. A Federal District Court granted Hustler's motion to dismiss some of the claims, but granted leave to Herceg to amend the complaint to add an allegation of incitement. The amended complaint stated that Troy had read the article, and was incited by the article to perform the act that resulted in his death. The District Court subsequently dismissed all cause of action except those based on incitement (ELR 6:12:17). A jury then found in favor of Herceg and awarded her $69,000 in actual damages and $100,000 in exemplary damages; the jury also awarded $3,000 for pain and mental suffering and $10,000 in exemplary damages to the young man who discovered Troy's body.

In reversing the entry of judgment on the jury verdict, Federal Court of Appeals Judge Alvin B. Rubin noted that while some types of speech may be excluded from, or entitled only to narrowed constitutional protection, First Amendment protection "is not eliminated simply because publication of an idea creates a potential hazard." Judge Rubin observed that the "crucial element" to lowering the First Amendment shield is the imminence of a threatened evil. But the Hustler article did not advocate engaging in the practice of autoerotic asphyxiation, and emphasized the seriousness of the danger of harm associated with the practice. Furthermore, applying an imminence of harm analysis in the instant case appeared to the court as inappropriate since the incitement theory was based on concern over crowd behavior. However, the court did not reach the question of whether written material might ever be found to create culpable incitement unprotected by the First Amendment.

The court then reviewed the case of Weirum v. RKO General, Inc., 15 Cal.3d 40 (1975), in which the Supreme Court of California held a radio station liable for wrongful death damage to a non-listener motorist resulting from an accident caused when two youths who listened to a promotional broadcast engaged in a street race in order to reach the site of a prize money giveaway. In contrast to the radio station broadcast, noted Judge Rubin, the Hustler article was not an effort to achieve a commercial result, and attempted to dissuade readers from conducting the dangerous activity described therein.

Also rejected was Herceg's suggestion that a less stringent standard for imposing liability be applied in cases involving non-political speech that has produced harm. The result of differentiating between categories of speech in order to decide how much constitutional protection is required might be that an article discussing the nature and danger of using cocaine, or of hang-gliding, according to the court, might lead to liability. "Mere negligence ... cannot form the basis of liability under the incitement doctrine any more than it can under libel doctrine," concluded Judge Rubin, and, in any event, the case was not tried on a negligence theory.

Judge Edith H. Jones, concurring in part and dissenting, noted being disturbed "to the point of despair" by the majority's broad reasoning which might foreclose the possibility of state-imposed civil liability for harms caused by the pornography business. For Judge Jones, Hustler would not be considered a bona fide competitor in the marketplace of ideas, but rather a largely pornographic, whether or not technically obscene (and thus totally unprotected) publication. The magazine was aware that many of its readers were adolescents, but proceeded to send forth a dangerously explicit message to a vulnerable audience.

Judge Jones would uphold state regulation by means of tort recovery for injuries directly caused by pornography when tailored to specific harm and when not broader than necessary to accomplish its purpose. A Texas court thus might base liability on negligence and attractive nuisance theories. But since Herceg did not appeal the dismissal of all causes of action except incitement, Judge Jones did not address further the nature of any tort liability on the part of Hustler.

Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987) [ELR 9:3:13]

Soldier of Fortune magazine was not entitled to summary judgment in action involving "Gun for Hire" advertisements

When Norman Douglas Norwood was shot and wounded in an attempt by several individuals to injure or murder him, Norwood sued Soldier of Fortune magazine, claiming that the attack resulted from conspiracies formed by Larry Elgin Gray and other parties after Gray responded to advertisements in the magazine.

In 1985, Richard Michael Savage and Michael Wayne Jackson each placed advertisements in Soldier of Fortune, seeking employment in the category of "Gun for Hire" According to Norwood, Gray contacted Savage, Jackson and other individuals and hired them to kill Norwood.

A Federal District Court in Arkansas has refused to grant Soldier of Fortune's motion for summary judgment, rejecting the magazine's claim that the "Gun for Hire" advertisements were absolutely privileged. Chief Judge H. Franklin Waters found inapplicable cases cited by both Norwood and the magazine on the permissible boundaries of regulating First Amendment rights. In the advertisements (which offered to keep all inquiries private) Savage claimed to be a "professional mercenary" and a "Vietnam vet," and Jackson referred to himself as "NAM sniper instructor" Judge Waters observed that it was likely that most individuals would view such statements as "a far cry from the type of responsible public debate which the United States Supreme Court obviously intends to foster by cases such as New York Times. . ."

Norwood was not seeking to curtail the magazine's speech, declared the court, but was asking for damages for the personal injury he suffered, allegedly due to the exercise of the magazine's right. It will remain for a jury to decide whether the magazine infringed Norwood's rights, for "reasonable jurors might conclude that a reasonable person shouldn't be especially surprised when he learns that the gun that had been hired through his advertisement was used to do one of the things that guns often do and are designed to do - hurt people."

Norwood v. Soldier of Fortune Magazine, Inc., 651 F.Supp. 1397 (W.D.Ark. 1987) [ELR 9:3:14]

Art dealer obtains summary judgment in action arising from restorer's loss of Andrew Wyeth painting; issue of damages is ordered to trial

In February 1982, art dealer Frank Fowler left an Andrew Wyeth painting called "The Woodchopper" with Julius Lowy Frame and Restoring Co. for the repair of a broken glass frame. The painting apparently was lost. However in late 1982, Lowy's insurance carrier, American Centennial Insurance Co. disclaimed coverage, on the grounds that notice of the loss (which was given in May 1982) was not timely given and that the loss was the result of a "mysterious disappearance" which was excluded under the policy.

Fowler recovered about $125,000 from his own insurance carrier; the insurer then brought a subrogation action against Lowy. Lowy impleaded its insurance broker, Coven Agency, and a sub-broker, alleging that they negligently failed to procure proper insurance.

A New York trial court has ruled that Fowler was entitled to summary judgment against Lowy because the restorer did not produce evidence that the loss occurred without its negligence. Civil Court Judge Walter M. Schackman (sitting by designation) declared that the relationship between Fowler and Lowy was that of bailor and bailee, and that a prima facie case of negligence had been established. A trial was ordered on the issue of damages.

It was further found that Fowler was not entitled to maintain a direct action against American; that a triable question of fact was presented as to the timeliness of Lowy's two-month delay in providing notice to the insurer of the loss and the timeliness of the insurer's disclaimer; that, at trial, Lowy would have the burden of proving that the loss was a covered peril under the insurance policy; and that Lowy could not proceed with an action against the sub-broker.

Fowler v. Julius Lowy Frame & Restoring Co., Inc., New York Law Journal, p.5, col. 2 (N.Y.Cnty., June 30, 1987) [ELR 9:3:15]

Federal Court of Appeals rules that taxpayers were entitled to claim charitable deduction based on price paid for donated lithographs rather than on unsubstantiated increased value claimed as of date of donation

In 1978, David and Barbara Orth paid $10,000 to purchase 100 unframed lithographs created by Leonardo Nierman. About fifteen months later, the Orths donated 73 of the lithographs to several charities, and in their 1979 federal income tax return, claimed a charitable contribution deduction of $27,682 (about $379 each) for the donated Nierman lithographs.

The Commissioner of Internal Revenue disallowed the claimed deduction to the extent it exceeded $7300 - the cost of the lithographs to the Orths. The Tax Courts affirmed the Commissioner, finding that the Orths did not prove that the value of the donated art works was greater than their cost.

A Federal Court of Appeals has upheld the Tax Court's decision. The Orths had argued that in calculating the fair market value of a charitable contribution of property, the retail market, i.e., sales made by art dealers and galleries, should be used in determining the value of the lithographs. According to the Orths, the lithographs were valued in this market at $300 each (the $300 figure, rather than the $379 claimed in the tax return was the value set by the Orths before the tax court and on appeal).

However, the court agreed with the tax court's finding that the lithographs were most commonly sold in large guantities to individuals; were most commonly sold for $100 each; and that this was the market in which the Orths made their purchase.

With respect to the time of valuation, the tax court found insufficient evidence of the lithographs' value as of the date of donation, and calculated the value of the Orth's deduction based on the $100 per lithograph purchase price. The Orths provided no evidence of the number of sales at the time of the donation, what types of customers were involved, or any other specific information, noted Judge Harlington Wood, Jr., and the tax court therefore reasonably found that the purchase price of the art works accurately reflected their value at the time of donation.

Orth v. Commissioner of Internal Revenue, 813 F.2d 837 (7th Cir. 1987) [ELR 9:3:15]

National Collegiate Athletic Association's decision to impose sanctions against Bradley University's basketball program did not involve state action, rules Federal District Court in dismissing equal protection and due process claims of students affiliated with mens' basketball team

Several Bradley University basketball players have unsuccessfully challenged the National Collegiate Athletic Association's decision to impose sanctions against the school's basketball program for violating ten of the NCAA's regulations. The sanctions included a public reprimand, a two year probation period, and barring Bradley's intercollegiate mens' basketball team from participating in the NCAAs Division 1 men's basketball championship or any post-season competition during the 1986-87 academic year. Bradley's mens' basketball team's coaching staff was prohibited from participating in off-campus recruiting activities for one year.

The students sought to enjoin the NCAA from enforcing the disciplinary action taken against Bradley, claiming that restricting the team's post-season competition, without giving the students an opportunity to be heard, denied the students procedural due process in violation of the United States Constitution. Also raised was a claim alleging the violation of 42 U.S.C. section 1983 and of the equal protection guarantees of the Fourteenth Amendment. A Federal District Court in Illinois has rejected the students' due process and equal protection claims and has granted summary judgment to the NCAA on the ground that the NCAa's conduct did not constitute state action. Citing Arlosoroff v. NCAA, 746 F.2d 1019 (ELR 7:4:7), the court noted that the NCAA is not an agency which is subjected to or governed by any state government; that the basic character of the NCAA is that of a voluntary association of public and private institutions; and that the regulatory or overseeing function regarding the nation's intercollegiate athletics, as undertaken by the NCAA, was not traditionally an exclusive state function.

In a lengthy, albeit dicta, discussion, the court denied the students' attempts to claim a protected property interest in post-season competition, in gaining tournament experience, or in securing professional careers in athletics.

Hawkins v. National Collegiate Athletic Association, 652 F.Supp. 602 (C.D.Ill.1987) [ELR 9:3:15]

Award of damages to Atlanta ticketing service in antitrust action against competing ticket service and Omni Coliseum is upheld

The Omni Coliseum in Atlanta, in its standard contract with respect to entertainment events, required promoters to conduct all ticket sales via the facility's box office or at other ticket agencies approved by the operators of the Omni; some contracts provided for the payment by promoters of all fees and expenses immediately following the show, including a 3.5% ticket charge. The arena never established any written specifications or procedures for approving a ticketing service-apparently, there "was no real dispute" that the phrase in the contract concerning the facility's box office referred to an Omni-affiliated ticket-selling service known as SEATS.

Tic-X-Press, a ticketing agency primarily engaged in the business of selling tickets for musical concerts in the Atlanta area, requested permission to sell tickets to Omni productions but was refused on several occasions. Tic-X-Press used "hard tickets" which are preprinted, divided and distributed to various locations to be sold. SEATS used a centralized computer system which allowed the company to print the ticket at the time of purchase.

When Tic-X-Press sued the Atlanta Coliseum, Inc. and various affiliated parties, the company claimed that the Coliseum engaged in an anticompetitive tying arrangement by conditioning the lease of the facility upon the use of SEATS. A Federal District Court held that the Coliseum parties had violated the antitrust laws and awarded Tic-XPress treble damages and injunctive relief. The court found that SEATS, during its career, had sold the tickets to every musical event at the Omni-more than 1 million tickets between 1978 and 1982, for a gross intake of between $9 and $13.5 million in ticket sales; that the lease of the Omni facilities and the sale of tickets to Omni concerts constituted two separate products; and that the products were "tied" as a matter of antitrust law. Treble damages of about $30,000 and attorney's fees of about $59,000 were awarded to Tic-X-Press.

A Federal Court of Appeals has upheld the District Court's decision, pointing out that the court had found that the Omni's standard contract fell only "slightly" short of expressly requiring promoters to use the SEATS ticket service, and that the negotiating process with promoters also appeared to indicate the necessity of using SEATS for Omni events. The District Court also correctly found that the facts and circumstances surrounding negotiations for leasing the Omni established that leasing the facility was, as a practical matter, conditioned upon the use of SEATS; that there was a sufficient impact on competition in the tied market to violate the antitrust laws; and that the Coliseum had sufficient economic power to force acceptance of the tie.

Also affirmed was the award of attorney's fees and the amount of the damage award, an amount based upon the lost revenue from the concerts promoted by the one promoter the District Court found definitely would have chosen Tic-X-Press over SEATS to provide ticketing services for events the promoter staged at the Omni.

Tic-X-Press, Inc. v. Omni Promotions Company of Georgia, 815 F.2d 1407 (11th Cir. 1987) [ELR 9:3:16]

City of San Diego's right to regulate subscriber fees of cable television franchisee was preempted by state law, rules California appellate court; in separate matter, appellate court reverses decision granting refund to Cox Cable of tax assessed by County of San Diego on company's use of public rights-of-way

California's Cable Rate Deregulation Act preempted local rate regulation of cable television, a state appellate court has ruled in affirming a trial court decision granting summary judgment to Cox Cable San Diego in a declaratory relief action against the city of San Diego.

In 1979, San Diego granted Cox a cable television franchise; the governing ordinance, among other provisions, permitted the city to regulate the rates Cox charged subscribers for cable television services.

In 1984, Cox notified the city that the company intended to deregulate its subscriber rates pursuant to the state Government Code. San Diego asserted that as a charter city, it was not bound by the provisions of the Act.

The appellate court stated that the Act manifested "a statewide concern and intent to occupy and exempt cable rate regulation by local government entities under certain conditions." It was found that Cox met the statutory conditions, and that the cable rate deregulation provisions did not unconstitutionally impair the contractual rights of the parties.

In an earlier proceeding brought by Cox against the County of San Diego, the appellate court upheld the county's right to assess a property tax on the cable company's rights to use and occupy, both overhead and underground, public rights-of-way. The trial court had found that the rights were not subject to property tax because Cox did not own a possessory interest, and ordered a refund of about $31,000 in taxes paid by the cable company in 1980-1981.

In reversing the trial court's ruling, and remanding the matter for further proceedings, the appellate court noted that the company's tangible property, such as satellite receiving stations, antennae, wires, and coaxial cables were taxed separately and this assessment was not in issue. Cox had argued that the tax on the "possessory interest" was an impermissible tax on Cox's franchise, for which the company already paid its franchise fee. But the court rejected this argument, and also determined that Cox's constant presence with respect to its rights-of-way fulfilled the exclusive use requirement for a locally assessable possessory interest.

Cox Cable San Diego, Inc. v. City of San Diego, 233 Cal.Rptr. 735 (Ca.Ct. App. 1987); Cox Cable San

Diego, Inc. v. County of San Diego, 229 Cal.Rptr. 839 (Ca.Ct.App. 1986) [ELR 9:3:16]

Exclusive cable television franchise arrangements of three Bay Area cities violated First Amendment, rules Federal District Court in California

The exclusive cable television franchise arrangements of three California municipalities violated the First Amendment rights of Century Federal, Inc., an aspiring franchisee, a Federal District Court in California has ruled.

When Century Federal attempted to enter the cable television business in Palo Alto, Atherton, and Menlo Park, the company was told that it must participate in the franchise selection process conducted by Palo Alto on behalf of all the cities; the company also was refused pole attachment services by local utilities because it had no operating franchise.

Century Franchise did not participate in the franchise selection process. Instead, the company sued the cities, alleging that the franchising process violated the antitrust laws and the First Amendment. The antitrust claims were dismissed on the ground that the cities were immune from liability for the challenged conduct. Subsequently, the company's First Amendment claim also was dismissed. But after the decision in Preferred Communications, Inc., v. City of Los Angeles, 754 F.2d 1396, aff'd., 106 S.Ct.2034 (ELR 7:1:12), Century Federal filed the instant action, reasserting its First Amendment claim.

In granting Century Federal's motion for partial summary judgment, Judge Eugene Lynch found that any increase in "disruption to the public domain resulting from the initial installation of more than one cable system, as opposed to a single system, [did] not constitute a substantial or important governmental interest so as to justify the suppression of all cable speakers except [the franchisee] Furthermore, since cable television was characterized by the court as more closely analogous to newspapers than to the broadcast media, the fact that the cable television market in a proposed service area may be a natural monopoly would not justify greater governmental regulation of cable operators than would otherwise be allowed under the First Amendment.

Judge Lynch stated that the cities were not required to grant cable franchises to "all comers, regardless of size, shape, quality or qualifications." However, it was noted that the court did not need to reach the issue of permissible minimum requirements for franchisees.

Century Federal, Inc. v. City of Palo Alto, 648 F. Supp. 1465 (N.D.C. 1986) [ELR 9:3:17]

Briefly Noted:

"Here's Johnny."

A Federal Court of Appeals in Michigan has upheld a District Court order (ELR 5:2:7) enjoining a company known as Here's Johnny Portable Toilets, Inc. from using the phrase anywhere in the country and awarding Carson about $31,000 in damages. The court noted that many states have never considered whether a right of publicity exists, and "even fewer have considered whether that right protects not only an entertainer's name or picture but also a phrase or nickname or other name or symbol associated with the entertainer" Nevertheless, it was found that there were indications that other states would hold as the court predicted Michigan would, and that pending the possible use of the phrase in a state where the substantive law differed from Michigan's, there would be "no harm" in letting the injunction stand, without prejudice to the company's right to seek future modification in the event of changed conditions.

Carson v. Here's Johnny Portable Toilets, Inc., 810 F.2d 104 (6th Cir. 1987) [ELR 9:3:17]

Satellite Programming.

Several pay television entertainment services have obtained summary judgment in an action against the Holiday Inn in Corinth, Mississippi. A Federal District Court found that the motel's unauthorized reception, use and retransmission into guest rooms of the programming services' satellite transmissions violated section 705(a) of the Communications Act, and infringed copyrighted works. However, the unauthorized display of authentic Home Box Office and Showtime programming was not likely to lead to the type of consumer confusion cognizable either under trademark laws or as unfair competition, stated the court. A permanent injunction was entered, restraining the motel from "intercepting, receiving, appropriating, converting to their own use, or re-transmitting, divulging or using any satellite-delivered transmissions" of the programming service parties without their authorization.

Home Box Office, Inc. v. Corinth, Motel, Inc., 647 F.Supp. 1186 (N.D.Miss.1986) [ELR 9:3:17]

Copyright Infringement/Toy Bear.

Worlds of Wonder, Inc. has obtained a preliminary injunction preventing Veritel Learning Systems, Inc. from distributing cassette tapes for the popular Teddy Ruxpin toy bear. A Federal District Court in Texas found that Worlds of Wonder held a valid copyright for Teddy Ruxpin as an audiovisual work; that Veritel's tapes were derivative works which were substantially similar to World of Wonder's tapes; and that World of Wonder was likely to succeed on its copyright infringement claim. The court pointed out that Worlds of Wonder had demonstrated that it would suffer irreparable harm in the absence of a preliminary injunction. Although Veritel was barred from distributing tapes purporting to activate the Teddy Ruxpin animation system, or containing a voice confusingly similar to the Teddy Ruxpin voice, the restraint did not extend to Veritel's manufacture of its cassette tapes. However, Judge Fish stated that if Worlds of Wonder is ultimately successful in the case, Veritel might be permanently enjoined from selling or otherwise using any tapes it might produce.

Worlds of Wonder, Inc. v. Veritel Learning Systems, Inc., 658 F.Supp. 351 (N.D.Tex. 1986) [ELR 9:3:18]

Employment Termination.

Samuel J. Falcone claimed that when he was hired by Columbia Pictures Industries to work at its Music Publications Division in Hialeah, Florida, he was advised orally that it was Columbia's policy before terminating an employee to follow certain procedures, including giving oral and written warnings. In August 1982, Columbia notified Falcone, who had been promoted in 1981 to a position in New York City, that the company was terminating his employment and giving him five months severance pay. Falcone sued Columbia for wrongful discharge, alleging that the termination procedures set forth in a 1982 company booklet were not followed.

A Federal District Court granted Columbia's motion for summary judgment on the ground that Falcone did not present any evidence that he relied upon the company's alleged oral and written representations when he accepted employment, and thus did come within New York's narrow limitations on an employer's ability to terminate an at will employee.

In upholding the District Court's decision, Federal Court of Appeals Judge Rosenn rejected Falcone's argument that his move from Florida to New York constituted sufficient consideration to bind Columbia to the alleged promise not to terminate employment without prior warnings and time to "rehabilitate" himself; also rejected was the argument that Falcone's continued employment constituted sufficient consideration for such a promise. The reliance necessary to limit an employer's right to terminate an at will employee may be found in the terms and acceptance of employment or where an employee moves or continues employment in reliance upon a limitation of the right to terminate at will, if the employee can demonstrate that he/ she would not have moved or continued the employment absent such a promise; no such demonstration was made by Falcone.

Falcone v. Columbia Pictures Industries, Inc., 805 F.2d 115 (3d Cir. 1986) [ELR 9:3:18]

Noncompetition Covenant.

In 1975, Western Media purchased radio station KBMN from William Merrick, the station's president and chief operating officer. Merrick agreed not to operate or work for any other radio or television station within a 50 mile radius of Bozeman, Montana for a period of ten years. Western Media agreed to pay Merrick $500,000, including $50,000 (payable monthly for a period of ten years) for the covenant not to compete.

In 1984, Merrick accepted a position with KUSM, a public radio station located on the campus of Montana State University. Western Media sued to recover its monthly payments to Merrick, alleging breach of the covenant not to compete.

The Supreme Court of Montana has reversed a trial court decision granting summary judgment on behalf of Merrick. The court noted that the covenant not to compete was valid because it was included in a contract transferring all of KBMN's tangible and intangible assets, including goodwill, to Western Media, and because the covenant applied to a limited geographic area and reasonable time period. Western Media therefore was entitled to recover any monthly payments made to Merrick subsequent, but not prior, to the breach of the covenant, and any damages for losses incurred due to Merrick's employment at KUSM.

Western Media, Inc. v. Merrick, 727 P.2d 547 (Mont. 1986) [ELR 9:3:18]

Tax.

The Commissioner of Internal Revenue correctly determined a deficiency of about $27,000 in John R. and Antoinette V. Cozzi's 1980 federal income tax, the United States Tax Court has ruled. The Cozzis were limited partners in Hap Production Company. In 1975, Hap entered into a production agreement for an X-rated film dealing with the adventures of a teenage female in Hong

Kong; the film eventually was distributed under the same title as a somewhat more well-known production- "Annie" Hap also entered into a nonrecourse loan agreement in 1975 with a company known as Sargon Etablissement.

In assessing the deficiency after a 1981 audit, the Internal Revenue Service argued that the production agreement constituted Hap's only means of paying the loan from Sargon; that the production agreement became worthless and was abandoned by Hap in 1980; and that Hap was released from the debt in 1980 and realized income as a result of such release.

Tax Court Judge Simpson agreed, noting that the record was clear that Hap was a tax shelter "which generated significant tax benefits in 1975, but thereafter ignored its stated business purpose and attempted to fade into oblivion." It was noted, in part, that there was no evidence that a reasonable possibility ever existed that the film would show an economic profit, and that Hap did not make a scheduled final payment to Sargon in 1980 and never entered into an arrangement to defer any such payment. And the fact that the taxpayers did not provide a credible explanation for their failure to recognize any income until after the Commissioner began an investigation supported the imposition of an additional to tax of $1,350.

Cozzi v. Commissioner, 88 T.C. No. 20 (U.S.Tax Ct. 1987) [ELR 9:3:18]

IN THE NEWS

Arbitrator finds that director Michael Cimino forfeited right to make a final cut of the film "The Sicilian"

Arbitrator Murray Schwartz has concluded that director Michael Cimino forfeited the right to make the final cut of the film "The Sicilian" The arbitrator, in a confidential proceeding which was conducted under the auspices of the Directors Guild of America, found, according to news reports, that Cimino did not adequately consult with producer David Begelman concerning cutting Cimino's 2 hour, 25 minute version of the film to comply with the contractually specified length of 2 hours and 5 minutes. After Begelman rejected as unacceptable a shorter version of the film submitted by Cimino, the director did not engage in further discussions about the work.

Still pending is Cimino's action against Begelman seeking a Federal District Court order barring the producer from making a final cut of the film. [Aug. 1987] [ELR 9:3:19]

Federal District Court dismisses Bette Midler's claims against Ford Motor Co. arising from use of "sound-alike" singer

Ford Motor Co. was not liable for damages claimed by Bette Midler in connection with the company's use of a "sound-alike" singer in advertisements for its Lincoln Mercury cars, a Federal District Court in California has ruled. "Regardless of the morality of the defendant's actions, the law offers no protection',' stated Judge Ferdinand F. Fernandez. Midler apparently declined an offer to sing "Do You Want to Dance" in the television commercials for the cars. When Ford used a sound-alike performer, Midler sought damages of $10 million, alleging unfair competition, invasion of privacy and violation of her right to publicity. [Aug. 1987] [ELR 9:3:19]

Screen Actors Guild ends strike against animation studios and agrees to new contract

The Screen Actors Guild has ended its strike against four major producers of animated films. Walt Disney Co., Filmation, Marvel Productions and DIC Enterprises agreed to a new three year contract, under which work sessions for performers who provide the voices for television cartoon characters will be four hours long. However, an eight hour session will be maintained for the first episode of a series in a production season, and for sessions combining singing and voice-overs. A six hour session will be standard for series episodes in excess of a half-hour, for halfhour non-episodic television shows, and for additional dialog recording sessions. An exception from the four hour standard session also has been made with respect to recording "pickup" lines of dialogue.

Performers will receive a ten percent increase in minimum pay over the term of the agreement, with another ten percent increase in minimums for actors who perform a third main character voice on the same show.

The agreement is similar to the settlement previously reached between the Guild and Hanna-Barbera; Hanna-Barbera and other animation producers will be eligible for the above-cited exceptions to the now standard four hour work session. [Aug. 1987] [ELR 9:3:19]

Composer of French song is awarded damages in copyright infringement action involving the song "Feelings"

Louis Gaste, the composer of the French song "Pour Toi" has been awarded over $500,000 in damages by a Federal District Court jury in New York in a copyright infringement action alleging that singer Morris Albert based the song "Feelings" on Gaste's thirty year old work. The jury apparently found that most of the value of "Feelings" derived from Gaste's music and awarded Gaste eighty percent of the earnings of the song for the past three years; between 1983 and 1986, the song earned about $1 million worldwide. [Aug. 1987] [ELR 9:3:19]

Federal District Court jury dismisses breach of contract action brought by Scorpio Music against MCA Records

A Federal District Court jury in Los Angeles has rejected Scorpio Music's $3 million breach of contract claim against MCA Records. Scorpio alleged that it had ordered 1. 1 million cutout records in 1984, but received worthless goods rather than the titles ordered. Although Scorpio obtained a refund of $150,000, the company stated that it did not receive either the requested albums or the balance of a $350,000 advance payment. MCA argued that it should not be held liable for losses arising from Scorpio's purchase through a cutout dealer who was not an agent of MCA, and who may have presented Scorpio with erroneous order information.

In March 1987, a $10 million lawsuit brought by MCA against Scorpio, involving the alleged distribution of counterfeit cassettes was dismissed by a Federal District Court (ELR 8:10:19). [Aug. 1987] [ELR 9:3:19]

Federal District Court jury rejects racial discrimination claim brought by black cameramen against ABC-TV

A $3.5 million action brought by three black cameramen against ABC-TV has been rejected by a Federal District Court jury in Los Angeles. The cameramen had claimed that the network engaged in racial discrimination by barring them from working on high-paying jobs. ABC contended, in part, that the cameramen either were not qualified for assignments on higher paying programs, or had declined the overtime work which such assignments often require. [Aug. 1987] [ELR 9:3:19]

Former pitcher Denny McClain obtains reversal of conviction on criminal charges

A Federal Court of Appeals in Atlanta has reversed pitcher Denny McClain's conviction on charges of racketeering, extortion, conspiracy and possession of cocaine with intent to distribute. The court found that McClain did not obtain a fair trial in 1984, citing, in part the District Court judge's effort to rush the proceedings. McClain, who has served 29 months of a twenty-three year sentence, will be entitled to a new trial. [Aug. 1987] [ELR 9:3:20]

Beastie Boys obtain temporary restraining order barring city of Jacksonville from enforcing ordinance requiring ticket warning label

A Federal District Court in Jacksonville, Florida has issued a temporary restraining order barring the city from enforcing an ordinance that would have required the Beastie Boys to include a warning label, reading "adult subject matter," on tickets and advertisements for the group's concert at the Jacksonville Veteran's Memorial Coliseum.

The ELR
will let you know
if further developments
will stop any show
But until then
please be aware
we have no written opinion
here

[Aug. 1987] [ELR 9:3:20]

Cinetel Films obtains confirmation of $1 million arbitration award in dispute with producers of the film "Knight of the Dragon"

A Los Angeles Superior Court has confirmed an arbitrator's decision to award over $1 million to Cinetel Film in a proceeding against producers La Salmandra, S.A. and Stan Torchia (doing business as Universum Sales Organization). Cinetel paid the producers $500,000 for the right to distribute a film entitled "Knight of the Dragon" in the United States and Canada. The arbitrator determined that the producers failed to deliver the film and awarded Cinetel a total of about $1.14 million in damages, and attorney and arbitration fees. [Aug. 1987] [ELR 9:3:20]

Photographer agrees to $35,000 settlement payment to model claiming royalties on sales of popular dance posters

Photographer Harvey Edwards has agreed to pay a $35,000 settlement to model Jonette Swider, who posed in tattered leg warmers and worn toe shoes for a popular series of posters. Swider claimed that she and dance partner Bruce Wurl, now deceased, agreed to pose for Edwards in return for royalties on poster sales, but never received any royalties. Edwards stated that he paid the dancers a $600 modeling fee, and did not promise to make any additional payments. [Aug. 1987] [ELR 9:3:20]

Former employees of "Nightwatch" program settle sexual harassment action against CBS Inc.

Seven women who worked for CBS' "Nightwatch" program have settled a $14 million action against the network; the terms of the settlement were not announced. The action charged that CBS violated the District of Columbia's Human Rights Act; that the staff of "Nightwatch" engaged in sexual harassment; and that several of the women were discharged in August 1986 after "speaking out against sexual discrimination and harassment." [Aug. 1987] [ELR 9:3:20]

WASHINGTON MONITOR

Copyright Office determines that colorized versions of black-and-white film are eligible for copyright protection

The Copyright Office of the Library of Congress has announced that colorized versions of black-and-white films may obtain copyright protection upon establishing a minimum amount of individual creative authorship.

Colorized films will be classified as derivative works upon meeting the following criteria: numerous color selections must be made by human effort from an extensive color inventory; the range and extent of color added to the blackand-white work must represent more than a trivial variation; and the overall appearance of the film must be modified. Removing color from a film or other work will not justify registration, and the existing regulatory prohibition on copyright registration based on mere variations of colors will not change.

The copyright in a colorized film will extend only to the new material contained therein, i.e., the added color selections. The Copyright Office limited its decision to films produced by existing computer-coloring technology, stating that any increased use of computers in color selection might warrant a reconsideration of copyrightability. Parties seeking to register a colorized film must deposit a blackand-white version of the film with the

Library of Congress along with the colorized copy. [Aug. 1987] [ELR 9:3:21]

Federal Communications Commission abolishes fairness doctrine

The Federal Communications Commission has voted to repeal the fairness doctrine. The 38-year-old policy required radio and television stations to cover contrasting viewpoints on controversial issues of public importance.

In announcing the abolition of the doctrine, the general counsel of the Commission noted that pursuant to the doctrine the Commission had to "to second-guess the editorial judgment of broadcasters-first, as to whether a controversial issue of public importance was involved and, second, as to whether the broadcaster reasonably aired contrasting views" The Commission concluded that the doctrine was an unconstitutional restraint on the First Amendment rights of broadcasters; that government restrictions on speakers' rights injured the public interest; and that the doctrine resulted in "excessive and unnecessary Government intervention into the editorial process of broadcast journalists."

According to news reports, several members of Congress have announced that they will seek to enact the doctrine into law. [Aug. 1987] [ELR 9:3:21]

President Reagan vetoes Fairness Doctrine bill

President Reagan has vetoed a bill that would have legalized the Federal Communications Commission's fairness doctrine. The doctrine requires broadcasters to present both sides of controversial issues and to air divergent points of view. Reagan's veto message stated that "In any other medium besides broadcasting, such federal policing of the editorial judgment of journalists would be unthinkable" A veto override attempt or the reintroduction of the legalization proposal on other legislation is anticipated. [Aug. 1987] [ELR 9:3:21]

Federal Communications Commission freezes new channel allotment pending inquiry into advanced television systems

The Federal Communications Commission has imposed a temporary freeze on new television channel allotments in thirty major metropolitan markets pending an inquiry into advanced television systems, and the impact of such systems on broadcast service. The Commission plans to consider whether current technical standards for television are outdated; whether additional airwave capacity is available for advanced television systems, including high definition television; and whether the proposed improvement in the quality of video and audio television transmissions justifies the cost of developing the new technology. [Aug. 1987] [ELR 9:3:21]

DEPARTMENTS

In the Law Reviews:

Gray Market Goulash: The Problem of At-the-Border Restrictions on Importation of Genuine Trademarked Goods by Seth E. Lipner, 20 Cornell International Law Journal 103 (1987)

The Supreme Court's Limiting of First Amendment Protection for Defendants in Defamation Cases by Gregory L. Hughes, 16 North Carolina Central Law Journal 171 (1987)

Seton Hall Legislative Journal, 177 Ryan Street, Southfield, NJ 07080, has published Volume 10 containing the following sports law articles:

Incentives Are Needed to Increase Graduation Rates of Scholarship Athletes by Congressman James J. Howard, 10 Seton Hall Legislative Journal 201 (1987)

The Future of Sports Broadcasting: An International Question by Thomas J. Cryan, James S. Crane, and Michael J. Marcil, 10 Seton Hall Legislative Journal 213 (1987)

Gender-Based Discrimination in High School Athletics by James V. Hetzel, 10 Seton Hall Legislative Journal 275 (1987)

Legal and Ethical Conflicts Arising From the Team Physician's Dual Obligations to the Athlete and Management by Charles V. Russell, 10 Seton Hall Legislative Journal 299 (1987)

Zoning and the First Amendment: A Municipality's Power to Control Adult Use Establishments by Virginia M. Giokaris, 55 University of Missouri-Kansas City School of Law Review 263 (1987)

The Antitrust Implications of Professional Sports Leagues Revisited: Emerging Trends in the Modem Era by Thane N. Rosenbaum, 41 University of Miami Law Review 729 (1987)

Taking Serious Value Seriously: Obscenity, Pope v. Illinois, and an Objective Standard by Susan Elkin, 41 University of Miami Law Review 855 (1987)

Why Courts Should Not Use Public Forum Doctrine Analysis in Considering Cable Operators' Claims under the First Amendment by John J. Brunelli, 24 American Business Law Journal 541 (1987) (published by Department of Economics & Business Administration, Gettysburg College, Gettysburg, PA 17325)

To Tell the Truth: Comparative Advertising and Lanham Act Section 43a, 36 Catholic University Law Review 565 (1987)

Righting the "Tilted Scale": Expansion of Artists' Rights in the United States, 34 Cleveland State Law Review 441 (1985-6)

Right of Privacy by Larry M. Elison and Dennis Nettik-Simmons, 48 Montana Law Review 1 (1987)

Taxation, the Student Athlete, and the Professionalization of College Athletics by Erik M. Jensen, 1987 Utah Law Review 35 (1987)

Douglass v. Hustler Magazine Inc.: Anatomy of Privacy for a Public "Figure" in Illinois by Howard L. Teplinsky, 19 The John Marshall Law Review 1053 (1986)

Experience with Gertz "Actual Injury" in Defamation Cases by T. Michael Mather, 38 Baylor Law Review 917 (1986)
[ELR 9:3:22]