

**BUSINESS AFFAIRS**

**The Age of Docudramas:  
True Stories Produced Without Releases**

**by Alan J. Hartnick**

Not long ago, consents of the parties involved were considered necessary in order to film or telecast stories about actual facts or happenings. Hollywood legend has Elizabeth Taylor arriving, without lawyers, at the offices of ABC, which had announced that it was preparing a "docudrama" based on her life and loves. She is reported to have said at such meeting that no one can play Elizabeth Taylor other than Elizabeth Taylor. Perhaps overwhelmed by Ms. Taylor's beauty, ABC never filmed her life. The reality was that, in a highly publicized

complaint, Elizabeth Taylor sought to enjoin the production of a docudrama based on her life. [Taylor v. American Broadcasting Companies, Inc., 82 Civ. 6977 (S.D.N.Y. 1982). The case was settled before any issues were presented to the court for decision.]

A 1982 complaint by Elizabeth Taylor was, in a legal sense, long ago. "Docudramas" are essentially televised true portrayals of actual facts or happenings. Recent docudramas have involved Jackie Kennedy Onassis, Elvis Presley, the two living wives of Ernest Hemingway, Bernhard Goetz and Baby "M". Their stories are deemed to be in public domain, so that permission from the principals involved is not necessary.

Why not obtain releases? First, it may be impossible to obtain releases from everyone to be portrayed. Second, a release is a contract, and the producer cannot exceed its scope. Some releases exempt only libel and such an exemption invites litigation. It is possible that a release,

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although assuring cooperation, may limit the producer. Finally, in some states, such as California, a release does not provide a release from torts not yet committed. And so, most docudramas do not use releases.

Is not filming any true story necessarily a dramatization or fictionalization? When interviewed about her lawsuit in 1981, Elizabeth Taylor stated that a docudrama of her life would have to be fiction, unless there was somebody under her carpet or bed for the last fifty years. Such a position is certainly an overstatement as most of us have been privy for years to many details of Ms. Taylor's public and private life. In fact, Ms. Taylor may be an American icon - a true public figure - like Marilyn Monroe. Certainly, a performer gives life to a story and some interpretations by performers may be unique in their artistry. [See, e.g., *Waring v. WDAS Broadcasting*, 194 Atl. 631 (Pa. 1939), and *Waring v. Dunlea*, 26 F.Supp. 340 (E.D.N.C. 1939).] Two actors interpreting the same

role produce different versions of the same story. So adding flesh and blood does dramatize.

But what about libel, the right of privacy, and publicity rights? What about errors and omissions insurance without which very few docudramas would be filmed?

### The Beginning

The new age may have begun when Dr. Koussevitzky, conductor of the Boston Symphony, sought to enjoin a book purporting to be his biography for which he refused authorization. *Koussevitzky v. Allen, Towne and Heath*, 68 N.Y.S.2d 779 (1947), *aff'd* 69 N.Y.S.2d 432 (1st Dept. 1947). Justice Shientag wrote that:

"The right of privacy statute does not apply to an unauthorized biography of a public figure unless the biography is fictional or novelized in character. An examination of the book complained of clearly shows

that it is not fictional. That it may contain untrue statements does not transform it into the class of fiction ...."

There are statements in the book which the plaintiff might naturally find to be highly objectionable, if he is at all sensitive about those things. He may be able to prove some of them to be untrue and even defamatory. There are however, no so-called revelations of any intimate details which would tend to outrage public tolerance. There is nothing repugnant to one, s sense of decency or that takes the book out of the realm of the legitimate dissemination of information on a subject of general interest."

The next important case was Spahn v. Julian Messner, Inc., 286 N.Y.S.2d 832 (1967), in which Spahn, of the Milwaukee Braves, sought to enjoin the publication of the book "The Warren Spahn Story," claiming "all-pervasive" use of imaginary incidents. Judge Keating, writing for the Court of Appeals, said

"We hold in conformity with our policy of construing [the New York privacy act] so as to fully protect free speech, that, before recovery by a public figure may be had for an unauthorized presentation of his life, it must be shown, in addition to the other requirements of the statute, that the presentation is infected with material and substantial falsification and that the work was published with knowledge of such falsification or with a reckless disregard for the truth .... The extent of Mr. Shapiro's 'vast amount of research' in the case at bar amounted, primarily, to nothing more than newspaper and magazine clippings, the authenticity of which the author rarely, if ever, attempted to check out. To hold that his research effort entitles the defendants to publish the kind of knowing fictionalization presented here would amount to granting a literary license which is not only unnecessary to the protection of free speech but destructive of an individual's right - albeit a limited one in

the case of a public figure - to be free of the commercial exploitation of his name and personality." It should be noted that Spahn was not an unanimous decision, but was 4-2, with one judge not taking part.

Koussevitzky and Spahn provide the key to all the legal issues for docudramas. Can principles from cases concerning literary material be applied to other media? The answer is yes. The First Amendment applies to speech by broadcasters as well as journalists. There is no reason to discriminate against television.

Liability for libel is straightforward: to be libelous, a statement must be about a living individual ("of and concerning"), be false and defamatory, and hold the person up to hatred and shame. As a result of *New York Times v. Sullivan*, 376 U.S. 254 (1964), and its progeny, libel law has been relaxed for the media if public figures (pervasive or limited), public officials, or private individuals

in a matter of legitimate public concern are involved. Most docudramas concern such individuals.

The next issue is substantiation: the manner in which a life is portrayed. Even if privacy does not apply to a subject of general interest, a false light claim may arise if there is too much embellishment, fictionalization or distortion so as to place the plaintiff in a false light. The issue is what is enough to make a non-fiction work a work of fiction.

Reducing a life to cinematic proportions, according to James Mellow (in his review of the "Hemingway" docu-drama for the New York Times [4/24/88, sec. 2, pg. 33]), means discarding a good deal that would be essential to any literary biographer. The telescoping of different incidents of a life into a single episode for dramatic purposes and the use of composite characters seems to be a necessary condition for a film biography.



Comments from one person are sometimes put in another's mouth. Time sequences are fudged.

According to John O'Connor, writing on television docudramas,

"... in terms of factual information, the terrain changes precipitously when one reaches the borders of docudrama. Now the principals are portrayed by actors. Now the scenario is being shaped by a producer and director. Now the story must have a dramatic arc to grab and hold an audience. There must be a beginning, middle and end, preferably with the kind of upbeat feeling that American television nearly always demands." ["TV Docudramas Go One Step Beyond Reality," N.Y. Times, 5/22/88, sec. 2, pg. 11.]

Whether or not such critics are purists, elitists or right, docudramas present to a large number of viewers information about matters of legitimate public interest. The

"breathing space" afforded broadcasters is the leeway that permits the development of docudramas.

Privacy must inevitably give way unless the information does not command public interest. [Sanford, Libel and Privacy, sec. 11.3.3.1 (1985)] The plaintiff must prove that the docudrama had no "public significance" or was not newsworthy. Moreover, as far as libel is concerned, where the subject involves a matter of legitimate public interest combined with an individual who exposes himself or herself to the risk of publicity, the plaintiff must prove that the statement was made with "actual malice," that is, that the statement is false or was made with reckless disregard as to its truth or falsity.

Publishers and broadcasters have generally prevailed in cases involving claims of fictionalization. [Sanford, Libel and Privacy, sec. 11.4.6 (1985)] The courts appear not concerned with minor inaccuracies, affording "the leeway afforded an author who attempts to recount and

popularize a historic event." [Meeropol v. Nizer, 560 F.2d 1061, 1065 (2d Cir. 1977), cert. den. 434 U.S. 1013 (1978)] Moreover, courts have extended the public interest privilege to matters with a "requisite logical nexus" to a topic of public concern. [Campbell v. Seabury Press, 614 F.2d 395 (5th Cir. 1980)] In short, the relaxation of the law of libel and privacy have created a judicial atmosphere favorable to docudramas.

### The Existing Law

There are very few cases concerning docudramas. Those that do exist indicate that docudramas are protected by the First Amendment and need not contain only literal truth. The major legal issue concerns the inaccuracies that appear to be inevitable in docudramas. The inaccuracies may be caused by the needs of the media itself or the desire to reach the largest audience.

Accuracy itself is too high a standard, for non-fiction works or for docudramas. At the moment, there is no leading case; therefore determinations as to docudramas will be on an ad hoc basis.

The procedural questions would concern jurisdiction and choice of law. Most television and cable networks probably could be sued in any state where the docudrama is broadcast. The footprint of the satellite delivery system of most cable networks covers most states. Under the "single publication rule," all claims in all U.S. jurisdictions would have to be included in one action. The choice of law is generally the law of the plaintiff's domicile.

As to substance, in the case concerning the film "Missing" the court stated that the use of simulated dialogue, composite characters and telescoped events are "singularly appropriate and unexceptional," provided the

context is not distorted. The court established standards for docudramas:

"Self-evidently a docudrama partakes of author's license - it is a creative interpretation of reality - and if alterations of fact in scenes portrayed are not made with serious doubts of truth of the essence of the telescoped composite, such scenes do not ground a charge of actual malice." [Davis v. Costa-Gavras, 654 F.Supp. 653 (S.D.N.Y. 1987)]

In *Street v. National Broadcasting Co.*, 645 F.2d 1227 (6th Cir. 1981), cert. granted 454 U.S. 815, cert. dismissed 454 U.S. 1095 (1981), the Sixth Circuit held that the defendant's television dramatization of the Scottsboro rape case did not constitute actual malice, even though it contained literal falsehoods.

It is hard to find concrete judicial guidance as to what may be considered justifiable embellishment. In *Frosch v. Grosset and Dunlap*, 4 Med.L.Rptr. 2307, aff'd 427

N.Y.S.2d 838 (1st Dept. 1980), a few fictionalized conversations did not revoke the fair comments privilege upon a public figure's life.

In the absence of established guidelines, the producer must be prepared to defend the substantial accuracy of the material. There are many methods to do so, including reliance on a well-established author or determining whether there had been any claims based upon a published work covering the event. In a way, substantiation is really a matter of business policy and good will because the failure to investigate, without more, does not demonstrate actual malice. [Dowd v. Calabrese, 589 F.Supp. 1206 (D.D.C. 1984); see Cantrell v. Forrest City Publishing, 419 U.S. 245 (1974)]

The Importance of a Legal Review by a Lawyer

Because of the need to substantiate, the role of the lawyer becomes crucial. In an era in which the business community complains of too many lawyers, it is a pleasure to write of one subject matter, docudramas, in which the lawyer's role is imperative. Without a resourceful and skilled lawyer, there would be no docudramas.

The lawyer must be part of the production team. The lawyer functions as a lawyer - not as part of business affairs. He or she scrutinizes the script to be certain that all events are documented and are logical interpolations from the record.

The lawyer should establish procedural programming guidelines. The lawyer should be advised of any variations between the proposed story and the proposed script. He or she should be given substantiation material, such as books, articles, interviews and court proceedings. It would be better if the lawyer were given an annotated script keyed to the annotative materials.

The annotated script must provide sufficient substantiation for each scene depicting either actual events or representative events. Where available, specific quotes from books, statistical reports and interviews should be supplied to confirm dialogue, events or dates in the script. ABC, as an example, has an effective guideline concerning docudramas.

If the script uses composite characters, the annotated script should indicate the specific characters who have been used to create the composite. The composite characters should not play a pivotal role and must conform to the actual incident. If living persons are involved, they should not be identifiable if the composite character possesses derogatory or unfavorable characteristics which the constituent does not possess. Moreover, the personal characteristics, attitudes and demeanor of actual persons portrayed must meet the test of "reasonable basis." Even though composite characters may be given

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aliases to insulate the producer, unfavorable traits in a composite character who is identifiable may be the basis for defamation liability.

The entire substance of the docudrama will depend on the lawyer's crucial determination of the sufficiency of the back-up data, which may be readily available or submitted to him or her. Since that data will rarely correspond with the dramatic elements of the script, the lawyer must differentiate among scenes which are clearly or possibly substantiated, or unsubstantiated but of dramatic necessity. Certain dramatizations and embellishments are necessary and part of the judicially approved leeway to avoid requiring the docudrama to be merely a dramatized news report. The lawyer must make a considered judgment.

The level of substantiation will be determined by the status of the individual involved in the story, and the level of protection that the individual or event has under

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the First Amendment. An all-purposes public figure may require less substantiation than a limited purpose public figure, depending upon the surrounding circumstances.

Finally, there should be separate guidelines for programs containing substantial fictionalizations and fictional stories inspired or suggested by actual events. In some ways, a docudrama is legally more defensible than stories inspired by actual happenings. Sometimes disguises are in order. The greatest safety would be to have really fictional characters in real life incidents. More dangerous would be having real people involved in fiction. All such situations require creative legal solutions - as well as the hope that the solutions will work without litigation.

Disclaimers should be considered so that the public will not be misled as to the nature of the facts or events presented. [Leopold v. Levin, 259 N.E.2d 250, 253 (1970); Sliwa v. Highgate Pictures, 7 Med.L.Rept.

1386, 1392 (1981); Sanford, Libel and Privacy sec. 11.4.6 (1985)]

In the case of the docudrama about "Baby M," the disclaimer was: "Certain scenes and dialogue are interpretive of [the supporting] material."

Some courts, particularly in the Second Circuit, discount disclaimers in trademark cases. [Home Box Office v. Showtime/Movie Channel, 832 F.2d 1311 (2d Cir. 1987); Charles of the Ritz Group v. Quality King Dist., 832 F.2d 1317 (2d Cir. 1987); Soltex Polymer Corp. v. Fortex Industries, 832 F.2d 1325 (2d Cir. 1987)]A disclaimer would not necessarily dispose of a defamation or false light claim, but conservative advice suggests that they be utilized.

One purpose of having a lawyer in close attendance while producing a docudrama is that doing so aids in obtaining errors and omissions insurance. Insurance companies require comfort that a lawyer has been fully

involved in the docudrama and are prepared to defend any future claims relating to the matter. Some insurance companies have clearance procedures which require the insureds' attorney to assure himself or herself before the first exhibition of the insured production. If a docudrama is involved, the lawyer must attach an addendum to the application for insurance explaining the methods of substantiation. There should be a reasonable basis for each scene.

### Are There No Limits?

Are there no limits to docudramas? Perhaps a docudrama based on private incidents involving a person who is not a public official, public figure or limited public figure might go beyond the pale. It is sometimes difficult to determine whether a private person is a public figure. I suggest that conservative advice be given.

The cause of action for public disclosure of private facts involves material not of legitimate concern to the public. [Restatement (Second) of Torts, sec. 652D] Everything that may be of interest to the public is not necessarily the legitimate concern of the public, and the "logical nexus" which eliminates privacy protection from participants in a true story requires a topic of public interest.

It must be remembered that all the potential causes of action, even though constitutionalized, are state causes of action. There is no federal question. Predictability is somewhat difficult as the law of docudramas is developing. To date, courts have shown willingness to accept minor fictionalizations as part of "the leeway" afforded docudramas. I doubt if courts would tolerate private information broadcast for sensation and not for its informational value and without any bearing on a newsworthy topic.

## Conclusion

The existing case law in docudramas is generally favorable to the media. This suggests that the media, in producing docudramas, is policing itself by avoiding unsubstantiated portrayals and by using appropriate disclaimers. But every docudrama, because the law continues to emerge, is a business risk - perhaps small, but a risk. The existence of insurance suggests that the risk is small.

And is all worth while? I think so. Another commentator believes that the docudrama, when used too freely, is no longer a means of dispensing data; it becomes a way of short-circuiting the viewer's imagination. [Maslin, "Just Because It's True, Is It Art?", N.Y. Times, 3/20/88, sec. 2, pg. 21] Perhaps we are bombarded with too much information and entertainment. Nonetheless, aesthetic values aside, there appears to be no legal

reason to curtail docudramas, and I do not think courts will substantially interfere. (Most state publicity laws exempt docudramas. As an example, the California publicity statute, Civil Code section 990, provides (in paragraph n) that it does not apply to "a play, book, magazine .... film, radio, television program ... [or to] material that is of political or newsworthy value.")

But be aware that the courts have not provided detailed guidance, and the interesting cases may lie ahead. [Brooks, "The Maze of Docudrama," N.Y.L.J., April 10, 1986] What would happen if a producer, without releases, intends to produce a docudrama based on the life and loves of Elizabeth Taylor, and is prepared to enter into legal battle with her? To use a copyright term, should not Elizabeth Taylor have a "moral right" in her own life?

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[ELR 10:3:3]

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## RECENT CASES

### **"Ozzy" Osbourne and CBS Records are not liable for damages sought by parents of teenage suicide victim, rules California appellate court**

On October 26, 1984, 19-year-old John Daniel McCollum tragically shot and killed himself while lying on his bed listening to music from "Speak of the Devil," an album recorded by John "Ozzy" Osbourne. McCollum's parents, on their own behalf and on behalf of their son's estate, alleged that the music proximately resulted in the suicide, and brought a lawsuit against Osbourne, CBS Records, and other parties involved in producing and distributing the album.

The trial court's decision dismissing the action (ELR 8:8:20) has been affirmed by a California appellate court on the grounds that the complaint was barred by the

First Amendment, and that the McCollum parties did not allege sufficient facts to show any intentional or negligent invasion of their rights.

Judge Walter Croskey reviewed the events leading up to the suicide, noting that on the evening of October 26th, John McCollum, who, according to the court, had a problem with alcohol abuse as well as serious emotional problems, listened repeatedly to Osbourne's albums, including "Blizzard of Oz" and "Diary of a Madman." Osbourne apparently appealed to an audience which included, in part, troubled adolescents who were attracted to the performer's "unusual, anti-social and even bizarre attitudes and beliefs often emphasizing... satanic worship or emulation, the mocking of religious beliefs and death." As described by Judge Croskey, the message conveyed by Osbourne, was that "life is filled with nothing but despair and hopelessness and suicide is not only acceptable, but desirable."

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The McCollum parties claimed that Osbourne's audience was extremely susceptible to being influenced by and directed by the performer; that Osbourne and CBS knew that many members of the adolescent audience were confronting issues of "self-identity, alienation, spiritual confusion and even substance abuse;" and that a "special relationship" of kinship existed between Osbourne and his fans, a relationship purportedly furthered by the personal nature of the performer's songs.

The song "Suicide Solution" to which John McCollum was listening on the family stereo, before he went to his bedroom on the night of October 26th, included a 28-second instrumental break containing some "masked" lyrics. The lyrics, which were not printed on the album cover (and which may or may not actually have been heard or understood by the teenager), read: "Ah know people, You really know where its at, You got it, Why

try, why try, Get the gun and try it, Shoot, shoot, shoot." The last line was repeated for about ten seconds.

The McCollum parties stated that the lyrics, although sung at one and one-half the normal rate of speech and not immediately intelligible, along with the rhythm of Osbourne's music and, on occasion, the use of a "hemi-sync" process of sound waves, combined to produce a foreseeable influence on the emotions and behavior of individual listeners. In particular, listeners such as John McCollum, who, because of their emotional instability, were "peculiarly susceptible" to such music, lyrics and tones, might be influenced to act in a destructive manner, claimed the McCollum parties, in alleging that the negligent distribution of Osbourne's music aided, advised or encouraged John to commit suicide, or created an "uncontrollable impulse" in him to commit suicide. It also was claimed that the Osbourne parties incited John to commit suicide, and intentionally aided, advised, or

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encouraged suicide in violation of Penal Code section 401.

In order to find culpable incitement, stated Judge Croskey, it would be necessary to find that Osbourne's music was directed and intended (emphasis by the court) toward the goal of bringing about the imminent suicide of listeners, and that it was likely to produce such a result. No intent or likelihood was shown by the McCollum parties, determined the court - apart from the "unintelligible" lyrics from "Suicide Solution" (to which John McCollum was not listening when he shot himself), there was nothing in any of Osbourne's songs which commanded listeners to commit an immediate suicidal act. Osbourne's lyrics may have expressed "a philosophical view that suicide is an acceptable alternative to a life that has become unendurable - an idea which, however unorthodox, has a long intellectual

tradition," but the performer was constitutionally free to advocate such a view.

It was further noted that musical lyrics and poetry cannot be construed to contain the requisite "call to action" - reasonable persons understand that such writings are figurative expressions, rather than literal commands or directives to immediate action; to view them otherwise "would indulge a fiction which neither common sense nor the First Amendment will permit," declared the court.

While not finding a California case dealing directly with recorded music and lyrics, the court noted the rejection on First Amendment grounds of all claims that certain fictional depictions in movies or on television incited unlawful conduct so as to require imposing tort liability (*Olivia N. v. National Broadcasting Co.*, 74 Cal.App. 3d 383; *Olivia v. National Broadcasting Co.*, 126 Cal.App.3d 488 (ELR 3:16:2); *Bill v. Superior*

Court, 137 Cal.App.3d 1002 ; DeFilippo v. National Broadcasting Co., 446 A.2d 1036 (ELR 4:13:8); Walt Disney Productions, Inc. v. Shannon, 276 S.E.2d 580 (ELR 6:6:6); Zamora v. Columbia Broadcasting System, 480 F.Supp. 199 (ELR 1:21:2).

Judge Croskey emphasized that imposing liability for civil damages for the publication of protected speech would violate the First Amendment just as would a prior restraint in that a damage award might significantly inhibit composers, performers, record producers and distributors in selecting controversial materials leading to a self-censorship "which would dampen the vigor and limit the variety of artistic expression."

Judge Croskey next addressed the question of whether recovery was available to the McCollum parties, apart from any First Amendment issues. As distinguished from *Weirum v. RKO General*, 15 Cal.3d 40, upon which the McCollum parties relied, Osbourne's music

and lyrics did not constitute a "real time" urging of listeners to act in a particular manner - there was "no dynamic interaction with, or live importuning of, particular listeners."

The court emphasized that there was no close connection between John McCollum's death and the composition, performance, production and distribution, years earlier, of recorded artistic musical expressions; that Osbourne and CBS bore no moral blame for the tragedy; and that "it is simply not acceptable to a free and democratic society to impose a duty upon performing artists to limit and restrict their creativity in order to avoid the dissemination of ideas in artistic speech which may adversely affect emotionally troubled individuals. Such a burden would quickly have the effect of reducing and limiting artistic expression to only the broadest standard of taste and acceptance and the lowest level of offense, provocation and controversy. No case has ever gone so



far. We find no basis in law or public policy for doing so here."

The lack of an intent to cause injury also required the dismissal of the McCollum parties' claims based on intentional tort liability. And Penal Code section 401 requires some active and intentional participation in the events leading to a suicide in order to establish a violation. In the absence of the requisite intent and participation, stated the court, Penal Code section 401 may not be applied "to composers, performers, producers and distributors of recorded works of artistic expression disseminated to the general public which allegedly have an adverse emotional impact on some listeners or viewers who thereafter take their own lives."

McCollum v. CBS, Inc., Case No. B025565  
(Ca.Ct.App., July 12, 1988) [ELR 10:3:8]

## **Court of Appeals upholds \$3 judgment in United States Football League's antitrust action against National Football League**

A Federal Court of Appeals has blocked the United States Football League's appeal of a District Court decision entering judgment on a jury verdict awarding \$1 to the USFL in an antitrust action against the National Football League.

After a forty-eight day trial, the jury found that the NFL had willfully acquired or maintained monopoly power in a market consisting of major league professional football in the United States, and found that the NFL's unlawful monopolization of professional football had injured the USFL. The jury rejected other USFL claims, and the District Court denied the USFL's motion for judgment notwithstanding the verdict on the claims of monopolization and attempted monopolization of the

television submarket, and unreasonable restraint of trade with respect to network television contracts and essential facilities. The District Court also rejected the USFL's motion for a new trial on damages on the monopolization of professional football claim (or in the alternative for a new trial), and denied a request for injunctive relief.

Judge Ralph K. Winter, summarizing the principal rulings in his 45-page opinion, first noted that the jury's finding of illegal monopolization of the market for professional football was based upon evidence of activities which were not of sufficient impact to support a large damage verdict or to justify "sweeping" injunctive relief.

The USFL admitted that its primary claim was that the NFL, by entering contracts with the three major networks and, allegedly, by acting coercively toward the networks, prevented the USFL from acquiring a network television contract. Judge Winter stated that the jury,

which expressly rejected the USFL's television claims, was entitled by the evidence to find that the NFL's contracts with the networks were not an anti-competitive barrier to the USFL's bidding against the NFL to acquire a network contract. It appeared to the court that there was " ample" evidence that the USFL failed because "it did not make the painstaking investment and patient efforts that bring credibility, stability and public recognition to a sports league." For example, the USFL chose to abandon its original strategy of playing in the spring in order to build fan loyalty and public recognition.

The court proceeded to review the myriad contentions of the parties: the history of major league professional football; the nature of the NFL's television contracts; the NFL's alleged " predatory tactics" unrelated to television, such as attempting to "co-opt" USFL owners with promises of an NFL franchise; and the USFL's decision, in August 1984, to move to a fall playing season in

1986, despite ABC's warning that such a move would breach the USFL's contract with the network for the spring of 1985 and 1986, and despite the contrary recommendations of a management consulting firm and of the USFL's directors of operations and marketing.

In turning to the issue of whether the NFL's multiple contractual arrangements with the three networks complied with the Sports Broadcasting Act of 1961's anti-trust exemption for pooled rights contracts, the court observed that the statutory language did not state that the exemption limited the NFL to a contract with only one network. The legislative history did not suggest to the court any reason to depart from the unambiguous statutory language. Accordingly, the court held that the mere existence of the NFL contracts with the three networks did not violate the antitrust laws.

Judge Winter next rejected the USFL's argument that the District Court erred in instructing the jury to analyze

the NFL's television contracts in light of a 1984 CBS study concerning the possibility of broadcasting USFL games. The CBS study mentioned a "dilution effect" on the network's gross advertising revenues due to the possible decrease in advertising revenues from NFL games if USFL games were added to the schedule. The jury had rejected the USFL's claims as to the dilution effect in finding that the NFL did not monopolize a television submarket, that the five year NFL television contracts were not an unreasonable restraint, and that the NFL did not have the power to exclude a competing league from obtaining a network contract. Furthermore, even if there were no "dilution effect," the jury was free to conclude, stated the court, that the revenue to be expected from USFL telecasts would be so low, for various reasons, that no network would purchase the rights.

In upholding the District Court's jury instructions with respect to the remaining USFL television-related claims,

Judge Winter stated his disagreement with the USFL's argument that proof of either anticompetitive intent or effect would be sufficient in a rule of reason case under section 1 of the Sherman Act, and affirmed instructions concerning the relevant television submarket.

Judge Winter concluded by upholding various evidentiary rulings; the District Court's instructions on damages; and the nominal damage award of \$1 -- an amount that was trebled to \$3 under the antitrust laws.

United States Football League v. National Football League, 842 F.2d 1335 (2d Cir. 1988) [ELR 10:3:9]

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**Musical group "Boston" wins summary judgment for more than \$3 million in deferred royalties held by CBS Records**

CBS must pay the musical group "Boston" more than \$3 million in deferred royalties held by the record company, a Federal District Court in New York has ruled.

In his most recent decision in the ongoing CBS-Boston litigation (ELR 7:1:10; 6:10:20), Judge Vincent L. Broderick first reviewed the relationship of the parties. In 1976, CBS entered a recording contract with Ahern Associates which managed the group Boston; Tom Scholz, the leader of the group, agreed to be bound by the contract. The contract's initial one year term was subject to extension upon the exercise of options granted to CBS. CBS was entitled to receive a specified number of record albums in certain periods of time, and the company had an option to increase the number of records for certain periods by one additional album. If Boston did not fulfill the minimum recording commitment for a certain period, CBS could extend the expiration of the period until the group corrected the default plus sixty days

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thereafter. And in the event of such a default, CBS, upon written notice, could suspend the payment of royalties due the members and managers of Boston under the contract.

CBS released the first Boston album in August 1976. In November 1976, CBS exercised its option to extend the term of the contract for an additional one year period, and in May 1977, the company increased the minimum recording commitment for the first option period from one to two albums. The first option period album was due in August 1977, and the second was due in November 1977.

In 1977 and 1979, CBS and Boston entered three separate contracts pursuant to which, for tax reasons, certain compensation due the Boston parties was deferred.

In December 1977, CBS extended the first option period. The second Boston album (the first option period album) was delivered to the company in August 1978.

However, the relationship of the parties subsequently deteriorated, and CBS began (on a disputed date, but no later than the summer of 1982) to withhold royalty payments due to the Boston parties.

In 1983, CBS brought a \$20 million breach of contract action against Boston; the instant proceeding considered Scholz's defenses and counterclaims.

Judge Broderick found that triable issues of fact were present with respect to Scholz's defense asserting that CBS was estopped from claiming that the failure to deliver the third Boston album within the time specified in the record contract was a material breach of the contract. Questions were raised, stated the court, concerning the representations made by CBS as to the time requirements for the delivery of the albums; the reasonableness of Scholz's reliance on any such representations; and any injury to Scholz resulting from his reliance.

Judge Broderick next found that issues of fact also were present as to Scholz's defense that CBS, by its words and conduct, waived its right under the contract to the timely delivery of the third album, and as to the effect of any such waiver on the rights and obligations of the parties. The court noted, in particular, the dispute over whether CBS suspended the payment of royalties in 1978, observing, in a footnote comment, that the company did not have "much success demonstrating that it provided defendants with written notice of the suspension of payment of the royalties."

The court also refused to dismiss Scholz's defense alleging that the Boston parties would not be obligated to deliver more than one album, if any, under the terms of the CBS contract, and a defense based on CBS' alleged failure to provide to Scholz a recording fund of \$65,000, thereby possibly preventing the delivery of an additional album.

CBS did obtain the dismissal of Scholz's statute of limitations defense. The parties agreed that the applicable statute of limitations was six years; CBS' complaint was filed in October 1983. Scholz argued that the statute began running in August 1977 when the second album originally was due. Judge Broderick noted that the delivery of the second album in August 1978 would have "cured" the Boston parties' failure to deliver the second album, and observed that the claim that the statute of limitations in contract actions "runs from the date of the first failure to satisfy a condition in a contract, even though such a failure is anticipated and provided for by the contract, and even though failure timely to satisfy that condition is subsequently excused and the condition is later satisfied ... makes little sense when applied to an on-going service contract."

In reviewing Scholz's counterclaims, Judge Broderick found that genuine issues of fact were raised by the

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claim that CBS, in manufacturing and distributing a solo record album featuring Barry Goudreau, a performer in Boston, engaged in unfair competition and violated section 1125(a) of the Lanham Act.

Issues of fact also were raised, stated the court, in a counterclaim alleging that CBS fraudulently obtained Scholz's consent to the deferral of royalty payments, and that CBS entered into the deferral arrangement with the intent not to perform and to use the arrangement to obtain "leverage" over the Boston parties. The court proceeded to find meritless" CBS' argument seeking the dismissal of Scholz's counterclaims for promissory estoppel and fraud based on oral representations allegedly made to Scholz in 1981 by Walter Yetnikoff, the president of CBS Records. Evidence also was present to support Scholz's counterclaim asserting that CBS breached a fiduciary duty by withholding the deferred royalties. Summary judgment therefore was denied CBS on this

counterclaim, as well as on Scholz's counterclaims alleging the misappropriation of royalties, tortious interference with precontractual relations and violations of the antitrust laws.

Judge Broderick then considered Scholz's first counterclaim in which the musician alleged that CBS breached the recording contract by withholding royalties. The court agreed with Scholz that the three deferral contracts entered into by the Boston parties were separate contractual obligations distinct from the 1976 recording contract, citing both the fact that the deferral contract did not affect the obligations of the musical group under the recording contract, and the fact that the deferral contracts each contained a provision that the segregated royalty funds were not subject to counterclaim or set-off and were payable when due. Judge Broderick granted Scholz's application to divide the first counterclaim into two distinct counterclaims, pointed out that CBS

conceded that there was no basis for its retention of the royalties owed to Scholz under the deferral contracts, and found that no genuine issues of fact existed with respect to the meaning of the deferral contract.

Scholz's motion for sanctions was denied.

CBS, Inc. v. Ahern, Case No. 83 Civ. 7918 (S.D.N.Y., May 27, 1988) [ELR 10:3:10]

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**New York trial court rules that musician may proceed with privacy and fraud claims against Yoko Ono-Lennon in connection with proposed commercial exploitation of film and soundtrack of 1972 charity concert**

In August 1972, two charity rock concerts were held at Madison Square Garden; the concerts, which featured

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performances by John Lennon and Yoko Ono-Lennon raised over \$1.5 million for a home for retarded children.

Adam Ippolito, a member of the Elephants Memory Band which performed with Lennon at the concert, claimed that he agreed to donate his services based upon the representation that any proceeds from the concerts and the subsequent telecast of a concert film would be used only for charitable purposes. However, according to Ippolito, in 1985, Ono-Lennon delivered the film and soundtrack of the benefit performances to Capitol Records and Sony Corporation for commercial reproduction as a record album and videotape. Ippolito also claimed that Ono-Lennon gave the film and soundtrack to Showtime/The Movie Channel for airing in March 1986.

A New York trial court has ruled that Ippolito may proceed with his claim under sections 50/51 of the New



York Civil Rights Law and with a cause of action based on fraud with respect to the allegedly unauthorized use in the film and soundtrack of the musician's name and property rights in his performance at the concerts.

Judge Harold Baer, Jr., first found that the videotape, film and long-playing record album at issue were derivative works of the film and soundtrack recorded on August 30, 1972, and thus were protected under the Copyright Act as original works of authorship. The section 50/51 claim and the fraud claim involved "something more than rights equivalent to those under the Federal Copyright Act," and therefore were not preempted, stated the court. But Ippolito's causes of action for conversion of his property rights and for unfair competition were preempted, except to the extent that a portion of the unfair competition cause of action related to a claim of "palming off."

In turning to the sufficiency of Ippolito's claim, Judge Baer did not agree with Ono- Lennon that Ippolito clearly sold or assigned his property rights, and also found sufficient the pleading of the cause of action for fraud. The palming-off claim was dismissed because the album and video, as well as a Showtime press release, credited Ippolito with having performed on the keyboards; the court thus found it "difficult, if not impossible, to see how the public would in any way be 'confused or misled.'"

Ippolito v. Ono-Lennon, 526 N.Y.S.2d 877 (N.Y.Cnty. 1988) [ELR 10:3:12]

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**Dispute concerning payments due under distribution agreement for Abel Gance films "Napoleon" and "Bonaparte" is ordered to special referee**

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In 1976, Ruth Zorn, doing business as Cinema Central New York, entered an agreement with The Images Film Archive concerning the distribution of the Abel Gance films "Napoleon" and "Bonaparte." Subsequently, a dispute arose between the parties, and in 1985, a New York trial court directed a settlement of judgment and ordered Images to account to Zorn.

Images continued to attempt to resettle the interlocutory judgment, objecting, in particular, to a provision in the judgment which stated that Zorn was entitled to five percent of all sums remitted by exhibitors to Images or its assignees, licensees or transferees from the theatrical distribution of the two films, and five percent of the gross receipts received by Images, its assignees, licensees and transferees from the non-theatrical distribution of the films. Images contended that Zorn was not

entitled to any payments based on sums remitted to any party other than Images.

When Images delivered an accounting to Zorn in June 1986, along with a check for about \$32,000, purportedly representing the total amount due Zorn under the interlocutory judgment, Zorn objected. Images claimed that Zoetrope Studios was not a licensee, assignee or transferee and that Zorn was not entitled to a five percent share of Zoetrope's gross receipts, but only a five percent share of the receipts received by Images from Zoetrope. Furthermore, Images argued that Zorn did not have any right in the soundtrack of the films and sought to reduce the payment to Zorn by the claimed fifty percent interest in the soundtrack.

A New York trial court first found that the acquisition by Zoetrope of a fifty percent interest in "Napoleon" during the term of Zorn's contractual rights did not provide a basis for reducing the gross receipt monies for

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which Images was obligated to account. And the distinction between the soundtrack and the film was without merit, stated Judge Stecher, noting that no separate proceeds were derived from the distribution of the score. Zorn was entitled to an accounting of receipts from the distribution of the film on videocassette - the contract extended to five percent of receipts from "television and theatrical distribution and from any other uses of the films..." (emphasis added by the court). Including videocassette distribution as "other uses of the films" was fair and reasonable, and the matter was ordered to a special referee to settle the account.

Zorn v. The Images Film Archive, Inc., New York Law Journal, p. 21, col.6 (N.Y.Cnty., July 1, 1988) [ELR 10:3:12]

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## **Copyright infringement claim involving "Snorks" cartoon characters is rejected**

A Federal District Court in Florida has rejected Shirley Evans' claim that Wallace Berrie & Co.'s animated children's series "The Snorks" infringed Evans' copyright in the unpublished work "Snorkie Snorkel vs. Simon Shark." It was noted that Berrie never had access to Evans' work; that distributing the work to about twenty publishers did not constitute wide dissemination; and that the work was not published nor distributed to the public at large.

Even assuming access, stated the court, the works were not substantially similar. The works at issue involved an underwater world, and such similarities as "using a sand dollar as currency, foods made of seaweed, seahorses for transportation and plates made of oyster or mother of pearl" were not protected similarities

of expression, but were "characterizations that naturally follow from the common theme of an underwater civilization." Furthermore, the concepts of festivities, dancing, singing and picnicking were not protectible expressions of ideas, but were events that could occur in any storyline; the fact that the events took place in the underwater setting was "of no import" because the underwater theme was not protectible. Summary judgment therefore was granted to the Wallace Berrie parties.

Evans v. Wallace Berrie & Co., Inc., 681 F.Supp. 813 (S.D.Fla. 1988) [ELR 10:3:13]

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**Santa Cruz theater owner did not establish antitrust claims against competing exhibitors and film distributors, rules Federal District Court**

A Santa Cruz theater owner's antitrust claims against two competing film exhibitors and nineteen film distributors have been rejected by a Federal District Court in California, in an opinion issued in December 1987 but only recently published.

The Movie 1 & 2, owned by Harold Snyder and his two sons, alleged that United Artists Communications and Nickelodeon, Inc. entered an illegal split whereby United Artists monopolized the first run commercial film exhibition market and the Nickelodeon monopolized the first run art film exhibition market in Santa Cruz. The Movie claimed that the distributors participated in the exhibitors' allocation scheme and discriminated against The Movie in furtherance of the monopolies.

Judge Aguilar first found that The Movie did not establish that the exhibitor/distributor parties acted as part of a conspiracy or pursuant to an agreement to unreasonably restrain trade in violation of section 1 of the

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Sherman Act. The Movie sought to infer the existence of a split from the alleged historical pattern of movie exhibition in Santa Cruz, and claimed that the distributors' acquiescence in the purported allocation of films provided the requisite element of agreement. But the fact that the two exhibitors presented films "consistent with their marketing strategy and philosophy" did not constitute an unfair restraint of trade conspiracy, observed the court; the alleged split reflected permissible and legal business activities.

The Movie also did not show that the exhibitors coerced or induced the distributors into joining the split, found the court, or that the distributors engaged in anti-competitive conduct with the exhibitors which deprived The Movie of -first run films. Judge Aguilar stated that The Movie did not present admissible and sufficient evidence that the distributors participated in bid tipping (providing information concerning offers already

received in order to receive a higher offer from another exhibitor), moveovers (the change of auditoriums, within or outside of the same complex without any time elapsing between runs while under the licensing agreement for the first screen), film rental adjustments, or a consistent pattern of distributor rejection of substantially superior bids by The Movie. Indeed, in only 43 instances out of a total of 182 first-run pictures in which The Movie expressed an interest during the damage period was any guarantee offered to the distributor, and the evidence showed that The Movie did not even bid on all of the films for which it claimed it could have acquired licenses during the damage period.

Summary judgment therefore was granted to the exhibitor/distributor parties with respect to the section 1 claim, and on the section 2 claim as well. Judge Aguilar found that The Movie did not present sufficient evidence to establish that United Artists and the Nickelodeon

coerced the distributors into denying film licenses to The Movie, or that the exhibitors' conduct was an unlawful attempt to monopolize or attempt to monopolize the first run art or commercial film market. Although it might have been a "questionable" practice for the exhibitors to advertise films before receiving a bid-for license, this did not constitute monopolization, stated the court.

The Movie's pendent state claims of unlawful business practice and interference with prospective economic advantage were dismissed from the court's jurisdiction.

The Movie 1 & 2 v. United Artists Communications, Inc., 681 F.Supp. 654 (N.D.Ca. 1987) [ELR 10:3:13]

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## **Videotape investment program was a "generic tax shelter," rules Tax Court, in denying deductions and credits claimed by investors**

Investors in a program to produce and distribute videotapes for use on commercial television did not qualify for advertising expense deductions or the investment tax credit for films, the United States Tax Court has ruled.

Special Trial Judge Marvin F. Peterson, whose opinion was adopted by the court, noted that the "Television Property Purchase Agreement" signed by the investors did not state the number of videotapes to be purchased under the contract, describe the content of such tapes, or specify a time when the producer, Vitagram, Inc., was required to deliver the tapes. The contract price under the Purchase Agreement for Vitagram's services was set at fifteen times the total amount of investment credit desired by the investor.

In reviewing the investment program, Judge Peterson observed that Eric L. Clayden, an investor who also promoted the program during the years 1981 through 1984, received from Vitagram a total of fifteen videotapes consisting of musical performances by various unknown performing artists. The court could not determine from the record which videotapes were produced with respect to each of Clayden's five Purchase Agreements, how much Vitagram charged Clayden for each tape, the date of production, nor when, if ever, any of Clayden's tapes were broadcast. Other investors also did not receive such information about their tapes.

The Internal Revenue Service argued that the investment program lacked economic substance and constituted a "generic tax shelter." Judge Peterson agreed, citing the program's focus on tax benefits; the investors' failure to negotiate the terms of purchase; the difficulty in valuing the videotapes; and the deferral, in the form

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of valueless promises to pay, of the bulk of the consideration. In all, the investors engaged in the program primarily, if not solely, to obtain tax deductions and credits, and were not concerned with either the price or the value of their videotapes. The court therefore concluded that the investors were not entitled to any deductions or credits claimed in connection with the program, and found that the investors would be liable for additional interest based on their lack of a profit objective in entering the transaction.

Clayden v. Commissioner, 90 T.C.No.40 (1988) [ELR 10:3:14]

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**Arizona appellate court upholds indictment under racketeering statutes in connection with obscenity charges, but finds that free speech rights limit state's remedies**

A criminal indictment charged Steven Feld and Larry Chabler with conducting an illegal enterprise through racketeering; the other three counts of the indictment alleged the exhibition of obscene films by Feld, Chabler and C.A.T.,Inc., doing business as Erotica Motel. The trial court's order found that the Arizona organized crime and fraud statutes (which were based on the federal Racketeer and Corrupt Organizations statutes) were unconstitutional as applied to obscenity proceedings. The court granted a motion to dismiss the first count of the indictment.

An Arizona appellate court reinstated the racketeering count, but cautioned that some of the statutory remedies

appropriate to other RICO criminal offenses might be unconstitutionally overbroad when applied to protected speech as opposed to unprotected obscenity. The court approved of the statutory scheme for preconviction remedies, although noting that an order requiring action such as the forfeiture of business property, or of a party's interest therein, or closing a business prior to the determination of liability, would be an impermissible prior restraint. Similarly, certain post-judgment remedies, according to the court, amounted to a prior restraint upon the sale of privileged matter in that the sanctions might restrict future protected speech, rather than punishing the distribution of unprotected speech in the past.

The court stated that its construction of the RICO statutes would mean that when the statutes were used in a criminal prosecution involving obscenity, there would not be a chilling effect on protected rights - "conducting



an illegal enterprise dealing in obscenity would be punishable as a greater offense than the lesser crime of obscenity, just as the RICO statutes make many other crimes more serious when effected through racketeering."

The United States Supreme Court has declined to review the appellate court's decision.

State of Arizona v. Feld, 745 P.2d 146 (Ariz.App. 1987)  
[ELR 10:3:14]

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### **Briefly Noted:**

#### **Copyright Infringement/Music.**

In a decision issued in December 1986, but only recently published, a Federal District Court in

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Massachusetts granted statutory damages of \$10,000, and attorneys fees in the amount of about \$3600 to the owners of several copyrighted musical works in an infringement action against Peter Arlos, the former operator of coin-operated jukeboxes. The court rejected Arlos' contention that he was an innocent infringer with respect to twenty alleged infringements because he was not aware of the jukebox registration requirements of the Copyright Act of 1978. It was noted that Arlos operated between sixty and seventy unregistered jukeboxes between 1978 and 1981. However, the court declined to enter summary judgment with respect to five alleged infringements by Arlos in 1983 because of the possibility that there may have been a valid registration certificate on one of the six music selectors located in Arlos' restaurant.

Broadcast Music, Inc. v. Arlos, 682 F.Supp. 1 (D.Mass. 1986) [ELR 10:3:15]

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### **Lien Law/Film Negatives.**

A New York trial court has ordered The Optical House, Inc. and Peter Wallach Enterprises, Inc. to surrender possession to producer Urban Entertainment Associates and distributor Angelika Films of negatives of the film "The Chair" (one of the late James Coco's last movies). Optical House and Wallach, two special effects companies, claimed that the producer and distributor owed them about \$50,000 and \$67,000, respectively; that they had possessory liens under New York law; that they were not required to surrender possession of the negatives until they were paid; and that the court could not substitute a surety bond for the right of possession.

Acting Judge Edward H. Lehner disagreed, stating that allowing Optical and Wallach to retain possession of the negatives until the final determination of the action would give them an " unfair advantage," particularly since they would be fully protected by the filing of a surety bond in the amount of their claims.

Angelika Films, Inc. v. Urban Entertainment Associates, Inc.,. New York Law Journal, p.18, col.3 (N.Y.Cnty., July 19, 1988) [ELR 10:3:15]

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**Art.**

In June 1982, M. Robert Voitier, Sr. purchased at an auction in New Orleans a painting which was owned by Fred Rotondaro, entitled "Wooded Farmland Glade." Voitier eventually discovered that the art work was not

painted by its purported creator, George Inness, and sought a rescission of the sale (on the ground of error), the return of the sale price, and damages. A Louisiana appellate court has upheld a trial court judgment ordering Rotondaro and the art gallery owner who had sold the work to Rotondaro, to pay Voitier \$23,610—the purchase price of \$17,500 plus damages. On appeal, Judge Guidry determined that the evidence established that Voitier was entitled to rescind the contract on the basis of unilateral error. A disclaimer of warranty in the auction catalogue was ineffective in this case; the disclaimer did not appear in the bill of sale or invoice for the painting, and was not brought to Voitier's attention nor explained to him at the time of sale. Furthermore, the auctioneer had assured Voitier that the painting was an original Inness. In affirming the trial court's judgment, including an award of \$2,500 for mental anguish, Judge Guidry declined to impose liability on the art gallery

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owner who acted as Rotondaro's agent. The painting was ordered returned to Rotondaro upon payment of the judgment in full.

Voitier v. Antique Art Gallery, 524 S.2d 80 (La.App. 1988) [ELR 10:3:15]

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### **Art.**

The Supreme Court of Alabama has reversed a trial court decision granting summary judgment to Patt B. Grethmann, doing business as Country Emporium, in an action brought by Rozanne T. Yates, the owner of an antique oil painting. Yates had placed the painting, which she believed was worth \$1,000 on consignment with Grethmann; Grethmann was to receive a 25 percent commission from the sale of the painting. Yates was

informed, in an anonymous telephone call, that the painting might be worth more than \$1,000. When Grethmann subsequently denied Yates access to the painting, Yates brought an action alleging breach of contract, conversion, fraud, and breach of a resulting trust. The court found that the evidence presented created genuine issues of material fact, and the matter was remanded for further proceedings.

Yates v. Grethmann, 521 So.2d 1317 (Ala. 1988) [ELR 10:3:16]

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### **Horse Racing.**

A Louisiana appellate court has found that genuine issues of material fact were present as to the existence of a partnership and/or joint venture between two

individuals to engage in the race horse business. The trial court incorrectly evaluated testimony and weighed evidence when granting summary judgment with respect to certain issues, and the matter therefore was remanded for further proceedings.

Simon v. Fasig-Tipton Company of New York, 524 S.2d 788 (La.App. 1988) [ELR 10:3:16]

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### **Horse Racing.**

A New York appellate court has upheld a trial court ruling dismissing an action arising from the "infamous" second race conducted at the Saratoga Race Track on August 2, 1986. The apparent winner of the race, "Al-lumeuse," was disqualified for a foul and placed last in the official order of finish, following a stewards inquiry

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involving a collision during the stretch run. A horse named "Festivity" was declared the winner of the race, and the net proceeds of the pari-mutuel pools were distributed to the winning ticket holders. However, later that afternoon, the stewards announced that Allumeuse was disqualified in error. The New York State Racing Association was directed to pay the purse money to Allumeuse's owner, but, pursuant to the regulations of the state's Racing and Wagering Board, the pari-mutuel payoff was not changed. Individuals claiming to hold pari-mutuel tickets on Allumeuse brought an action against various state racing authorities, seeking to nullify the stewards' official decision, to have Allumeuse declared the winner of the race, and to redeem their tickets as "incidental damages." In dismissing the action, the court noted, among other factors, that under Board rules, the stewards have the final word concerning the official outcome of a race as far as the pari-mutuel payoff is

concerned, and that the Board therefore did not act in an arbitrary and capricious manner in refusing to overturn the disqualification of Allumeuse.

Cramer v. New York State Racing Association, 525 N.Y.S.2d 938 (N.Y.App. 1988) [ELR 10:3:16]

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### **Libel/Consumer Advocate.**

An Illinois appellate court has affirmed the dismissal of a libel action brought by consumer advocate David Horowitz against the Peoria Journal Star. Horowitz claimed that an article written by Rick Baker and published in the October 26, 1984 edition of the newspaper criticized a transaction involving Horowitz's purchase of bricks from the city of Peoria with the assistance of the city's former mayor. According to Horowitz, the article was

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false and defamatory in implying that he secretly" obtained the bricks at a lower price than did any other prospective brick buyer. Judge Scott found that the complained-of statements were constitutionally protected expressions of opinion, and, furthermore, were reasonably susceptible to an innocent construction. The language used in the article to describe the brick transaction was incapable of precise meaning, and, given the context of the article and the broader social context within which the statements were made, an average reader "would not regard the statements as factual reporting, but only as the author's personal distaste for a specific transaction involving a proclaimed consumer advocate and the mayor of a depressed city." Notwithstanding the possibility that Baker's characterizations may have been "unwarranted and distasteful," the statements were merely opinion, reiterated the court. (Judge Scott noted Mr. Baker passed away on March 4, 1988,

after the opinion in the case was drafted, but prior to its publication.)

Horowitz v. Baker, 523 N.E.2d 179 (Ill.App. 1988)  
[ELR 10:3:16]

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### **Common Law Marriage.**

Former New York City ballet dancer Sandra Jennings did not show that she was entitled to interim support from actor William Hurt pending a hearing to determine whether there was a common law marriage between the parties, a New York trial court has ruled. Acting Judge Jacqueline W. Silbermann noted that Jennings and Hurt lived together in South Carolina from October 31, 1982 until January 10, 1983 while Hurt was filming the movie "The Big Chill." A divorce judgment terminating Hurt's

marriage to Mary Beth Hurt was entered on December 3, 1982; William Hurt did not learn of the judgment until about December 9, 1982. In late January 1983, Jennings gave birth to Hurt's son. Judge Silbermann noted that although New York has abolished common law marriages, the state will recognize the validity of a common law marriage contracted in another state, if it is valid where contracted. However, in this case, Jennings' probability of establishing the validity of the marriage was "questionable." Under South Carolina law, Jennings would have to prove, by a preponderance of the evidence, that she and Hurt had agreed to take each other as husband and wife; the fact that they lived together of itself did not create a common law marriage. It appeared to the court that Jennings and Hurt did not hold themselves out as being married during the time they lived together in South Carolina. Furthermore, Jennings waited for about five and one-half years before asserting

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that she and Hurt were married. In denying temporary maintenance, the court referred to Hurt's voluntary payment of Jennings' expenses (totalling about \$65,000 during the previous year); determined that Jennings' and her child's needs were "adequately provided for;" and stated that its decision was without prejudice to Jennings' ability to eventually prove her case. All other financial aspects of the case had to await a decision as to whether there was a valid marriage between the parties, concluded the court.

Jennings v. Hurt, New York Law Journal, p. 25, col.3  
(N.Y.Cnty., July 7, 1988) [ELR 10:3:16]

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## Previously Reported:

The following cases, which were reported in previous issues of the Entertainment Law Reporter, have been published: *United States v. King Features Entertainment, Inc.*, 843 F.2d 394 (9:12:8); *Maheu v. CBS, Inc.*, 247 Cal.Rptr. 304 (10:1:4); *Greenfield v. Mosley*, 247 Cal.Rptr. 314 (10:1:13); *Harkins Amusement Enterprises, Inc. v. General Cinema Corporation*, 843 F.2d 1198 (9:12:11). According to news reports, a Federal Court of Appeals has denied a rehearing sought by the exhibitors and distributors in *Harkins*.

The United States Supreme Court has let stand the decision in *Cablevision Systems Development Company v. Motion Picture Association of America* (10:1:8).  
[ELR 10:3:17]

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## IN THE NEWS

### **Writers Guild members ratify new contract with producers**

The members of the Writers Guild have approved a new four-year contract with the Alliance of Motion Picture and Television Producers, bringing to an end a 22-week strike.

Under the contract, the minimum payment of \$18,000 for work on a single one-hour network television episode will increase 5 percent in the first 18 months, 5 percent in the second 18 months and 4.5 percent in the last year of the contract. The \$12,000 minimum payment for one network rerun will increase by the same percentages.

The payment received by a writer when a one-hour television show is sold in the domestic syndication



market will be determined by a percentage of the sale price of the show, instead of being set at the fixed amount of \$16,200, with a minimum payment of \$8,460 and a maximum of \$25,380 for six showings nationwide. If the domestic syndication market improves, the Guild may request binding arbitration to restore a fixed payment system.

With respect to foreign residuals, the Guild may choose between two methods of payment for one-hour shows sold to foreign countries. The current method sets a maximum payment of \$4,400 for a one-hour television show; the new agreement provides for one payment rather than an allocation over three years of the \$4,400 residual amount. However, the Guild may choose a new formula whereby a writer would receive 1.2 percent of the producer's gross from foreign sales of a show. Even with a low sale price, the writer would receive at least 85 percent of the \$4,400 figure; with a more lucrative

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show, the writer could receive up to 130 percent of that figure.

Writers will receive an increase in residuals from shows made for other mediums, but shown on basic cable. The residual fee for television shows produced prior to July 1, 1984 will increase from 1.2 percent to 2.5 percent of the company's accountable receipts; for programs produced after July 1, 1984, the residual increases from 1.2 percent to 2 percent.

The contract will cover high-budget (as defined in the contract) made-for-cable shows. Minimums have been set at made-for-television syndication rates, and production companies can elect one of three residuals options. Producers of low-budget dramatic shows and other programming for basic cable will continue to negotiate agreements on a project-by-project basis.

Simplified procedures have been established for the re-acquisition by a writer of a work remaining unproduced

for a certain period. And the contract establishes a committee of Guild and producer representatives to review the allocation of credit and to resolve creative differences.

The Guild has agreed to withdraw an antitrust action filed against the studios and the networks in connection with interim agreements signed by the writers with independent companies, and will not require the companies to reveal the names of writers who worked during the strike. The Guild did not agree to provide amnesty from fines or discipline to these writers. The new contract expires May 1, 1992. [Aug. 1988] [ELR 10:3:18]

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**Universal Pictures settles dispute over the title "The Great Outdoors"**

Universal Pictures, according to news reports, has settled a dispute with producer Robert Slatzer over the use of the title "The Great Outdoors." Slatzer challenged Universal's use of the title, claiming that he had registered the title and that his production company currently syndicates a television series called "The Great Outdoors," and is developing another work under the title. Universal reached the settlement with Slatzer prior to the late June 1988 release of the company's film entitled "The Great Outdoors." [Aug. 1988] [ELR 10:3:18]

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**Settlement is reached concerning reimbursement of Lucasfilm's expenses for successful defense of infringement claim involving fantasy machine creatures from "The Empire Strikes Back" and "Return of the Jedi"**

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Lucasfilm, Ltd. has settled a long-running dispute (ELR 7:8:18; 8:8:7; 8:10:18) with artist Lee Seiler concerning the creation of the fantasy machine creatures of "The Empire Strikes Back" and "Return of the Jedi." A Federal Court of Appeals granted summary judgment to Lucasfilm in a copyright infringement action brought by Seiler in which the artist alleged that he created the designs of the giant mechanical creatures. Seiler apparently will reimburse Lucasfilm for an undisclosed amount of attorneys fees and costs. [Aug. 1988] [ELR 10:3:18]

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**North Carolina adopts statute regulating flea markets in order to reduce sale of counterfeit and pirated recordings**

A North Carolina statute regulating peddlers, itinerant merchants, flea market vendors and flea market operators became effective on July 1, 1988. The statute's tax and licensing requirements include a provision requiring flea market operators to maintain a daily registration list of all vendors. According to the Recording Industry Association of America, the North Carolina flea markets have been the second worst offenders in the United States with respect to the sale of counterfeit and pirate sound recordings. It is expected that the statute, by providing a method to determine the identity and location of vendors, will, among other purposes, serve to protect the legitimate sound recording industry, as well as other businesses and the general public. [Aug. 1988] [ELR 10:3:19]

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## **Former football player Charlie Krueger is awarded \$2.36 million in action involving career-related injuries**

A San Francisco trial court judge has ordered the San Francisco 49ers to pay \$2.36 million in damages to former defensive lineman Charlie Krueger. The court acted in response to a California appellate court ruling (ELR 9:1:13) upholding Krueger's claim for fraudulent concealment based upon the nondisclosure of material medical information; the trial court was directed to enter judgment in favor of Krueger and to determine damages. [Aug. 1988] [ELR 10:3:19]

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## **Australia's High Court refuses to ban publication of "Spycatcher"**

The High Court of Australia has refused to grant the British Government's request to suppress the publication of "Spycatcher," Peter Wright's memoir of his service as an MI5 agent. According to news reports, the court stated that it had no jurisdiction to enforce a British security regulation requiring agents to maintain silence about their work. Despite a ban imposed in Britain and Hong Kong on the sale of "Spycatcher," the book has sold more than 1.4 million copies worldwide, and the judgment will release a substantial amount in royalties to Wright. [Aug. 1988] [ELR 10:3:19]

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## WASHINGTON MONITOR

**Federal Communications Commission issues "warning" to broadcasters concerning "payola"**



The Federal Communications Commission has issued a statement reminding broadcasters that Section 507 of the Communications Act prohibits anyone from offering or accepting payments to put any programming on the air without the knowledge of the station management or owner; the section carries criminal penalties of up to a year in jail and fines of up to \$10,000. Section 317 of the Act requires stations to disclose on air any payments they receive to broadcast particular programming; violators of the section are subject to administrative penalties, including fines and license revocation. Section 317 and the Commission's rules require licensees to exercise "reasonable diligence" to prevent payola. An official of the FCC's Mass Media Bureau has stated that during the past five years, the Commission has referred to the Justice Department three or four cases involving alleged section 507 violations. But the FCC has declined to

undertake a broad investigation into payola. [Aug. 1988]  
[ELR 10:3:20]

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### **FCC approves RKO's sale of Los Angeles television station to Disney**

The Federal Communications Commission has approved the sale of RKO General's television station in Los Angeles to Walt Disney Co. The \$324 million sale of KHJ-TV will end at least a part of lengthy Commission proceedings involving RKO's fitness to hold broadcast licenses (see ELR 9:5:18). Disney will pay \$218.6 million to RKO and an additional \$105.4 million to Fidelity Television, the group organized in 1965 to challenge RKO's license.

The Commission also approved a separate settlement agreement involving the sale of Memphis, Tennessee

radio station WHBQ-AM. RKO will receive about \$525,000 in this sale; the \$225,000 balance of the purchase price will be paid to competing applicants for the station license.

Commissioner Patricia Dennis, in dissent, stated that approval of the settlement might indicate to broadcasters that prolonging Commission proceedings may serve to avoid license revocation. [Aug. 1988] [ELR 10:3:20]

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[ELR 10:3:21]