LEGAL AFFAIRS

Another Lesson from the Bill Cosby Show: Innocent Infringers and Novelty in Idea Cases

by Alan J. Hartnick

Copyright infringement is a tort, and its net of liability often extends to innocent infringers and parties with a less than direct involvement in the liability. n1 Does the same principle of law apply to cases involving the submission of an idea. n2

Enforcement of an idea and format submissions is a state matter, not a copyright or federal question. Forum shopping is important in idea cases because California decisions represent a doctrinal cast that is different from New York cases. In short, California is more relaxed, with its law recognizing intangible elements that have made many men wealthy.

Idea cases are more than a pre-contractual interference with reasonable business expectancies, which involved bad intent. Idea cases rest more on misappropriation, the wild card of torts. Moreover, claims for infringement of noncopyrightable ideas are not preempted by the 1976 Copyright Act. n3 And how do you protect an idea?

The Cosby Show - Alleged Submission of Ideas

Successful movies and television series seem to elicit litigation brought by those who claim to have authored the concept. Sometimes such claims take the form of copyright infringement. n4 Sometimes the complaint is grounded in ideas.

In 1980, the plaintiff in Murray v. NBC n5 submitted a proposal to NBC for a situation comedy. As stated in the opinion of the savvy, experienced and literate Judge Miriam Goldman Cedarbaum, the one-page proposal entitled "Father Day" for a program about a black middle-class family is the subject of the action. The plaintiff later expanded his proposal to two pages, and suggested that Bill Cosby play the part of the father.

At the end of 1980, NBC returned the proposal to the plaintiff , and informed him that "we are not interested in pursuing [its] development at this time."

In the fall of 1984, NBC began broadcasting The Cosby Show starring Bill Cosby, which became an outstanding artistic and commercial success. The plaintiffs lawsuit, brought in 1985, was based on the contention that the plaintiff's idea was "misappropriated" and used in the creation of The Cosby Show. The plaintiff sued NBC, Brandon Tartikoff, an NBC official, and Carsey-Werner, the executive producer of the show.

The plaintiff contended that The Cosby Show, like his proposal, is the first television series to portray an intact black family in a color-blind, nonstereotypical manner. The plaintiff sought compensatory and punitive damages and an accounting.

The Defense of Defendant Carsey-Werner

The dismissal motion of all defendants was limited to the issue of the lack of "novelty" of the plaintiff's idea. In opposition to the motion, the plaintiff apparently admitted that Carsey-Werner had heard nothing about him or his claim until his suit was commenced. Since Carsey-Werner was an "innocent infringer" of the alleged idea, Carsey-Werner, under the skilled guidance of David Eizenman and Stanley Rothenberg of Moses & Singer, sought dismissal.

In a reply memorandum of law, Carsey-Werner argued that in an "idea" case, as distinguished from a copyright case, a defendant cannot be liable for "innocent infringement." Rather, Carsey-Werner argued that a defendant who receives an idea from a third party cannot be liable for its use unless the defendant had notice that the third party made the disclosure in breach of some duty to the plaintiff.

As authority, Carsey-Werner cited the Vantage Point n6 case in which the Milton Bradley Company marketed a game developed from a proposal furnished by a group of people who sold toy and game ideas to manufacturers. Unknown to Milton Bradley, one of the members of that group may have actually obtained the idea when he worked for Parker Brothers - a game company to which the plaintiff had earlier submitted the same idea in confidence. The plaintiff claimed that Milton Bradley's game was actually based on the plaintiffs idea and that Milton

Bradley was liable because it knew or should have known that it received the idea in breach of a confidence traceable to the plaintiff.

The Court in Vantage Point dismissed the claim on summary judgment motion because the earliest that Milton Bradley could be charged with notice that the game had a "suspect origin" was after it had already incurred costs in bringing the game to market. The court applied the analogous law of trade secrets:

"[L]iability may be imposed where the defendant was furnished the idea by a third party who teamed of it in confidence or other fiduciary relationship, if the defendant knew of that relationship and that the disclosure was in breach thereof, at the time the third party furnished the idea. [Citations] ... [W]here a party has learned of another's idea through a third party, without notice that the latter's disclosure is in breach of a duty he owes to the other, the party is liable for its use only after notice that the disclosure was wrongful." n7

Vantage Point further held that no duty to the plaintiff can be imposed on such a defendant even after receiving such notice if, by that time, it has changed its position by investing time and money in developing the idea.

On this basis, in the Cosby case, Carsey-Werner requested that the claim against it be dismissed. A separate conference was held before Judge Cedarbaum, and on February 4, 1987, a stipulation was entered dismissing with prejudice the claims against Carsey-Werner.

There is no judicial opinion confirming Carsey-Werner's clever defense. But in any event, such a fascinating defense is of great interest to practitioners in intellectual property.

The Novelty Defense

The remaining defendants argued that the plaintiff had no legally protected right to an idea that is not new. The black letter New York substantive law is simply stated: when one submits an idea to another, no promise to pay for its use may be implied, and no asserted agreement enforced, if the elements of novelty and originality are absent, since the property right in an idea is based upon these two elements. n8 Idea cases in New York are different from copyright cases. Novelty is not a condition of copyright; originality is all that is required.

Professor Ralph S. Brown suspects that references made in some of the cases to "novelty" and "concreteness" are reflections of an attempt by troubled judges to find more secure footholds for decisions in idea cases. n9 Does lack of "novelty" invalidate a contract just as would a mistake of fact? The standard of novelty seems too tough. Perhaps "novelty" should be an aid to interpretation rather than a prerequisite for recovery.

Returning to the Cosby case, for the purpose of the defendant's summary judgment motion only, Judge Cedarbaum assumed that the defendants used plaintiff's idea. The sole question then became novelty, the New York standard. Judge Cedarbaum wrote:

"The question presented in this case is therefore a narrow one: whether the proposed use of a black family made 'Father's Day' such a novel and original conception that it transformed a common and frequently utilized formula for family situation comedies into an idea entitled to legal protection.

"Two factors preclude a finding that plaintiff s idea was sufficiently novel to be entitled protection. First, plaintiff s proposal merely combined two ideas which had been circulating in the industry for a number of years-namely, the family situation comedy, which was a standard formula, and the casting of black actors in non-stereotypical roles, for which the television industry recognized a need. To a limited extent, the networks had already cast black actors in nonstereotypical roles.

"The second factor precluding a finding of novelty in this case is that The Cosby Show is closely related to television programs with which Bill Cosby has been associated in the past. In fact, in 1965, Cosby himself publicly expressed his desire to develop a television series depicting a middle-class black family."

Judge Cedarbaum held that:

"Lack of novelty is fatal to all of these claims. Unless an idea is novel, it does not constitute property, and recovery cannot be obtained for its unlawful use. See Downey v. General Foods Corp., 31 N.Y. 2d 56, 61, 334 N.Y. S.2d 874 (1972) (If an idea is not novel, 'no promise to pay for its use may be implied, and no asserted agreement enforced'); see also Lehman v. Dow Jones & Co. Inc., 783 F.2d 285, 300 (2d Cir. 1985) (quoting Downey); Ed Graham Productions, Inc. v.

National Broadcasting Company, Inc., 75 Misc. 2d 334, 336 (Sup. Ct. N.Y. Co. 1973) (lack of novelty in plaintiff's proposal for a cartoon series precluded a finding that it was exclusive property capable of protection.

"Moreover, with respect to plaintiff s cause of action for breach of an implied contract, `[a] contract cannot be implied infact where the facts are inconsistent with its existence; or against the declaration of the party to be charged ... The assent of the person to be charged is necessary and unless he has conducted himself in such a manner that his assent may fairly be inferred he has not contracted' Miller v. Schloss, 218 N.Y. 400, 406, 407 (1916) (citations omitted). The facts in this case do not support a finding of an intent to contract. On the contrary, the complaint alleges NBC's express rejection of plaintiff's proposal.

"In addition, unjust enrichment, or an implied contract in law, 'rests upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another' Id. at 407. Defendants cannot have enriched themselves at the expense of the plaintiff since plaintiff had nothing of value to confer. See, e.g., Educational Sales Programs, Inc. v. Dreyfus, 65 Misc.2d 412, 415, 317 N.Y.S.2d 840 (Sup.Ct.N.Y.Co. 1970)."

Is the Downey Rule Adequate?

New York prides itself as being the intellectual capital of the U.S.A. Nonetheless, New York courts appear to dismiss idea and format submissions under summary judgment. California courts have continued to uphold the triability of such claims. It is hard to win idea cases, whatever the choice of law may be. Why?

Idea cases are brought only when the ideas are not sufficiently developed to become a copyright case. Some may view the idea-submission plaintiff as a "free-rider," seeking money from the party who actually developed the idea. There is a kind of "spoiler" notion. Plaintiffs can win when there is a breach of a confidential relationship. n10

Dreams or other ideas must be translated into a "property," a "product," a "patent," a "trade secret," the elusive "know how," or a "copyrightable subject matter." In New York, only a "novel" idea may become a "property."

If "property" is the key (and it need not be), there must be something transforming ideas into something else. Some labor, "novelty" or "sweat of the brow" must be involved; to dream is not sufficient. If it is intellectually difficult to protect "maps" in copyright law, n11 it is more difficult to protect "ideas."

Perhaps the difference between California and New York law in idea cases is the old difference between equity and law. California courts deal with the conscience of the Chancellor so that protection is hard to predict, at least so far as summary judgment is concerned. New York deals with strict requirements that permit prediction, but that sometimes allow injustice.

To critical legal studies professors, treating ideas as "property" undervalues the human factor, and is a form of corruption. To others, protection of mere unworked-out vapourings can interfere with the entrepreneurs who actually move along the economic system, creating jobs and a greater gross national product. Remember, for analogous reasons, it is far easier to protect a trademark, representing a product, than a copyright, representing the expressions of an idea.

Any legal system that automatically allowed authors to monopolize ideas would clearly interfere with the functions of the First Amendment. Little communication or innovation would occur if people could not build upon the ideas of others. n12

A Suggestion for Reform

The Downey rule aids judicial economy and perhaps represents common sense. Ideas are free. However, the Downey common law rule makes New York far too inhospitable to the protection of ideas in whatever circumstances. The Downey rule misuses novelty: the patent standard of "novelty" is intended to filter out inventions that should not have monopoly status. Monopoly status should be irrelevant to the evaluation of what really happened in idea cases and the subsequent application of an express or implied contract standard. "Novelty" has nothing to do with people's expectations.

Perhaps the best approach to idea and format submission cases is to say that certain ideas under certain circumstances will be protected, as a form of contract, implied contract or breach of a confidential relationship, with decision on a case by case basis.

In the Cosby case, the Downey rule may not have shortchanged justice. The plaintiff s idea submission apparently was not seminal in the thrust of the Bill Cosby series and, more importantly, the idea used was developed without knowledge of the plaintiffs idea. The application of the Downey rule in all New York cases is too narrow and really means that New York rarely protects ideas. I suggest that the New York common law rule should be enlarged so that "novelty" should become one of the several criteria by which ideas may be protected. Perhaps New York law should be rethought.

Practice Tip: In "idea" and format submission cases, the best advice may be to Go West, Young Man!

NOTES

1. Shapiro, Bernstein & Co., Inc. v. H. L. Green Co., 316 F.2d 304, 307 (2d Cir. 1963); Dreamland Ball

Room, Inc. v. Shapiro, Bernstein & Co., Inc., 36 F.2d 354 (7th Cir., 1929). But see 17 U.S.C. Section 504(c)(2).

2. Weitzenkorn v. Lesser, 256 P.2d 947 (1953); Minniear v. Tors, 266 Cal.App.2d 495 (1968); Blaustein v. Burton, 8 Cal.App.3d 161 (1970).

3. Whitfield v. Lear, CCH 1985 Copyright Law Decisions, para. 25,824, rev'd on other grounds, 751 F.2d 90 (2d Cir. 1984).

4. As examples, see Musto v. Meyer, 434 F.Supp. 32 (S.D.N.Y. 1977), aff'd 598 F.2d 609 (2d Cir. 1979); Bevan v. CBS, 329 F.Supp. 601 (S.D.N.Y. 1971).

5. U.S.D.Ct., S.D.N.Y., 85 Civ. 7675 (MGC); appeal pending.

6. Vantage Point, Inc. v. Parker Bros. Inc., 529 F.Supp. 1204, aff'd sub nom. Vantage Point, Inc. v. Milton Bradley, 697 F.2d 301 (2d Cir. 1982).

7. Vantage Point, supra note 6, at 529 F.Supp. 1210 n.2.

8. Downey v. General Foods Corp., 31 N.Y.2d 56, 334 N.Y.S.2d, 874, 286 N.E.2d 257 (Ct. of Appeals 1972). See Krisel v. Duran, 258 F.Supp. 845, 860 (S.D.N.Y. 1966).

9. Brown & Denicola, Cases on Copyright, Fourth Edition, at 633 (Foundation Press 1985).

10. Davies v. Krasna, 54 Cal.Rptr. 37 (Cal.App. 1966).

11. U.S. v. Hamilton, 583 F.2d 448 (9th Cir. 1978).

12. Swanson, "Copyright versus the First Amendment," 7 Loyola Entertainment Law Review 263 (1987).

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[ELR 9:5:3]

BUSINESS AFFAIRS

California Business Managers: A Review of Current Regulations

by Alan Z. Grosbard

Business managers perform for hire one or more of the following tasks for people with substantial income: collect and deposit income, pay expenses, select insurance, advise on investments, obtain data for the preparation of financial statements and tax returns, offer to clients packaged investments, regulate a budget, and manage assets.

Given the recent abuses of client funds by a handful of business managers, an often heard complaint is that there ought to be laws regulating them.

Since 1947, there have been. California requires business managers to obtain and maintain a license.

California governs the activities of business managers with four bodies of law: (1) the Check Sellers, Bill Payers and Proraters Law n1; (2) Administrative Rules for Proraters n2; (3) the Investment Advisor Law n3; and (4) Administrative Rules for Investment Advisors. n4

Depending on the scope of the business manager's activities, conduct may also be regulated by federal law. n5

Special Prorater Defined

Many of California's rules governing business managers are contained in the body of law which regulates the conduct of check sellers, check cashers, general proraters (who resolve debts with creditors on behalf of consumers), and business managers. These laws use the terms "business agent" or "special prorater" interchangeably to describe a business manager. n6

"A prorater is a person who, for compensation, engages in whole or in part in the business of receiving money or evidences thereof for the purpose of distributing the money or evidences thereof among creditors in payment or partial payment of the obligations of the debtor." n7

A business agent "is a person who engages in business as a prorater as defined in Section 12002.1 as an incident to the business of advising, counseling, or directing persons in their investments, and in the organization and management of their affairs under an exclusive contract, the primary purpose of which is not the liquidation of existing indebtedness." n8

A business agent must obtain a "special proraters license." n9

A business manager who operates without the benefit of a special proraters license is guilty of a misdemeanor. n10

Exemptions from Registration

The special prorater law has certain exemptions from licensing. They include exemptions for banks, trust companies, savings and loans, and all of the following California licensed professionals, provided their business manage ment services are rendered in the capacity for which the person is licensed: lawyers, certified public accountants, athletes' agents, and real estate brokers. n11

While there is no case law which determines this point, logic suggests a certified public accountant who performs ancillary business management services for a client need not be licensed, while a firm of certified public accountants which holds itself or one of its departments out as business managers should obtain the license.

The possibility of criminal prosecution urges compliance in areas of doubt.

The Application for Registration

The applicant completes a Department of Corporations form CSCL 104 and submits it to the Department together with a filing fee of $250. All of the following must be included: (1) a corporate resolution authorizing the application, (2) the Department's Form LF 512 SIQ statement of identity and personal financial statement for all officers, directors, and employees having access to trust funds, (3) articles of incorporation, (4) by laws, (5) a verified itemized report of financial condition (which must demonstrate sufficient net worth), (6) exemplars of all documents used by the business manager, (7) a schedule of fees, (8) a statement from each officer or partner that he or she has read and is familiar with the Check Seller Law and the Commissioner's Rules, (9) a $10,000 bond for the firm, and (10) a $10,000 fidelity bond for each person in the firm who will have signature authority for client funds. n12

The firm must demonstrate assets of $10,000 in excess of liabilities, at least $5,000 of which are liquid assets. n13

Operational Requirements

Once the license is granted, the special prorater licensee must observe a variety of rules:

1. All client funds must be maintained in trust accounts, open to inspection by the Commissioner of Corporations. n14 However, the records of a client may only be inspected by the Commissioner with the express consent of the management client. n15

2. Books and records must be maintained in accordance with "good accounting practice" Books must be kept for at least four years. Books must be kept available for inspection at the main office of the licensee. n16

3. Client funds must be deposited into the trust account no later than the end of the next business day following receipt. n17

The license may be revoked on any of the following grounds:

1. Failure to permit inspection of books, accounts, records and files. n18

2. Shortage in a client trust account. n19

3. Failure to maintain the required bonds. n20

State Investment Advisor Law

A business manager may also be regulated by the State Investment Advisor Law. n21 "`Investment adviser' means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing or selling securities, or who, for compensation and as a part of a regular business, publishes analyses or reports concerning securities." n22

There is no case law to determine whether a licensed business manager must also register as an investment advisor. The Department of Corporations issued, in 1969, a Policy Letter indicating that a licensed business manager is exempt from investment advisor registration, provided the firm does not have one class of clients to whom it renders business management services and another class to whom it renders financial advice. n23 In normal practice, financial advice is not offered unless one or more of the remaining business management services is rendered.

A "Policy Letter" is an earlier form of what is now referred to as an "Interpretive Opinion," and it is applicable only to the transaction identified in the request therefor. It may not be relied upon in connection with any other transaction. n24 Nonetheless some weight may be given to the fact that no Interpretive Opinion to the contrary has been issued since 1969, no appellate case has been decided in this area, and no legislative intent to the contrary has become law.

In 1985, State Senator Montoya introduced a bill in the California legislature, which would have required all "persons holding themselves out to the public as rendering financial advice for compensation" to obtain a separate license as an investment advisor. The thrust of the bill was to require a set of written disclosures by invest-

by the Corporations Commissioner, to protect clients and their investments. The bill would have eliminated virtually all exemptions to registration. n25

The bill was significantly amended by both houses, and the amended bill was passed by both houses in 1986. As amended, it would have exempted licensed business managers and many others from registration. But the bill was vetoed by the Governor. n26

One may reasonably, but not conclusively, determine that a licensed business manager is exempt from obtaining a State investment advisor license. The majority of the legislature and the Governor do not appear intent at this time on requiring dual registration.

Federal Investment Advisors Act

Federal law requires registration of investment advisors with the Securities and Exchange Commission under the Investment Advisors Act of 1940. n27

California modeled its Investment Advisor Law on the federal law. Both therefore use the same definition of "investment advisor." n28

The Securities and Exchange Commission staff issued an interpretation of the federal Act in 1981. The SEC determined that "a person who provides financial services including investment advice for compensation is in the business of providing investment advice" and therefore must be licensed. n29

Section 203(b) of the federal Act exempts from registration two important categories of advisors:

1. Any investment advisor all of whose clients are residents of the state where the advisor maintains its place of business;

2. Any investment advisor who during the preceding 12 months has had fewer than 15 clients. n30

Due to the practical requirements of business management, few business managers will have clients who permanently reside out of state. Furthermore, the law should always be considered at a time of expansion or merger by a business management firm.

Conclusion

A business management firm is a professional entity which must be licensed in order to operate lawfully. The special prorater license is required for all firms. Firms with clients who reside outside of California may also need to obtain a federal investment advisor license. Future changes in the direction of the law, either by legislative mandate or administrative ruling from the Commissioner of Corporations, may require California investment advisor registration as well.

NOTES

1. Financial Code Sections 12000 through 12403, as adopted by Stats. 1947, and amended by Stats. 1983.

2. Title 10, California Administrative Code, Sections 1760 through 1799.1, originally filed 1948.

3. Corporations Code Sections 25200 through 25246, as adopted by Stats. 1968 and amended by Stats. 1984.

4. Title 10, California Administrative Code, Sections 260.231 through 260.302.

5. The Investment Advisors Act of 1940, 15 U.S.C 80(b)-l et seq. as adopted August 22, 1940.

6. Financial Code Sections 12000 through 12403.

7. Financial Code Section 12002.1.

8. Financial Code Section 12002.2.

9. Financial Code Section 12200.5(a).

10. Financial Code Section 12102.

11. Financial Code Section 12100.

12. Financial Code Section 12300.

13. Financial Code Section 12205.

14. Financial Code Section 12300.3.

15. Financial Code Section 12313.5.

16. Financial Code Section 12303.

17. Financial Code Section 12300.5.

18. Financial Code Section 12301.4.

19. Financial Code Section 12301.4.

20. 10 California Administrative Code Section 1790.2.

21. Corporations Code Sections 25200 through 25246.

22. Corporations Code Section 25009.

23. California Commissioner of Corporations, Official Opinions, Policy Letters 1969-1971, Policy Letter No. 4, May 19, 1969 (1972).

24. 10 California Administrative Code Section 250.12(a).

25. California Senate Bill No. 315, introduced February 4, 1985.

26. 261 Senate History 79 (October 10, 1986).

27. 15 U.S.C. 80(b) - 1 et seq.

28. 15 U.S.C 80(b)-2(a)(11).

29. 17 CFR 276.770; Release No. IA-770, August 31, 1981, 46 FR 41,771.

30. 15 U.S.C 80(b)-3(b).

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[ELR 9:5:6]

RECENT CASES

Columbia Pictures held liable for copyright infringement, on grounds that ads and poster for "Moscow on the Hudson" are substantially similar to New Yorker magazine illustration by artist Saul Steinberg

Saul Steinberg is one of America's most famous artists. Even those who know little of art, and who do not recognize his name, are nevertheless familiar with at least one of Steinberg's works: his cover illustration for a 1976 issue of The New Yorker magazine. Reproduced in poster form, and sold in popular art stores from coast to coast, the illustration depicts New York City from the myopic point of view of a Manhattan resident. A few blocks of the the city occupy fully half of the poster, while everything west of the Hudson is telescoped and minimalized. New Jersey rates but a brown strip. The rest of the United States is reduced to two states. And beneath the horizon are three flat masses labeled China, Japan and Russia.

Columbia produced and distributed the movie "Moscow on the Hudson" which portrays the adventures of a Muscovite (played by Robin Williams) who defects to the United States while visiting New York City. The movie's poster and advertising illustration feature (beneath drawings of the movie's stars) four New York City blocks beyond which is a blue strip labeled "Atlantic Ocean," Europe reduced to London, Paris and Rome, and then, beneath the horizon, the city of Moscow as represented by a clump of Russian-style buildings.

Columbia's poster was, admittedly, "inspired" by Steinberg's illustration. But when Steinberg sued for copyright infringement, Columbia's position was that the two works were not substantially similar. Motions for summary judgment by Columbia and Steinberg both made the "substantial similarity" question the central issue to be decided by Federal District Judge Louis Stanton. He decided that they are substantially similar, and thus he has granted summary judgment to Steinberg on the issue of copying. (The question of what damages Steinberg ought to be awarded has yet to be determined.)

Judge Stanton acknowledged that "There is no dispute that [Columbia] cannot be held liable for using the idea of a map of the world from an egocentrically myopic perspective." That is because ideas are not protected by copyright; only expression is.

In deciding that the two works are substantially similar in their expression, Judge Stanton was influenced by the fact that both illustrations are rendered from the same vantage point, namely, a direct look down a wide two-way cross street that intersects two avenues before reaching a river. In his opinion, this was not an inevitable vantage point, especially because most of New York's cross streets are oneway. Judge Stanton also noted similar details, such as the depiction of water towers, cars, a red sign above a parking lot, and many individual buildings. The judge found this significant, because Steinberg's illustration does not depict actual New York City buildings, but instead includes "New York-ish structures" of his own creation. "Thus, the similarity between the buildings depicted in the 'Moscow' and Steinberg posters cannot be explained by an assertion that the artists happened to choose the same buildings to draw," Judge Stanton explained.

There are of course differences between the two works, especially because Steinberg's looks west to the far east, while Columbia's looks east to Moscow. But these differences did not influence the judge. He wrote, "Neither the depiction of Moscow, nor the eastward perspective, or the presence of randomly scattered New York City landmarks in [Columbia's] poster suffices to eliminate substantial similarity between the posters" because "no plagiarist can excuse the wrong by showing how much of his work he did not pirate" (quoting Judge Learned Hand for this last phrase).

Judge Stanton also rejected Columbia's contention that the similarities that exist are unprotectible "scenes a faire." According to the judge, Steinberg did not complain that Columbia had used buildings, pedestrians, vehicles, lampposts and water towers in its poster, just as he had in his illustration. Rather, Steinberg's complaint was the Columbia had copied his expression of those elements. And the judge agreed.

Finally, the judge rejected Columbia's fair use parody defense, saying that the studio's poster was not designed to be a parody of Steinberg's illustration. It was intended to be an appealing advertisement to promote an unrelated commercial product, and it borrowed numerous elements from Steinberg's work in order to do so.

Steinberg v. Columbia Pictures, 663 F.Supp. 706 (S.D.N.Y. 1987) [ELR 9:5:9]

Songwriter entitled to trial in copyright case against Lionel Richie; Federal Court of Appeals rules that jury must decide whether Richie's song "Stuck on You" is substantially similar to plaintiff's song

A jury will have to decide whether Lionel Richie's song "Stuck on You," from his very successful "Can't Slow Down" album, is substantially similar to a song written by Gene Thompson entitled "Somebody's Got to Love Her." That is the ruling of a Federal Court of Appeals in California - a ruling that by order of the court is "Not for Publication" and thus may not be cited in future cases.

The case against Richie had been dismissed, in response to his motion for summary judgment, by Federal District Judge James Ideman, after Judge Ideman had listened to tapes of the two songs and inspected their lyric sheets. He concluded that ordinary, laymen-who would make up a jury, if a trial were held-could not find the two songs to be substantially similar. As a result, he not only dismissed the case, but also found it to be "frivolous" and awarded Richie more than $34,000 in attorneys' fees and court costs.

The Court of Appeals, however, has reversed. Thompson had submitted the declaration of a music expert named Dr. Robert Winter who had examined the two songs and had found what he considered to similarities between them in melody, harmony and rhythm. Judge Ideman had considered Dr. Winter's declaration, but, having listened to the songs himself, Judge Ideman found that the similarities were not substantial and he ruled that no reasonable juror could find otherwise.

The appeals court at first seemed to agree with Judge Ideman that the songs are not substantially similar, for even the appeals court wrote that "the two songs appear to have little similarity." Nevertheless, the appeals court went on to rule that "the ears of the court must yield to the ears of jurors" because there is "no bright line ... as to what quantum of similarity is permitted before crossing into the realm of substantial similarity."

Since the appeals court reversed the dismissal of Thompson's suit, it also ruled that Judge Ideman had erred in finding the case to be frivolous, and thus it reversed his award of attorneys' fees and court costs as well.

Thompson v. Richie, U.S.C.A., 9th Cir., Nos. 86-6185 and 86-6505 (June 11, 1987) [ELR 9:5:9]

Universal wins dismissal of copyright case alleging that "Back to the Future" was copied from unproduced screenplay entitled "Waiting for You"; District Court finds no substantial similarity between them

A Federal District Court in Los Angeles has dismissed a copyright infringement action against Universal City Studios in which screenwriter Dana Rowe alleged that Universal's movie "Back to the Future" was copied from his unproduced script entitled "Waiting for You." Judge James Ideman dismissed the suit in response to a motion for sumMary judgment filed by Universal and Berkley Publishing Corporation, a co-defendant that published the authorized novelization of "Back to the Future."

Judge Ideman found that "Back to the Future" is not substantially similar to Rowe's script. Indeed, the judge found the two works to be so dissimilar that he ruled that Rowe's action had been commenced in bad faith "merely ... to harass the Defendants in a fortune hunting expedition." As a result, the judge awarded Universal and Berkley more than $25,000 in attorneys' fees and court costs.

In an unpublished Statement of Uncontroverted Facts and Conclusions of Law, Judge Ideman acknowledged that "on the most abstract level," the ideas of both "Back to the Future" and "Waiting for You" are similar: both involve characters who travel from one period of time to another and back again. But, as the judge pointed out, "This is an age old idea, only one example of which is H.G. Wells' `The Time Machine.'" Moreover, even at this abstract idea level, the two works are different, because in "Back to the Future," the main character travels back in time, while in "Waiting for You," the main character travels forward in time. Because of this difference, a "critical element" in "Back to the Future" - the main character's need to watch his actions so as not to alter the course of the future - simply was not present in "Waiting for You."

Judge Ideman also determined that even if the idea of the two works were similar, their expression is not. A detailed comparison of their plots, characters, dialogues, moods, settings and pace lead the judge to conclude that there is no substantial similarity between them. Those items of similarity that do exist-the theme of time travel, the use of young male time travelers, high school encounters, and home towns-are merely "unprotectible ideas which are not afforded copyright protection for ordinary expressions of those ideas," Judge Ideman ruled.

The judge also dismissed Rowe's unfair competition claim, on the grounds that it has been preempted by federal copyright law.

Rowe v. Spielberg, U.S.D.C., C.D.Cal., No. CV 86-3555 (JMI) (Dec. 3, 1986; Mar. 13, 1987) [ELR 9:5:10]

Paramount Pictures' television program "Anything for Money" did not infringe copyright to written treatment and format, because similarities were limited to unprotected ideas

Some people will do "Anything for Money," and in 1984 and '85, Paramount Pictures produced a television program by that name illustrating the point in hilarious fashion. Unfortunately, the show cost more to produce than it earned. By Paramount's count, it lost $5 million, and after 46 weeks on the air, the show was cancelled.

"Anything for Money" has become more than a footnote in television history, however. It also has become a footnote in the law of copyright and idea protection. For this, the show must thank writer Paul Davids who contends that the program was his idea in the first place.

According to Davids, it was his three-page treatment that the show's individual producers took to Paramount, and that sold Paramount on the concept. Davids also says that his separate two-page format and four-and-a-half pages of suggestions wound up on the screen when the program went into production, not long after he gave these writings to the show's producers at their request.

Davids registered his treatment, format and suggestions with the Copyright Office. And when he was not hired to work on the show, or compensated for the use of his writings, he sued - for copyright infringement, and for breach of implied contract, breach of confidential relationship and related state law claims.

Paramount's motion for summary judgment on the copyright infringement claim has been granted by Federal District Judge Wm. Matthew Byrne, Jr., who held that although Davids' writings and the program "do contain some similarities," there was no infringement of "matter protected by the copyright laws."

As described by Judge Byrne, "Anything for Money" featured segments, known as "bits," which were shot on location, in which actors approached members of the public, known as "marks," and asked them to perform unusual stunts for unusual reasons in exchange for money. Davids' copyrighted writings suggested a dozen and a half "bits," at least some of which were used by the show's producers. For example, Davids suggested that marks be asked to wear snakes around their necks in a famous restaurant in order to introduce a new style;

and when the show was produced, it did include "bits" involving marks being asked to wear snakes, though not in a famous restaurant. Likewise, Davids suggested that marks be asked to allow a barber trainee to cut their hair; and the show did feature a couple such bits. Davids also suggested that marks be asked to sell their eyeglasses to an impatient customer in an optometrist's office; the show used bits in which a mark was asked to sell his glasses to a man on the street and to someone who said he needed them for a medical experiment.

Davids contended that by using his "zany" bits, the show infringed his copyright as a whole, in that his suggested bits taken as a group expressed an idea which the format of the show infringed. Judge Byrne, however, disagreed. He found that Davids' writings did not provide any detail on how his bits would be used in a television program, beyond describing the bits themselves. "Any idea contained there is not only abstract, it is virtually nonexistent," and thus the judge held that "Such an idea is beyond the scope of copyright protection."

Davids also contended that the specific bits used in the show were substantially similar, and thus infringed the copyrights, to the bits he had submitted. But this argument too failed to persuade Judge Byrne. He held that Davids' "bits each encapsulate a single idea, with a minimum of concrete detail" which "in no instance" Paramount had copied "to such an extent" that it had "copied protected expression rather than the unprotected idea."

Judge Byrne also dismissed, for lack of federal jurisdiction, Davids' state law claims "without prejudice" so that they may be "pursued in state court."

Davids v. Bernstein, U.S.D.C., C.D.Cal., No. 85-2904-WMB (Sept. 30, 1987) [ELR 9:5:10]

Idea submission case against producers of "The Cosby Show" and NBC is dismissed because plaintiff's idea was not novel

A Federal District Court in New York City has dismissed an idea submission case filed by an NBC employee who claims that it was his idea that NBC and the Carsey-Werner Company eventually developed into the weekly television series "The Cosby Show," starring Bill Cosby. The court applied New York law and determined that the plaintiff s idea was not eligible for legal protection, because it was not "novel."

The court's opinion, which is in the Westlaw database but has not yet been published in the Federal Supplement, is discussed in depth in the "Commentary" article by Alan Hartnick in this issue of the Entertainment Law Reporter (ELR 9:5:3).

Murray v. National Broadcasting Company, S.D.N.Y. No. 85 Civ. 7675 (MGC) (July 16, 1987) [ELR 9:5:11]

Federal courts have jurisdiction to hear claim that song "Let the Good Times Roll" was co-authored; but claim has not been proved yet and is disputed

The August issue of the Entertainment Law Reporter reported a Federal Court of Appeals decision that held that federal courts do have jurisdiction to hear a claim by Shirley Goodman that she co-authored, along with the late Leonard Lee, the song "Let the Good Times Roll" (ELR 9:3:13). The report was worded in a way that may have suggested that Goodman's co-authorship was not disputed, or that the court already had found that she had co-authored the song.

In fact, Goodman alleges that she is the co-author of the song, but her position is disputed by Lee's estate. Since no trial on that factual issue has been held as yet, Goodman's claim has not been proved. The appeals court decision merely held that federal courts have jurisdiction to hear and decide Goodman's claim.

Goodman v. Lee, 815 F.2d 1030 (5th Cir. 1987) [ELR 9:5:11]

California appellate court upholds jury verdict on behalf of "60 Minutes" parties in slander action brought by Dr. Carl A. Galloway

A California appellate court, in an opinion designated "not to be published," has upheld a 1983 jury verdict finding that a segment of CBS' December 9, 1979 broadcast of "60 Minutes" did not slander Dr. Carl A. Galloway. The segment, entitled "It's No Accident," presented Dan Rather's report on insurance fraud rings involving collusive activities by doctors, lawyers and "cappers" who submitted false insurance claims in connection with nonexistent personal injuries purportedly incurred in staged or fictitious car accidents. During the report, Rather referred to a medical report prepared by a clinic for patient examinations that never occurred, and mentioned that the report was "signed by Carl A. Galloway, M. D." Rather's attempts to speak to Galloway prior to the broadcast had been unsuccessful.

Galloway presented evidence, during his slander action, that he had not signed the report to which Rather referred or four other fraudulent reports which bore his purported signature. Rather and producer Steve Glauber testified that at the time the broadcast aired, they had no doubts that Galloway had signed the report.

The appellate court, in denying Galloway's motion for a new trial, stated that it was not necessary, in view of the jury's general verdict on behalf of the CBS parties, to consider any errors claimed with respect to the standard of culpability applied by the trial court. CBS relied on a defense of substantial truth, as well as a defense of absence of reckless disregard for truth; no special verdict on the issue of truth was requested, and it thus could not be determined which theory of defense was accepted by the jury. However, there was considerable evidence, noted the court, that even if Galloway did not sign the report, he knew of the operations of the clinic and "actively, willingly and knowingly participated in them" insofar as such activities related to the report at issue. The court also rejected Galloway's allegations of erroneous jury instructions, and characterized as "totally untenable" the contention that because the jury was not instructed on the issue of negligence or punitive damages, nothing was really tried.

Galloway v. CBS, 14 Med.L.Rptr. 1161 (Ca.App. 1987) [ELR 9:5:11]

"60 Minutes" did not libel Michigan doctor in October broadcast, rules Federal District Court

In another action involving "60 Minutes," a Federal District Court in Michigan granted summary judgment to CBS in a libel action brought by Dr. Carl M. Pesta arising from a "60 Minutes" segment entitled "Tragic Assumptions." The segment, which aired on October 30, 1983, reported on the circumstances surrounding the 1972 death of a young man purportedly suffering from Reye's Syndrome. During the report, a medical expert expressed the opinion that the doctors at the hospital to which the youth was taken made a "critical mistake" in not ordering certain tests. And Ed Bradley announced that upon arriving at the hospital (where Dr. Pesta was working), the young man had an 80-90% chance of recovery. Dr. Pesta claimed that the two statements were false and injured him financially and professionally.

Federal District Court Judge Ralph M. Freeman found that the CBS parties had a qualified privilege under Michigan law to publish the statements at issue and that an examination of the challenged statements showed that Dr. Pesta had not presented any affirmative proof of actual malice.

Pesta v. CBS, Inc., 653 F.Supp. 350 (E.D.Mich. 1986) [ELR 9:5:12]

Libel action brought against the Washington Post by Mobil Corporation president and his son is rejected by Federal Court of Appeals

A Federal Court of Appeals in Washington, D.C., in a 78-page opinion (including a 31 page dissent) has affirmed the dismissal of a libel action brought by William Tavoulareas and his son Peter against The Washington Post.

On November 30, 1979, the Post published a report stating that "Mobil Oil Corp. president William P. Tavoulareas set up his son five years ago as a partner in a London-based shipping management firm that has since done millions of dollars in business operating Mobil-owned ships under exclusive, no-bid contracts." The report described, at length, the business arrangements with which the Tavoulareas parties were associated, and included Mobil's version of the events in question.

William and Peter Tavoulareas claimed that the newspaper article was defamatory in that it accused William Tavoulareas of setting up a relationship among three companies, including Mobil, in order to benefit his son, or, more narrowly, that the article raised accusations of nepotism.

In July 1982, a Federal District Court jury found, in part, that the Post and two reporters were liable to William Tavoulareas for $250,000 in compensatory damages and $1.8 million in punitive damages. The jury also found Philip Piro liable to both Tavoulareas for slander; Piro, the estranged son-in-law of William Tavoulareas, provided some limited information to the Post reporters.

The District Court entered judgment notwithstanding the verdict for Piro and for the Post parties. The Court of Appeals, in an opinion by Judge Starr and Senior Circuit Judge J. Skelly Wright, held that "the only reasonable inference to be drawn is that the 'set up' allegation was substantially true," and further held that Tavoulareas was a limited purpose public figure who presented insufficient evidence to support a finding that the Post parties acted with actual malice.

In a concurring opinion, Chief Judge Wald sought to clarify the appropriate standard to be applied by the court when reviewing a jury verdict in a libel proceeding.

Senior Circuit Judge MacKinnon, in dissent, reached the conclusion that the evidence in the case established clearly and convincingly that "the false statements and implications in the subject article were put forth with reckless disregard for their truth or falsity," and questioned the standard of independent review of the jury verdict employed by the majority.

Tavoulareas v. Piro, 817 F.2d 762 (D.C.Cir. 1987) [ELR 9:5:12]

Concert promoter's claim for recovery under rain insurance policy ordered for outdoor Eagles concert is remanded for further proceedings by Minnesota appellate court

Prior to presenting an outdoor concert featuring the Eagles at a Minnesota stadium on August 1, 1978, Casablanca Concerts, Inc. obtained rain insurance in the amount of $150,000. One of the insurance policies provided that if rain in excess of .10 inch fell during the concert, Casablanca would be paid the face value of the policy without requiring the concert to be cancelled, abandoned or postponed. The policies issued by American National General Agencies, however, conditioned payment upon the cancellation, abandonment or postponement of the concert.

During the concert, over .10 inch of rain fell at the concert site; the event was held as scheduled, and no refunds were issued to ticket holders.

When Casablanca submitted its claim for the proceeds of the insurance policies, American National denied the claim, stating that the promoter had not ordered insurance which would pay the face value regardless of cancellation, etc.

A trial court entered judgment for the insurance company, but an appellate court has reversed and remanded the matter. The appellate court noted that Casablanca possessed an insurable interest in profits derived from the concert (without the requirement that the concert be cancelled) in the form of increased expenses and other intangible losses incurred as a result of the rainfall.

The insurance company had argued that the policy insuring Casablanca's interest was grossly overvalued and therefore void as a wagering contract. It will be a question of fact for the trial court as to whether Casablanca ordered insurance which would pay the face value of the policy regardless of cancellation of the event and if so, whether the insurance company could establish that the face value of the policy was grossly disproportionate to the insurable interest, thereby voiding the contract. However, even if the policy is found illegal, Casablanca will be entitled to show that it valued its interest in good faith, and may thereby recover its premium.

If the trial court finds that the insurance contract was valid, Casablanca may recover the face value of the policy, unless the jury determines that the company suffered only a partial loss, in which case, recovery of the actual value of the loss would be allowed.

A dissenting judge pointed out that the policies were correctly considered contracts to insure against loss in the event the concert was cancelled, postponed, or abandoned, solely and directly in consequence of rainfall in excess of .10 inch; the concert was not so cancelled, postponed or abandoned; Casablanca sustained no loss; and the company was not entitled to recover totally or partially under the terms of either the policies that were issued, or which the company claimed it requested, and Judge Murally therefore would have affirmed the decision of the trial court.

Casablanca Concerts, Inc. v. American National General Agencies, Inc., 407 N.W.2d 440 (Minn.App. 1987) [ELR 9:5:12]

High Society magazines parody of L.L. Bean catalog was protected expression, rules Federal Court of Appeals in reversing ruling that article violated Maine's anti-dilution law

When the October 1984 issue of High Society magazine featured a prurient parody of the L.L. Bean catalog, Bean's complaint against the magazine's publisher raised several causes of action, including a claim of trademark dilution under Maine law. A Federal District Court granted summary judgment to Bean on the trademark dilution claim, stating that the article had tarnished Bean's trademark by undermining the goodwill and reputation associated with the mark (ELR 8.7:17), and enjoined further publication or distribution of the magazine. The District Court's judgment was a constitutionally impermissable application of the anti-dilution statute, a Federal Court of Appeals has ruled.

Federal Court of Appeals Judge Hugh Bownes declared that neither the First Amendment nor the history and theory of anti-dilution law "permit a finding of tarnishment based solely on the presence of an unwholesome or negative context in which a trademark is used without authorization." Dilution injury arises from an unauthorized effort to market incompatible products or services. But High Society used the L.L. Bean mark solely for noncommercial purposes, emphasized the court; the article was labelled as "humor" in the magazine's table of contents section; took up two pages in a one hundred page issue; and did not use Bean's mark to identify or promote goods or services to customers.

In reversing and remanding the District Court's ruling, Judge Bownes also cited that "vital importance of parody," noting that "it would be anomalous to diminish the protection afforded parody solely because a parodist chooses a famous trade name, rather than a famous personality, author or creative work, as its object."

Chief Judge Campbell, in dissent, suggested that the question of whether the magazine's conduct violated

Maine law should have been certified to the Maine Supreme Judicial Court. Judge Campbell would have declined to consider any constitutional question prior to the state court's ruling on the certified question.

L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26 (1st Cir. 1987) [ELR 9:5:13]

Arizona telephone company was entitled to reject sexually explicit dial-a-message service, rules Federal Court of Appeals; in separate case, court remands for review a message service's action challenging federal statute dealing with obscene or indecent commercial telephone communications; Federal Court of Appeals in Utah affirms dismissal of indictment against company operating dial-it telephone service

In 1985, Mountain States Telephone and Telegraph Company (Mountain Bell), a regional telephone company, declared, in response to community and official concerns, that the company no longer would provide its "976" dial-a-message network to any "adult entertainment" message service.

Carlin Communications, a supplier of "salacious" telephone messages to the public, sued Mountain Bell under 42 U.S.C. section 1983, asserting First Amendment rights, and under Arizona public utility law. A Federal District Court granted summary judgment to Carlin, ordered Mountain Bell to restore Carlin's 976 service, and enjoined the telephone company from disconnecting Carlin on the basis of message content. A Federal Court of Appeals has disagreed with the District Court and has vacated the court's injunction.

Judge Joseph T. Sneed stated that placing restrictions on message content was a permissible exercise of business judgment and did not violate Mountain Bell's obligation as a public utility under Arizona law, to offer its service to all persons without discrimination. Since all adult entertainment messages were excluded from the 976 network, Carlin was not singled out for adverse treatment. Furthermore, Mountain Bell faced potential criminal liability under state obscenity laws for carrying Carlin's messages.

However, Judge Sneed questioned whether state public utility law applied to the 976 network, given that the technology of the system was "fundamentally" different from that of a basic telephone service. Carlin actually functioned as a broadcaster of its messages, with Mountain Bell serving as a small radio station, rather than a common carrier, stated the court in declining to hold that the public utility law compelled Mountain Bell to carry "salacious or pornographic messages, both lawful and unlawful, on its 976 network."

In turning to federal law, the court noted that Mountain Bell initially terminated Carlin's service when a deputy county attorney threatened prosecution if the telephone company did not comply; this was found to be state action amounting to an unlawful prior restraint. And Arizona's criminal statute prohibiting the distribution of sexually explicit material to minors could not be constitutionally applied against Carlin's message service for "First Amendment does not permit a flat-out ban of indecent as opposed to obscene speech. . . "

But after the initial termination of Carlin's service, Mountain Bell claimed that it independently decided to exclude Carlin's messages from its 976 network; no state action was involved in adopting this policy, ruled Judge Sneed. The telephone company may or may not choose to extend its 976 service to Carlin, but will be "immunized" in any event by the court's decision from state pressure in dealing with Carlin. In a footnote, the court mentioned that Mountain Bell could still face criminal liability for carrying Carlin's messages depending on whether the messages were legally obscene, but stated that "some self-censorship is an inevitable result of all obscenity laws."

In dissent, Judge William C. Canby, Jr. stated that he would have found that Mountain Bell's adoption of its "no adult entertainment" message policy was "imbued" with state action on several grounds including the likelihood that official compulsion or the threat of it remained.

In a case decided three days prior to the decision in Carlin Communications, the Ninth Circuit affirmed in part and reversed in part a Federal District Court decision dismissing for lack of jurisdiction an action brought by Sable Communications of California seeking declaratory and injunctive relief against the Federal Communications Commission. Sable claimed that a federal statute and FCC regulations restricting the company's sexually suggestive telephone services violated the First Amendment.

The statute at issue, 47 U.S.C. section 223(b), enacted on December 8, 1983, imposed substantial civil and criminal sanctions on parties making obscene or indecent commereial telephone communications available to minors unless access to such communications was restricted in accordance with FCC regulations In 1985, the FCC required providers of sexually suggestive messages to limit access either to credit card holders or to persons with an access code indicating that he/she was at least eighteen years old.

The FCC regulation was invalidated in Carlin Communications Inc. v. FCC, 787 F.2d 846 (2d Cir.1986) (see ELR 7:6:19 for an earlier ruling in the proceeding) and

Sable subsequently sought declaratory and injunctive relief. The District Court found that the Court of Appeals had exclusive jurisdiction to review the regulation and declared that the constitutionality of the statute could not be considered without reviewing the regulation.

Federal Court of Appeals Judge Cynthia Holcomb Hall has determined that the District Court had jurisdiction to consider Sable's claims with respect to the statute. Judge Hall rejected the District Court's alternative holding that Sable did not present a justiciable case or controversy, noting that the government has announced that it considers the statute to be effective everywhere except New York and has specifically declined to agree not to enforce the statute against Sable. The penalties for noncompliance with the statute include criminal sanctions of a fine of up to $50,000 per day and a maximum of six months in prison; a civil sanction of up to $50,000 per day of violation may also be imposed. Sable therefore was entitled to review of the statute independently of the FCC regulation.

In a related case, a Federal Court of Appeals in Utah has affirmed the dismissal of an April 1985 indictment charging Carlin Communications and other parties, including an actress, with federal obscenity crimes in connection with the operation, via a New York City telephone number, of a sexually suggestive prerecorded "dial-it" message service. It was charged that the messages were distributed, on various dates during 1983, to minor children aged sixteen years or younger in violation of 18 U. S.C. sections 1462 and 1465, and 47 U.S.C. section 223(a).

Senior District Judge Wesley E. Brown found that the Carlin parties' conduct did not fall within the proscriptions of the statutes in effect at the time of the offenses charged in the indictment. Although section 223(a) prohibited the making of abusive or harassing telephone calls, the FCC has concluded that the section did not prohibit dial-it services. The court affirmed the dismissal of the indictment accordingly.

Carlin Communications, Inc. v. The Mountain States Telephone and Telegraph Company, Case No. 85-2797 (9th Cir., Sept. 14, 1987); Sable Communications of California, Inc. v. Federal Communications Commission, Case No. 86-6178 (9th Cir. Sept. 11, 1987); United States v. Carlin Communications, 815 F.2d 1367 (10th Cir. 1987) [ELR 9:5:13]

Constitutionality of local adult theater zoning ordinance must be reconsidered, rules Federal Court of Appeals

The constitutionality of an adult theater zoning ordinance enacted by the city of Whittier, California must be reconsidered, a Federal Court of Appeals has ruled.

After lengthy proceedings in state and federal court, the Court of Appeals affirmed a Federal District Court's findings and conclusions that the city's ordinance requiring a separation of 1,000 feet between an adult theater and a church had been unconstitutionally motivated; that the ordinance had an unconstitutional effect; and that it was an unjustified infringement of First Amendment rights. An order awarding attorneys' fees to theater owner Walnut Properties, Inc. also was upheld.

The Court of Appeals decision was vacated by the United States Supreme Court and the case was remanded for further consideration in light of City of Renton v. Playtime Theatres, Inc., 106 S.Ct. 925 (1986; ELR 8:5:14). After reconsideration, the Court of Appeals has vacated the decision of the District Court and has remanded the matter for new findings and conclusions.

Federal Court of Appeals Judge Boochever noted that a finding that "a motivating factor" in enacting a zoning ordinance is to restrict First Amendment rights is not of itself sufficient to hold the regulation presumptively invalid; the presumption will apply only if the predominant purpose in enacting the ordinance is suppression of First Amendment rights. The District Court thus must reexamine its findings to determine whether Whittier enacted the ordinance for the predominant purpose of suppressing Walnut Properties' First Amendment rights.

If the District Court finds that the predominant purpose for enacting the ordinance was not improper, the court then must analyze the ordinance as a form of time, place, and manner regulation and must consider whether the ordinance was designed to serve a substantial governmental interest while allowing for reasonable alternative means of communication. It was noted that Whittier apparently designed its ordinance to eliminate concentrations of adult theaters, rather, than as in Renton, to concentrate adult theaters in certain available areas. The District Court therefore also must make specific findings as to the availability of land, and as to whether Whittier effectively denied Walnut Properties a reasonable opportunity to open and operate an adult theater within the city.

Walnut Properties, Inc. v. City of Whittier, 808 F.2d 1331 (9th Cir. 1987) [ELR 9:5:14]

Clearance in exhibition agreements between Pacific Theatres and film distributors did not violate anti-trust laws, rules Federal Court of Appeals in California in affirming dismissal of claim brought by nearby sub-run theater

Clearances in exhibition agreements between Pacific Theatres and various film distributors were reasonable restraints of trade and did not cause antitrust injury to Three Movies of Tarzana, a Federal Court of Appeals in California has ruled.

As described by Judge Edward Leavy, clearances "preclude distributors from licensing other theaters, either specifically named or encompassed in a named geographic area, from showing a movie while it is being exhibited by the theater whose bid [for the right to exhibit] is accepted." Three Movies of Tarzana claimed that the distributors and Pacific acted in concert to provide

Pacific's Galleria Theaters with clearances over Tarzana's six screen movie theater. According to Tarzana, the Galleria gained an unreasonable competitive advantage, and eventually drove Tarzana out of business. Tarzana sold its theaters to Mann Theaters. Subsequently, Pacific and the distributors abandoned the challenged clearances.

A Federal District Court granted summary judgment on behalf of Pacific and the distributors and dismissed Tarzana's action, holding that Tarzana's theaters and Pacific's theaters were in substantial competition, that the clearances were reasonable and that Tarzana had failed to produce evidence of either a conspiracy or an antitrust injury.

In affirming the District Court decision, Judge Leavy noted that Tarzana had acknowledged that the physical condition of its theaters had deteriorated, and that the theaters lacked the projection and sound systems used by first run theaters. It was also observed that film distribution patterns changed during the late 1970's, with the release of new films to increased numbers of first run theaters.

Pacific's Galleria theaters, which opened in 1980, were located about 4 1/2 miles east of Tarzana's theatres. Pacific began requesting clearances over Tarzana for all first run films shown at the Galleria. Although Tarzana was accustomed to obtaining subrun films after the films' first run in Woodland Hills, Pacific was exhibiting its first run films for a longer time period than the Woodland Hills first run theaters. Tarzana claimed that it thereby was prevented from showing particular films from one to five weeks longer than in the past, that its ability to obtain subrun films was "crippled;' and that Tarzana was forced to sell its assets to Mann in October 1982 for only $1.4 million.

Mann upgraded the theaters to first run quality and soon began exhibiting first run films. In June 1984, Pacific stopped requesting clearances over Mann, purportedly reluctantly and only on a movie-by-movie basis, because distributors sought to increase the first run exhibition of their films.

Judge Leavy noted that clearances are vertical non-price restraints of trade which are evaluated under the rule of reason. Pacific's clearances reduced "intrabrand" competition by preventing Tarzana from showing first run films simultaneously with the Galleria's theaters. However, the restraints also encouraged "interbrand" competition, stated the court, by forcing Tarzana to find alterative subrun films to exhibit. Subrun films still were shown in theaters over which Pacific's Galleria did not have clearances, and the clearances were a "sound business practice" for Pacific and the distributors.

Furthermore, stated Judge Leavy, the District Court properly found that Tarzana's theaters and Pacific's theaters were in substantial competition and that Pacific was properly concerned that the exhibition of first run films by Tarzana would diminish the income of the Galleria theaters. The distributors also had a legitimate business interest in the revenue generated by the Galleria theaters because the distributors were paid, in part, out of each film's gross profits-Tarzana did not offer distributors as much in guaranteed payments and profits as did the first run theaters. In all, the clearances were reasonable, agreed the Court of Appeals.

Tarzana also failed to establish that the alleged restraint of trade injured competition in the relevant market, caused by a reduction in competition resulting from the restraint. Competition in the west San Fernando Valley area actually was enhanced when Mann began showing first run films; the termination of clearances demonstrated, for the court, increased competition rather than supporting Tarzana's assertion that the clearances were unreasonable.

The court concluded by rejecting a belated argument by Tarzana that the clearances resembled a horizontal restraint of trade; horizontal restraints of trade generally are presumed to be illegal. Judge Leavy noted that there was no evidence that the distributors withdrew from all business with Tarzana; the distributors just did not offer Tarzana from two to thirteen films when Tarzana wanted them. Again, legitimate business reasons supported the granting of clearances, ranging from the higher quality of the Galleria theaters to increased advertising costs necessitated by competing with other first run theaters.

Three Movies of Tarzana v. Pacific Theaters, Inc., Case No. 86-621 (9th Cir., Sept. 28, 1987) [ELR 9:5:15]

Briefly Noted:

Broadcasting/Candidate Debate.

A trial court in Pennsylvania has dismissed an action against a public television station brought by an individual who claimed that he was wrongly excluded from a television debate of candidates for the Democratic nomination for the United States Senate in a May 1986 primary election. The court determined that the complaint was based upon the station's alleged violation of the "equal time" and "fairness" doctrines of the Communications Act; that the Federal Communications Commission possesses exclusive jurisdiction concerning such violations; and that the debate was not a political contribution of free television air time.

Sagan v. Pennsylvania Public Television Network, 522 A.2d 191 (Commonwealth Court of Pennsylvania 1987) [ELR 9:5:16]

Texas Deceptive Trade Practices Act.

The "disgruntled" investors in a project proposing to produce and exploit children's educational video programs featuring Felix the Cat were awarded damages by a jury on several claims against the promoter of the project. A Federal District Court in Texas then entered judgment awarding damages of $65,000 per video program under the Texas Deceptive Trade Practices Act; the court also rescinded the security notes and production notes signed by the investors.

A Federal Court of Appeals has upheld the District Court's decision, rejecting the argument that the Act did not apply to the investment program. Although the program may have been characterized as a security, rather than as a good or service, the investors signed agreements concerning legal services, production facilities and the distribution of the videos - the Act extends to services related to the sale of a security when such services also were objectives of the transaction, as in this case, stated the court. And rescission of the investors' notes, in addition to the award of damages was proper under the Act in order to compensate the parties for the full damages caused by the allegedly deceptive trade practices.

Nottingham v. General American Communications Corp., 811 F.2d 873 (5th Cir. 1987) [ELR 9:5:16]

School Athletics.

In the fall of 1984, the National Collegiate Athletic Association declared that Peter Karmanos HI was ineligible to participate in intercollegiate ice hockey at the University of Michigan because Karmanos had played for a professional hockey team while he was attending high school in Canada. Karmanos argued that he was not a professional hockey player because he was not paid for his services; Karmanos' father had paid all of his son's expenses. The young man sued the NCAA and several officials of the university, alleging, in part, that the eligibility rules deprived him of his constitutional right to freedom of association. A Federal District Court decision (ELR 7:7:15) dismissing the action has been upheld. The Court of Appeals agreed with the District Court's finding that the complaint did not state a constitutional infringement cognizable under section 1983, and did not demonstrate that the NCAA acted under color of state law.

Karmanos v. Baker, 816 F.2d 258 (6th Cir. 1987) [ELR 9:5:16]

Copyright Infringement.

The owners of twenty copyrighted musical compositions have obtained summary judgment in an infringement action against P.O.S. Radio, Inc. A Federal District Court in Florida found that P.O.S. publicly performed the musical works at issue without receiving permission from the copyright owners or a license from ASCAP, and therefore enjoined P.O.S. from further infringing the copyrighted works and ordered the company to pay a total of $50,000 in statutory damages to the copyright owners as well as costs and attorneys' fees.

Nick-O-Val Music Co., Inc. v. P.O.S. Radio, Inc., 656 F.Supp. 826 (M.D.Fla. 1987) [ELR 9:5:16]

Contracts/Child Performer.

The New York Surrogate's Court has refused to approve a contract between 17 yearold Allison Smith, one of the performers on the television show "Kate & Allie," and the production company for the series on the ground that Smith's mother did not provide written approval of the contract, as required by state law. New York's Arts and Cultural Affairs law prohibited the court, in the absence of parental approval, from extending the original three year term of the contract between Smith and

Reeves Entertainment Group, stated Surrogate Marie Lambert.

Matter of Allison Smith, New York Law Journal, p.12, col.3 (Surrogate's Court, Sept.22, 1987) [ELR 9:5:16]

Copyright Infringement/Photograph.

A Federal District Court in New York has refused to grant summary judgment to an advertising agency and other parties in a copyright infringement action brought by photographer John Duke Kisch in connection with a photograph used in an advertisement for Rose's Lime Juice. The court noted that the two photographs at issue were taken in the same corner of the Village Vanguard nightclub; thus, the same "striking mural" appeared as the background for each photograph. In Kisch's photograph, a young woman was seated holding a concertina; the allegedly infringing photograph taken by Perry Odgen, featured musician John Lurie, seated, holding a saxophone. The lighting, camera angle, and camera position appeared to be similar in each photograph. The court therefore concluded that a rational trier of fact could find sufficient similarities to prove "copying," and would be permitted to find that the underlying tone or mood of the Ogden photograph was similar to the original conception expressed in Kisch's work. And Kisch's cause of action under state unfair competition law was not preempted by federal copyright law to the extent that the photographer alleged a tort of "passing off," concluded the court.

Kisch v. Ammirati & Puris, Inc., 657 F.Supp. 380 (S.D.N.Y. 1987) [ELR 9:5:17]

Employment Termination.

A Federal District Court in New York has granted summary judgment to CBS in a breach of contract action brought by Susan Blair. CBS terminated Blair's employment in 1985, and was entitled to do so, stated the court, because when Blair accepted employment, she "neither had an expectation of employment protection nor were any limitations of [CBS'] right to discharge [Blair] at will made part of the employment agreement." And Blair did not show that subsequent to accepting employment, she relied on certain pretermination procedures contained in the broadcaster's handbook on personnel policies.

However, the court refused to grant summary judgment to CBS on Blair's claim of sex and age discrimination under New York law due to the existence of material issues of fact.

Blair v. CBS Inc., 662 F.Supp. 947 (S.D.N.Y. 1987) [ELR 9:5:17]

Previously Reported:

The following cases, which were reported in previous issues of the Entertainment Law Reporter, have been published: Beisler v. Commissioner of Internal Revenue, 814 F.2d 1304 (9:2:12); Eden Music v. Times Square Music Publications Company, 514 N.Y.S.2d 3 (9:2:9); Effects Associates, Inc. v. Cohen, 817 F.2d 72 (9:2:19); T.B. Harms Company v. Jem Records, Inc., 655 F.Supp.1575 (9:2:8); Newman v. Universal Pictures, 813 F.2d 1519 (8:12:9); PPX Enterprises, Inc. v. Audiofidelity Enterprises, Inc. 818 F.2d 266 (9:2:8); Salinger v. Random House, Inc., 811 F.2d 90 (8:9:3).

A Federal Court of Appeals in New York has granted a request by Random House to supplement the record on appeal in J.D. Salinger's action seeking to bar the publication of a biography containing allegedly infringing excerpts from the author's copyrighted, unpublished letters. Random House sought to include in the record a marked copy of Salinger's trial exhibit setting forth those passages of Salinger's letters alleged to have been infringed and comparing them with the allegedly infringing passages of lan Hamilton's biography. Federal District Court Judge Leval color-coded passages in his copy of the exhibit to indicate his view of whether the passage contained an infringing quotation, an infringing paraphrase, a non-infringing quotation, a non-infringing report of historical facts, or a noninfringing report of ideas.

However, even after examining the marked exhibit, the court declined to alter its conclusion that the biography infringed Salinger's copyright in his letters, and denied Random Houses's petition for rehearing. Salinger v. Random House, Inc., 818 F.2d 252 (2d Cir. 1987)

A Federal Court of Appeals in California has affirmed the Federal District Court judgment ("for the reasons stated in paragraph 6 of the district court's 'Conclusions of Law'") in Lindsey v. Clossco, ELR 8:11:9. Lindsey v. Clossco, Case No. 86-2555 (9th Cir., May 4, 1987)

According to news reports, Doug Norwood has settled his action against Soldier of Fortune magazine (ELR 9:3:14) for an undisclosed amount.

After defeating Motown Records' motion for summary judgment in a contract dispute (ELR 8:11:10), the musical group known as Mary Jane Girls has unsuccessfully attempted to transfer the action to the Federal District Court for the Western District of New York. Judge Robert Sweet stated that even if Motown was not a resident of the forum, the recordings at issue were "mastered" in the Southern District, and then sent directly to Motown. In denying the application for a transfer, Judge Sweet also considered the convenience of the majority of witnesses, the calendar problems in the Western District, and the Southern District's familiarity with the action. Motown Record Corporation v. Mary Jane Girls, Inc., 660 F.Supp.174 (S.D.N.Y. 1987)

The United States Supreme Court has let stand without comment the following decisions which were previously reported in the Entertainment Law Reporter: Salinger v. Random House (8:9:3); Los Angeles Memorial Coliseum Commission v. National Football League (8:6:13; 8:9:11).

The Clippers basketball team has reached an agreement with the National Basketball Association in a dispute concerning the relocation of the team from San Diego to Los Angeles. Under the settlement, which is subject to approval by the NBA Board of Governors,

the Clippers will pay the NBA about $5.7 million. The parties were scheduled to go to trial in early October following a Federal Court of Appeals decision denying the Clippers' motion for summary judgment in an action for declaratory relief brought by the NBA (8:12:14).
[ELR 9:5:17]

WASHINGTON MONITOR

Tax Note: IRS decides that hockey team is "employer" for federal tax purposes, even though player used his own loan out company

by Chester L. Migden

A recent national office Technical Advice Memorandum issued by IRS has interesting implications for those who use PSCs or personal service corporations, usually known as loan out companies.

In the IRS Advisory, a professional hockey team engaged the services of a number of players through personal service corporations which had employed the players. In each case the team paid the personal service corporation negotiated fees. The team did not consider these players employees and did not therefore pay or withhold FICA, unemployment insurance taxes and income taxes. The PSCs held regular corporate and board meetings, kept books and records, paid professional fees, set up pension plans and paid all the taxes.

The issue was whether the team was the employer for all the tax purposes mentioned rather than the personal service corporations. The IRS ruled that the team was the employer and responsible for federal tax purposes. The IRS states that the ruling may not be used or cited as precedent, but they published it so obviously they want people to know about it.

In any event, the ruling applies common law criteria to determine employer-employee relationship. The test is whether a person is required to comply with instructions about when, where and how to work. The IRS said the team and the coach decided those matters. Then they looked at who controlled the training of the players. Again, it was the team franchise. The IRS next looked at how the services were integrated in the business of the team. The IRS said the team's success depended on the services which they controlled. They controlled the player's name and likeness for ads, and promotions and publicity contracts had to be honored. The services further had to be performed personally, no one could be substituted for the players by the PSC.

As to compensation, the IRS found the player was paid substantially like an employee; the team paid his business and travel expenses. The team furnished uniforms and equipment and facilities such as locker rooms, etc. The IRS found the team's right to terminate the player's contract about the same as those of an employer. In toto, the IRS said there was sufficient control to make the team the employer for tax purposes.

All told the IRS ruling is interesting and raises questions, which the IRS itself did not answer, about the proper treatment of loan out companies used by entertainers other than athletes.

The IRS memorandum is number G.C.M. 39553 and deals with Private Ruling 8625003 (dated Sept. 3, 1986). (It is in the Lexis database.)

Chester Migden is Executive Director of the Association of Talent Agents in Los Angeles.
[ELR 9:5:18]

RKO General is ruled an unfit broadcast licensee by administrative law judge

Administrative Law Judge Edward Kuhlmann has ruled that RKO General, Inc. is unfit to be a broadcast licensee. Judge Kuhlmann, in a decision which may involve the licenses for fourteen radio and television stations, accused RKO of unprecedented dishonesty, noting that since 1971 the company purportedly engaged in fraudulent billing practices, gave the Federal Communications Commission false and misleading financial reports, and destroyed copies of a 1974 internal audit report. RKO will retain all of its licenses pending an appeal to the FCC. [Oct. 1987] [ELR 9:5:18]

Federal Communications Commission undertakes review of personal attack and political editorial rules and announces that it will consider program exclusivity and compulsory copyright license policies

The Federal Communications Commission, in response to a petition filed by six media groups, has asked for public comment on whether it should abolish, modify or retain its personal attack and political editorial rules for broadcasters. The personal attack rule requires broadcasters to notify the target of an attack of the contents of the critical comments that were aired, and to offer the target air time in which to respond. The political editorial rule requires broadcast outlets that endorse a candidate for office to offer opponents time to reply on the air.

The media groups argued that the challenged rules are unconstitutional in that they have a chilling effect on broadcasters.

In May, the Commission initiated a proceeding to determine whether it should reinstitute some form of syndicated exclusivity rule permitting broadcasters to enter into exclusive agreements to show syndicated programming, and whether it should modify the network nonduplication rules in order to conform to the new syndicated exclusivity provisions.

And the Commission announced that it will reexamine issues relating to "programming property rights" with respect to cable television compulsory licensing in order to determine whether the public interest would be served by a recommendation to Congress that the compulsory license for cable television be amended or abolished. [Oct. 1987] [ELR 9:5:18]

IN THE NEWS

Free agent rights of baseball players were impaired by concerted action of club owners during late 1985, rules arbitrator

During the winter of 1985-1986, no offers of employment were made to baseball player free agents at any price until and unless the player's former club declared a lack of interest in the player. When spring training began in 1986, only four free agents had changed clubs; none of the four was offered salary arbitration by his former club prior to the December 7 contract deadline, thereby removing the former club from a negotiating position until at least May 1, 1986.

In contrast, following the completion of the 1984 championship season, sixteen of the twenty-six major league clubs signed free agents who had been playing for other clubs. A baseball player can become a free agent if he has completed six years or more of service in the major leagues and his contract has expired; during nine years under the free agent system prior to 1985, many players changed teams and salary levels increased significantly.

The Major League Baseball Players Association filed a grievance on behalf of the 62 major league baseball players who filed for free agency in 1985, including such players as Kirk Gibson, Carlton Fisk and Phil Niekro.

The clubs contended that each owner individually considered the employment of free agents, based upon "legitimate baseball, business management and financial factors."

Arbitrator Thomas T. Roberts has found that the major league baseball club owners approached free agency negotiations in a manner that was "not consistent with the existence of a free market." As a result of a series of monthly meetings in late 1985, every major league club through "uniformly established and maintained" conduct, abstained from the free agency market until an available free agent was "released" by his former club upon the announcement that the former club was no longer interested in his services. The action (or nonaction) of the club owners constituted a violation of the prohibition in Article XVIII(H) of the owner-player collective bargaining agreement against concerted conduct, stated Roberts, who therefore sustained the baseball players' grievance.

Hearings concerning appropriate remedies have not been scheduled. And a ruling has not yet been issued in a second grievance filed on behalf of players who were free agents after the 1986 season. [Oct. 1987] [ELR 9:5:19]

Dispute continues in Los Angeles trial court between Hemdale Film Corp. and Vestron Video concerning home video rights to several films, including "Platoon"

As "Platoon" launches its massive assault on home video viewers, the legal battle over video distribution rights to the film continues between Hemdale Film Corp. and Vestron Video.

In the spring of 1987, Vestron sued Hemdale, claiming that the producer failed to deliver to Vestron prints of the films "Platoon" and "Hoosiers" Hemdale also allegedly breached an agreement to grant home video rights to Vestron in twelve other films. Hemdale argued that Vestron did not pay agreed upon advances for the home video rights to "Platoon" and "Hoosiers," and that the company therefore proceeded to license these rights, for about $15 million, to HBO Video. And Hemdale licensed the home video rights to the 12 film package to Embassy Home Entertainment for about $21 million.

In April 1987, a Los Angeles trial court denied Vestron's request for a preliminary injunction seeking to restrain HBO Video from releasing videocassettes of "Platoon" and "Hoosiers."

Subsequently, a Federal District Court in Los Angeles dismissed a copyright infringement action brought by Vestron against HBO Video.

In August 1987, Los Angeles Superior Court Judge Kurt J. Lewin, in ruling on various motions filed by the parties, agreed with Vestron's argument that the company was entitled to formal written notice when it failed to pay the required theatrical release advance. But the court did not dismiss Hemdale's claims seeking to rescind the $7-$8 million video licensing agreement with Vestron.

The ELR will report on further developments in the dispute. [Oct. 1987] [ELR 9:5:19]

Grandchildren of the late George S. Halas Sr. may be entitled to damages in connection with reorganization of Chicago Bears football team, rules Chicago trial court

The late George S. Halas Sr., the founder of the Chicago Bears football team, failed to act in his grandchildrens' best interests in a 1981 reorganization of the team, a Chicago trial court has ruled. However, the court refused to void the reorganization, finding that Halas, the executor of the estate of his son George S. Halas Jr., had the right to vote the shares (which were assets of the estate) in favor of the team's new incorporation in Delaware. Christine and Stephen Halas, the children of

George S. Halas Jr., argued that the reorganization diminished the value of the Bears stock they inherited, and that Halas Sr. breached his fiduciary duty when he did not tell them about the change. Judge Henry A. Budzinski has asked for additional evidence to determine the amount of damage, if any, to be awarded to Christine and Stephen Halas. [Oct. 1987] [ELR 9:5:19]

Stuntwoman obtains jury award of $1.1 million in damages in wrongful termination action against Spelling Goldberg Productions

A trial court jury in Los Angeles has awarded $1.1 million in damages to stuntwoman Julie Johnson in her wrongful termination action against Spelling Goldberg Productions. Johnson claimed that the company did not renew her contract to act as the stunt coordinator for the television show "Charlie's Angels" after Johnson complained about safety conditions on the production and about alleged drug use by crew members. In early 1979, Johnson and another stuntwoman were injured while filming the show. The jury awarded Johnson $111,00 in compensatory damages, $1 million in punitive damages, and about $60,000 in residuals. [Oct. 1987] [ELR 9:5:20]

Los Angeles trial court declares mistrial in response to jury deadlock and orders dismissal of misdemeanor pornography charges against singer Jello Biafra and record company manager

A Los Angeles trial court has declared a mistrial and dismissed all charges against performer Jello Biafra arising from the distribution of an allegedly pornographic poster enclosed in the record album "Frankenchrist." The misdemeanor charges were dismissed after a jury stated it was deadlocked 7-5 in favor of acquittal. Biafra, the lead singer of the now-defunct Dead Kennedys group, and Michael Bonnanno, the manager of the company that distributed the Frankenchrist album, were charged with distributing harmful material to minors. The poster at issue was a reproduction of a surrealistic painting by H. R. Giger depicting disembodied sex organs. [Oct. 1987] [ELR 9:5:20]

Federal District Court in Los Angeles declares mistrial in Jeffrey MacDonald's breach of contract action against author Joe McGinniss

Federal District Court Judge William Rea, in response to a reported jury deadlock, has declared a mistrial in

Jeffrey MacDonald's $15 million breach of contract action against author Joe McGinniss. Apparently, five of the six jurors considered awarding MacDonald his escrowed royalties - about $90,000 - from McGinniss' book "Fatal Vision." The book concerned MacDonald's 1970 conviction on charges of slaying his pregnant wife and two young daughters. However, one of the jurors declared that MacDonald was not entitled to recover any royalties or damages, and refused to deliberate further. [Oct. 1987] [ELR 9:5:20]

New Jersey court refuses to ban surrogate mother's sale of publication rights in "Baby M" case

A New Jersey trial court ruled in June that Mary Beth Whitehead was entitled to publish her account of the "Baby M" proceeding. William and Elizabeth Stern, the couple who obtained custody of the baby carried by Whitehead as a surrogate mother, sought to ban the sale of publication rights, arguing that further publicity would not be in the child's best interest. New Jersey Superior Court Judge Harvey R. Sorkow ruled that the First Amendment precluded any restraint on Whitehead's literary efforts. [Oct. 1987] [ELR 9:5:20]

KABC-TV and A.C. Nielsen settle dispute over ratings delisting

Los Angeles television station KABC and A.C. Nielsen Co. have settled a lawsuit concerning Nielsen's decision to delete certain KABC newscast ratings from the service's May ratings guide (see ELR 9:2:20). The terms of the settlement were not disclosed. KABC had claimed, in part, that the "delisting" of the ratings for the station's late news broadcast decreased advertising revenue by over $1 million. [Oct. 1987] [ELR 9:5:20]

Previously Reported:

Correction: The August issue of the Entertainment Law Reporter reported, in its "In the News" department, that a Los Angeles Superior Court had confirmed a million dollar arbitration award in favor of Cinetel Films in a case against producers La Salmandra, S.A. and Stan Torchia (doing business as Universum Sales Organization). (ELR 9:3:20) As reported, Cinetel Films has obtained such an arbitration award, and a petition to confirm that award has been filed on its behalf with the Los Angeles Superior Court. However, no hearing has been held by the court in connection with that petition, and thus the award has not yet been confirmed. [ELR 9:5:20]

Correction: The August issue reported, in its "In the News" department, on ex-pitcher Denny McLain's good fortune in winning a reversal, from a federal appeals court in Atlanta, of his 1984 conviction on charges of racketeering and other offenses. (ELR 9:3:20) ELR Editorial Board member Phil Hochberg (a dedicated sports fan as well as sports lawyer) proved the continuing sharpness of his eyes and memory by writing to chide us for having misspelled Mr. McLain's name "McClain." This is one time, we are sure, Mr. McLain would want his name spelled properly. At the time the appeals court ruled in his favor, he had served 29 months of a 23-year sentence, but he is now entitled to a new trial. [Oct. 1987] [ELR 9:5:20]

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[ELR 9:5:22]