LEGAL AFFAIRS

The Winds of Labor War: Reflections on the Causes of the 1988 Writers Guild Strike

by Bernard D. Gold

I'm going to present a treatment. The treatment is called "The Winds of Labor War." It deals with the events and factors leading up to the 1988 WGA strike. Because of the sensitivities of this audience, I'm leaving out the sex and violence--that will be added later.

It is December 1987. The prevailing view is that the 1988 WGA negotiations will be a piece of cake.

And why not? There are no big issues demanding attention. Nothing like the made-for-pay issue of the 1981

WGA strike or the theatrical to video cassette issue of the 1985 WGA strike.

Sure, the one-hour syndication residual question is around. But everyone agrees that the Producers deserve some relief in that area. More importantly, the question has, apparently, already been resolved. In the 1987 Directors' negotiations, the Producers accepted a DGA proposal addressed to that problem. It even was assumed that the DGA had run its proposal by the WGA before submitting it to the Producers.

There are other factors pointing toward a peaceful negotiation. The WGA has new leadership, a leadership that has not yet negotiated a major collective bargaining agreement. The prudent thing to do would be not to look for trouble if the Producers don't; take a standard deal this time around; gain experience before risking a battle that can easily be avoided.

And it didn't look like the Producers would look for trouble either. Why should they?

Finally, the WGA's strikes of recent years had been disasters for the Guild. In 1981 the Guild struck for three months over the made-for-pay issue and ended up with the poorest made-for-pay provision of any of the Unions. In 1985, the WGA struck over the video cassette issue, but after two weeks changed its mind and took the Producers' original proposal. With that kind of a recent history the WGA would be looking toward 1988 as a respite from the wars--a time for peace and for building up its strength.

For all those reasons, the major outlines of the 1988 WGA deal seemed clear: (1) a standard increase in rates; (2) the DGA proposal for one-hour syndication residuals; and (3) a few minor adjustments. Why shouldn't that do it?

Why didn't that do it?

Pre-Strike Thoughts within the WGA

First of all, the combined effect of the 1981 and 1985 negotiations had left a large residue of bitterness among many WGA activists. Going into the 1988 negotiations there was a belief prevalent among important elements in the WGA that the Guild had to use those negotiations to restore its own self-confidence and to gain the respect of the industry. This could hardly be done by taking a standard deal.

Second, many in the WGA found it particularly unappealing to follow a pattern set by the DGA. They blamed the DGA at least in part for their lack of success in 1981 and 1985. In 1981 the DGA settled its contract without a strike during the third month of the WGA strike. In 1985, the WGA believed that its position was undercut by the DGA's 1984 video cassette settlement. The DGA settlement had been made while the WGA was engaged in litigation on the issue. The WGA had expected to win millions in those cases. However, as part of the 1985 settlement the WGA had to give up its litigation. Many believed that what had been a golden opportunity was turned into a humiliating defeat. Further, the DGA's 1987 actions in regard to the one-hour programs were also under suspicion insofar as the WGA was concerned. There was a dispute as to whether the WGA had approved, even implicitly, the DGA's 1987 proposal.

Third, there was also a belief among some in the WGA that the Guild could obtain a significant "victory" without a strike or with a very short strike. The networks were viewed as being particularly vulnerable as the 1988-89 season approached. Their share of the audience had declined substantially. They would view the loss of the coming season as a disaster from which they might never recover. They would not take a long strike over the one-hour syndication issue since it was an issue that meant nothing to them. Most importantly the networks would take product produced by others during a strike in order to save the television season.

The network actions would add to the pressures on the supposedly already fragile unity of the Producers. Those Producers who did not have one-hour programs would have no incentive for taking a strike on the issue. Even beyond that, the effects of a strike would vary enormously from company to company depending on their different production schedules. Many would settle quickly just to get their shows produced and sold.

Finally, there was a belief in some quarters that this was the right time for the Guild to assert itself, that the Guild was trigger ready for battle. A lot of work had gone into the task of unifying the Guild in order to prevent the disaster which had occurred in 1985. The new leadership had been meeting personally in small groups with many writers. Communications between the membership and Guild leaders was excellent. A feeling had spread among the writers that now they were in fact unified. There was an enormous amount of confidence in their new leadership. The Executive Director would receive standing ovations when he reported on negotiations. This feeling of unity and confidence led in many cases to feelings of strength and militancy, a feeling that the WGA was now a strong and powerful union, and that this was the time for the Producers to be made aware of the Guild's strength and to start to treat the writers with the respect they deserved and not as second class citizens. This was the right moment for action--it should not be allowed to pass.

A routine settlement would hardly satisfy those feelings.

The Rise of the Strike Issues

But even with all those factors, did issues exist which would justify a strike? If the only reason for opposing the DGA one-hour syndication deal was the simple fact that it was a DGA deal, that didn't seem to present a sufficient justification for a strike.

However, issues upon which the WGA could base a strike developed during the negotiations. In fact, for several months the negotiations seemed more successful in producing issues than in settling them.

Some believe that the philosophy and methods of the WGA created issues where none had existed. Others argue that the issues were determined by an informed Guild membership acting in a democratic manner. Cynics say that both schools of thought are really saying the same thing.

However put, the fact is that the new leadership of the Guild kept the membership fully informed in unusual detail of what was going on at the negotiations. That policy had some undesirable consequences.

As we all know, as part of the negotiating ritual, a union makes many proposals and the company rejects almost all of them. This is expected by professional negotiators. The arguments which those negotiators make across the table are seldom taken to heart, but each side waits for some signal from the other as to what is really expected and what is likely to be given.

But this routine may not work as well when the union membership is deeply involved in formulating the proposals and when the arguments at the bargaining table are reported in detail to the membership. That procedure can severely restrict the flexibility of the union negotiators. The membership may become emotionally involved in issues where emotion did not exist before. Obtaining certain demands may become matters of principle because of what was said about those demands by the union and company negotiators at the bargaining table. The price that will have to be paid may receive little consideration. However, the leadership, particularly if it is committed to the ideal of a democratic union, may well feel that it must push those demands.

That was a factor which ted to the rise of creative rights and foreign residuals as significant issues during the negotiations.

It is easy to see how an emotional and traditional issue such as creative rights would rise to the top in the atmosphere that existed in early 1988. But why foreign residuals?

The foreign residual issue was helped in its rise by another new development at the WGA. The Guild, for the first time, had an industrial analyst who was preparing sophisticated statistical data for the negotiations. Two of the areas to which that data was addressed were foreign residuals and one-hour syndicated programs. The data showed that Producer revenues from foreign residuals had been increasing. Moreover, the multiplying number of TV networks in Europe promised even greater revenue in the future. The WGA had made a demand for a share of those revenues. Upon seeing all this information, a belief spread within the active WGA membership that an increase in foreign residuals was an issue worth fighting about and about which a fight was fully justified.

The economic analysis also affected the one-hour issue. According to that analysis, the DGA proposal would have a heavier impact on writers than on directors. One of the reasons for this was that the directors, in the '87-'88 season, had caught the last good round of one-hour syndicated sales. This allowed the directors to take advantage of the 150% provision of its deal. The writers, coming on a year later, would miss that round.

With this analysis, the WGA could oppose the one-hour proposal on grounds other than its DGA origin.

But even with all that, the WGA, prior to the strike, made what it considered a reasonable proposal in the one-hour area, a proposal which afforded relief arguably comparable to that in the DGA deal. However, under the WGA proposal, money "contracted for" rather than money "received" was to be the relevant measurement, and if the market recovered the new provision was to be eliminated. In addition, because of the perceived greater impact on the WGA than on the DGA, the WGA wanted more economic relief in other areas--and foreign residuals became the leading candidate.

With this background, in early March, the Producers had to decide what offer they would present to the WGA for its consideration as the WGA met to determine whether or not to go on strike.

The issues had begun to crystallize: one-hour residuals, foreign residuals, and creative rights.

Pre-Strike Thoughts of the Producers

Insofar as foreign residuals were concemed, the Producers made a firm decision not to include any change from the existing contract in its offer. The foreign provision in the WGA contract was the same as in most of the other labor agreements which dealt with foreign broadcasts. The Producers' view was that if it gave the WGA something different in foreign, they would have to give the same thing to all the other labor groups--thereby multiplying its WGA foreign costs many times. Maybe some slight change was possible--perhaps moving up the 35% payment. But that would be dealt with, if at all, if the WGA came back and said that all it needed was a small move in foreign to close the entire deal.

Insofar as the creative rights issue was concerned, many believed that the WGA would not strike, or at least not strike for long, over that kind of an issue. Creative rights was a dispute that was always there; it was an area in which the Producers did not want to be compelled to give greater creative rights to writers who otherwise had minimum deals; that area should be left to individual negotiations. A few even took the view: "How can you get a show done with writers hanging around?"

The Producers' position on the one-hour issue, as on the foreign issue, was also determined by their desire for uniformity. They did not accept the WGA's one-hour proposal. The Producers wanted the DGA deal to become the pattern for the entire industry. They didn't want a different formula with each labor group.

The result was that the Producers' over-all final pre-strike proposal on the three big issues as well as on most other items was viewed as a carbon copy of the 1987 DGA deal.

The Producers did not expect their proposal to result in a long strike. In retrospect it is apparent that they not did give sufficient weight to the bitterness remaining from the 1985 strike or to the fact that this was a different Guild from the 1985 WGA. For reasons already alluded to, this Guild was ready to stay unified behind its leadership even through a long strike.

WGA's Response to Producers' Final Pre-Strike Proposal

The WGA, then, had to decide what to do with the Producers final pre-strike proposal. The WGA Board of Directors met and recommended a strike to the membership. Apparently, the Board believed that it would obtain its objectives in a short period of time. But it, too, was incorrect in its evaluation of several important factors.

First, based upon the experience of past strikes, it does not seem likely that any immediate pressure is brought to bear on the majors by a writers' strike which begins in the fate winter or in early spring. Apparently, real pressure is not felt until June. In the 1981 strike, Lew Wasserman did not appear at the bargaining table until the first week of June. It is interesting that in the 1988 strike, the chief executives became active in the negotiations at about the same time. However, the Guild seemed to believe it could make an impact much more quickly.

Second, the WGA did not seem to realize the importance which the Producers placed upon pattern bargaining. The Producers' view was that the Guild was attacking such bargaining in both the foreign and the one-hour area. The Producers were not going to give in on those points short of a long strike which threatened to cause substantial damage. One may argue that the Producers over-valued the importance of resisting a departure from pattern bargaining, but nevertheless their strong resistance was foreseeable.

Third, the support of the networks for the Producers was stronger than almost anyone had foreseen. All three network companies had new cost-conscious owners and management. The new owners were not going to be accused of undermining their suppliers when the suppliers were trying to control costs.

Fourth, the WGA was not in as good a position to exploit the possible differences among the Producers as it thought it was. Ironically, this was due to the high degree of unity among the writers. That belief in togetherness resulted in a WGA position during the early periods of the strike that all the writers should stay on strike until all went back to work. That made it somewhat difficult to break the Producers' groups apart. Instead of luring Independents into interim agreements, the Guild was busy trying to find legal ways to avoid entering into agreements with Independents. By the time the Guild got off that position , both the networks and the majors had become so firm in their own desire for unity that most Independents stayed in line.

Of course, all this has the benefit of hindsight.

The final act was now set.

The Strike Vote

Armed with the recommendation of the WGA Board of Directors, the Executive Director addressed the WGA membership meeting at which the decision whether to strike was to be made. He received a tumultuous standing ovation. He explained the Producers' proposal to the membership in a fair and balanced manner. There were at least some in the audience who believed that if he had concluded his address by recommending acceptance, the membership would have gone along. But he concluded his address by recommending rejection. Another standing ovation. The die was cast. The strike was set for Monday, March 7th.

There was a further exchange or two between the negotiators which came to naught. On the morning of March 7th the picket lines went up.

The story of the strike itself will be told in my 13-hour sequel entitled "Strike and Remembrance."

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given by Mr. Gold in September 1988 to the Los Angeles Copyright Society. Copyright 1988 by Bernard D. Gold.
[ELR 10:5:3]

RECENT CASES

Decision rejecting copyright infringement claim against "The A- Team" is affirmed

A trial court decision granting judgment notwithstanding the verdict to the National Broadcasting Company in a copyright infringement action involving the television series "The A-Team" has been upheld by a Federal Court of Appeals.

Ernest Olson claimed that Stephen J. Cannell, MCA Inc. and MCA Television Ltd., as well as NBC, infringed Olson's treatment and screenplay for a television series pilot entitled "Cargo." A Federal District Court jury found that "The A-Team" was substantially similar to Olson's material, and that NBC had copied "Cargo;" the jury also found that the Cannell parties, who wrote and developed "The A-Team," had not copied Olson's work.

The District Court granted NBC's motion for judgment notwithstanding the verdict, and also granted a motion by Cannell and the MCA parties for an order reversing the jury's finding of substantial similarity. Judge Edward Rafeedie found that Olson did not prove that the creators of "The A-Team" had access to Olson's work; that the television series was not substantially similar to "Cargo;" and that no reasonable person could conclude that NBC copied the general ideas or protectible expression of "Cargo."

After describing the characters and the premise of the works at issue, Federal Court of Appeals Judge Alfred Goodwin observed that works both were action-adventure stories "designed to show Vietnam veterans in a positive light." However, there was little similarity between "The A-Team" and "Cargo" in terms of "overall plot, sequence, dialogue or setting." And although both works emphasized action, conveyed a similar broadly comic mood, and were quickly paced, these similarities were common to the genre of action- adventure television series and movies, and therefore did not demonstrate substantial similarity, stated the court.

Judge Goodwin then found that Olson was not entitled to maintain a claim of substantial similarity based upon the alleged similarities in the characters in "The A-Team" and "Cargo." The "lightly sketched" characters in "Cargo" may have been descriptive enough to sustain a finding of infringement if other factors, such as the plot, theme, dialogue, mood, setting, pace and sequence of "Cargo" had been copied, but the descriptions were not sufficient to provide copyright protection to a character "taken alone," nor to the ensemble of "Cargo" characters.

The court emphasized that the format for an action-adventure series is not protected by copyright law, and, again, that Olson was not entitled to prevail on his copyright infringement claim based upon a comparison of the characters in the works at issue, both because the "Cargo" characters were drawn so thinly and because the characters of "The A-Team" differed in significant ways from those in "Cargo."

Furthermore, any similarities in "the total concept and feel of the works" apparently arose from unprotectible scenes a faire.

Judge Goodwin concluded by affirming the district court's decision to deny attorneys' fees to the Cannell parties. And the court, basing its decision on the lack of substantial similarity of ideas or protectible expression between the works at issue, stated that it was unnecessary to determine, among other issues, whether Olson could seek to have the Cannell parties held liable as innocent infringers.

Olson v. National Broadcasting Company, Inc., Case Nos. 86-6325, 86-6754 (9th Cir., Sept. 1, 1988) [ELR 10:5:7]

Similarity between format of proposed television game show and Goodson-Todman Enterprises' show "To Tell the Truth" must be determined by trier of fact

The proposed television game show "Bamboozle" is played with a three-person panel, made up of two celebrities and one noncelebrity contestant, three "bamboozlers," and a master of ceremonies. The three bamboozlers each tell a different fantastic story, one of which is real, and the panel's job is to determine which of the improbable accounts is true. The panelists take turns asking the bamboozlers questions, and the noncelebrity panelist then votes, based upon the advice of the two celebrity panelists, as to which story is true. Either the noncelebrity contestant, or the bamboozlers, can win money depending on the vote. At the end of the show, the truth teller is revealed and the fantastic incident is demonstrated.

The well-known television game show "To Tell the Truth" also is played with a panel of four celebrity questioners, a panel of three "liars," only one of whom is telling the truth, and a master of ceremonies. The liars all pretend to be the same person, rather than telling three different stories. After questioning the liars, each panelist votes; every wrong vote increases the amount of money to be divided among the three guests. The show ends with the master of ceremonies asking the familiar question "Will the real (contestant's name) please stand up?"

"Bamboozle" was developed by Barris/Fraser Enterprises in early 1986. The company entered an agreement with ABC to produce a pilot program of the show. In March 1986, Goodson- Todman Enterprises sent a letter to ABC stating that if the proposed show infringed the copyrighted program "To Tell the Truth," Goodson-Todman "would take all steps necessary to restrain and/or recover damages for any infringement of its rights."

Barris/Fraser claimed that Goodson-Todman's letter constituted tortious interference with its relationship with ABC, but a Federal District Court in New York denied Barris/Fraser's request for a preliminary injunction, finding no irreparable injury (ELR 8:5:9).

In the instant proceeding, Judge Edward Weinfeld first noted that the idea of a game in which people lie and contestants guess who is telling the truth is not protectible, nor is protection available to a system of asking questions, the concept of a master of ceremonies and celebrity guests, or the true stories told on a show.

Goodson-Todman argued that "Bamboozle" appropriated the format of "To Tell the Truth." Judge Weinfeld pointed out that many of the similarities between the shows arose from "the logic and necessities" of the television game show genre, and as such, were not protectible. Such similarities included the use of guest celebrities, and comic bantering during the questioning of the storytellers. Notwithstanding the above, the original selection, organization and presentation of stock devices can be protected. And in this case, the court declined to find as a matter of law that there was no similarity of protectible material in the overall composition of the shows. The choices made by Goodson-Todman to combine certain otherwise nonprotectible elements in a certain way may be protected. However, the question of whether the similarity in protected expression was substantial must be determined by a trier of fact, concluded the court.

Barris/Fraser Enterprises v. Goodson-Todman Enterprises, Ltd., 5 U.S.P.Q.2d 1887 (S.D.N.Y.1988) [ELR 10:5:7]

Publisher of paperback edition of "The Hunt for Red October" did not breach contract with novel's hardcover publisher by shipping retail copies prior to contractual "publication date"

The United States Naval Institute published the hardcover edition of the highly successful novel "The Hunt for Red October" by Thomas L. Clancy in October 1984. The Institute licensed to Charter Communications, a member of the Berkley Group, the right to publish the paperback edition of the work "not sooner than October 1985." According to the Institute, Charter breached the terms of the license by shipping the paperback edition to booksellers in September 1985, when the hardcover version of the work still was on the bestseller list; the pre-October sales also constituted copyright infringement, argued the Institute.

Federal District Court Judge Leval readily dismissed the Institute's action on the ground that the shipping dates of the Berkley group in relation to its publication dates were consistent with publishing industry practices. It was found that Berkley established that the term " publication date" was "uniformly understood in the industry to refer to the time when the concentrated selling effort begins, and not the time of shipment to outlets." The publication date "presupposes" that retail outlets throughout the country will have books in stock when the publisher's primary sales effort begins.

Judge Leval observed that Berkley began the shipment to domestic outlets of about 1.3 million copies of "Red October" on September 3rd and 4th. Due to the large volume of the shipment, the books were not sent out on September 8th along with other October titles. However, such " special handling" was consistent with "October publication," declared the court.

Berkley's claim that evidence of industry custom should not have been received was rejected. The court noted that without such information, the meaning of the contract would have been unclear. The evidence showed "beyond dispute" that the contractual term " publication date" was used in the industry with a clearly understood meaning, that the understood meaning was regularly observed, and that Berkley's conduct was wholly consistent with that understanding. The fact that the Naval Institute, a small specialized publisher, claimed that it was not aware of industry practices was irrelevant, concluded Judge Leval - the Institute conducted business in the publishing industry; entered a contract utilizing the conventional terminology of the industry; and previously had entered contracts with other paperback licensees.

United States Naval Institute v. Charter Communications, Inc., 687 F.Supp. 115 (S.D.N.Y. 1988) [ELR 10:5:8]

Illegitimate daughter of Hank Williams, Sr., is barred by laches from pursuing royalty claim

Cathy Yvonne Stone may not proceed with her claim to a share of the royalties from the works of the late country and western singer Hank Williams, Sr., a Federal District Court in New York has ruled.

Stone, who was born on January 6, 1953 claimed that she was Williams' illegitimate daughter and was entitled to a one- third interest in the copyright renewal rights in Williams' compositions. The singer died on January 1, 1953; at the time, he was married to Billie Jean Williams Berlin.

Judge John F. Keenan first stated that for purposes of the motion for summary judgment sought by Berlin, and by Hank Williams, Jr. (the late singer's legitimate child), the court would assume that Williams, Sr. was Stone's natural father. Apparently, in October 1952, three days prior to marrying Berlin, Williams entered a contract with Bobbie Jett, Stone's natural mother. The contract provided that Williams would assume various financial responsibilities in connection with the birth of Jett's child, but also stated, as described by Judge Keenan, that paternity was in doubt and not admitted by the contract.

Williams' mother, Lillian Stone, cared for Jett's baby, and adopted the child in December 1954. However, Lillian Stone died in February 1955. In April 1959, the child was adopted by the Deupree family.

In 1967-1968, during the course of litigation concerning the renewal term copyrights in Williams, Sr.'s works, an Alabama court ruled that Stone was not an heir entitled to any inheritance from Williams' estate.

In early 1974, when Stone turned twenty-one years old, she received an inheritance from Lillian Stone's estate; at this time, Stone became aware that she might be the natural child of Williams, Sr. However, it was not until 1981 that Stone began to seek out members of the Jett family and other individuals with information about her background. In 1984 Stone asked a Montgomery attorney for certain documents (which Stone first saw in 1981) pertaining to the 1967-1968 proceeding. The instant action was filed in September 1985.

Judge John F. Keenan ruled that the doctrine of laches served as a complete bar to Stone's claims. The court observed that as early as 1974, Stone ignored facts that should have alerted her to the "strong possibility" that Hank Williams, Sr. may have been her biological father, and indeed, made a "calculated decision" during the

1970's not to obtain information that might connect her with Williams. Stone thus engaged in "an unreasonable and inexcusable delay in bringing her claim," stated the court.

Furthermore, Stone's delay resulted in profound" prejudice to the Williams, Jr. parties. Many individuals with personal knowledge of the events at issue have died. And the Williams, Jr. parties, including several music publishers, entered various contracts based on the belief that Hank Williams, Sr. had only one child. Judge Keenan, citing the changed conditions and relationships since Stone chose not investigate her heritage during the 1970's, stated that it would be unfair to the Williams, Jr. parties to allow Stone "to reap the benefits of her recent change of heart," and dismissed the complaint accordingly.

Stone v. Williams, Jr., Case No. 85 Civ. 7133 (S.D.N.Y., Sept. 6, 1988) [ELR 10:5:9]

A&M Records is not entitled to refund of state sales and use taxes in connection with master tapes used outside of California to produce record albums and tapes

A trial court decision denying A&M Records and Lou Adler a refund of certain sales and use taxes has been affirmed by a California appellate court.

The taxes, amounting to about $860,000, were assessed for the period July 1, 1970 through March 31, 1974. The State Board of Equalization contended that although A&M acquired certain master tapes produced outside of California, the company used those tapes within the state to make the acetate masters and EQ copies necessary to produce records and tapes for sale. The amount of the tax was measured by royalty payments made by the record company during the subject period pursuant to contracts with various "artist companies."

Also included in the tax assessment was a sales tax, measured by payments made to the A&M parties pursuant to contracts with two record clubs, as well as a use tax based on payments made for the use of master tapes and duplicate master tapes owned by two A&M wholly-owned subsidiaries.

When the A&M parties sought a refund of the taxes paid, the company asserted that it had discovered in May 1982 that certain of the acetate masters and EQ copies were used outside of California to "master" record albums and tapes. The Board notified the company that the failure to raise the out-of-state use defense at the administrative hearing constituted a failure to exhaust administrative remedies.

Subsequently, the trial court granted the Board's motion to exclude evidence on out-of- state uses at trial; the court also granted the Board's motion for summary judgment.

On appeal, Judge Croskey first cited the Use Tax Law, found at sections 6201 to 7273.1 of the Revenue and Taxation Code; the law "was designed to reach transactions involving property purchased from outside the state, not subject to California sales tax so that an unfair burden would not be placed upon local retailers engaged in intrastate commerce..." Section 6201 imposes an excise tax on "the storage, use, or other consumption in this state of tangible personal property purchased from any retailer ... for storage, use, or other consumption in this state..."

After noting that California courts have upheld the procedural requirements governing taxpayer actions seeking to recover a use or sales tax paid to the state, Judge Croskey agreed with the trial court's determination that it had no jurisdiction to try the issue of whether certain record albums were mastered outside of California because A&M had not raised the issue in its claim to the Board for a refund.

Judge Croskey rejected the record company's argument that the Board acted outside of its statutory authority and violated due process by collecting use taxes on master tapes which, by "uncontroverted evidence," were shown not to have been used, stored or otherwise consumed in California. Even assuming the evidence was uncontroverted, the exhaustion rule prevented the court from considering any such evidence on appeal.

The trial court decision granting the Board's motion for summary judgment also was upheld. Any question as to whether all of the master tapes were used in California was resolved when the motion to exclude evidence was granted. A&M also had argued that its contracts with artist companies were personal service contracts designed to obtain the service of a performing artist, rather than to obtain tangible personal property, i.e., the master tapes. But Judge Croskey found that the trial court correctly held that the true object of the contracts was the production of the master tapes and their transfer to the A&M parties - A&M "had to have the master tapes produced by the contracts or the contracts were worthless." The master tapes were used to produce records and tapes, and were not used solely for their intellectual or artistic content. Thus, held the court, the master tapes were tangible personal property which, for purposes of the use tax, were sold to A&M by the artist companies.

The Board also had determined that the A&M parties owed the state sales taxes on the royalties they received from record clubs during the subject period. A&M argued that the record clubs produced records and tapes with duplicate masters or acetate masters which A&M leased to the record clubs, and that imposing a sales tax on lease payments duplicated the use tax already imposed on the masters acquired from the artist companies.

Judge Croskey agreed with the Board and the trial court that simply because the leased masters may have been identical to the master tapes, the leased property was not the master tapes themselves. A&M was not leasing what the company purchased under its contracts with the artist companies; the record company was leasing other (emphasis by the court) pieces of tangible personal property.

A&M Records, Inc. v. State Board of Equalization, Case No.BO24836 (Ca.Ct.App., Sept. 1, 1988) [ELR 10:5:9]

Taxpayer not entitled to investment tax credit or depreciation deduction in connection with purchase of episode of television series, rules Tax Court

Alfred W. Ragghianti was not entitled to an investment tax credit or depreciation deduction in connection with his purchase, for $100,000, of a single half-hour episode of a thirteen tape series about outer space, the Tax Court has ruled. Ragghianti, a mobile home salesman, had no background in the television or videotape industry, and had not obtained an independent appraisal of, or even seen, the videotape.

In upholding the disallowance of Ragghianti's claim for a 1978 depreciation deduction of $28,000 and a $7,800 investment tax credit, as well as a 1979 depreciation claim of $18,000 and $2,500 for interest, the court determined that the videotape was not purchased with the objective of making a profit. Thus, any deductions would be limited to the income generated, which, in this case, was zero, and no credits would be allowed. The fair market value of the episode and the entire series was nominal, given the limited commercial market for the programs, noted the court. And, for purposes of evaluating profit objective, it was found "highly relevant that the maximum economic liability on a purported $93,000 debt was $15,000."

Judge Gerber further stated that the depreciation deductions and credits also would be disallowed on the ground that while Ragghianti's tape "may have been in existence in 1978," the court did not think it likely that the tape was "placed in service" until some later year because the other tapes in the series still were not complete in 1978. Depreciation and the investment credit are allowed in the year in which qualifying property is placed in service by the taxpayer.

The court emphasized that Ragghianti did not substantiate that the fair market value of the tape was even close to the stated purchase price. If the purchase price and the principal amount of a nonrecourse note unreasonably exceed the value of the property acquired, the note does not constitute genuine indebtedness and cannot be included in the basis of the asset. The $93,500 seven year promissory note therefore could not be included in the basis of the tape at issue, declared Judge Gerber, either for depreciation or investment tax credit purposes.

Ragghianti v. Commissioner, 88 T.C. No. 125 (1988) [ELR 10:5:10]

Concertgoer may proceed with negligence action against City of New York and Paramount Pictures on account of injuries incurred at 1983 Diana Ross concert in Central Park

A New York appellate court has ruled that David Rotz may proceed with a $7 million negligence action against the City of New York and Paramount Pictures Corporation arising from a fractured leg suffered by Rotz when a crowd stampede occurred during a free Diana Ross concert held in Central Park on July 22, 1983.

A trial court had granted summary judgment to the city and to Paramount. Paramount, the holder of a license from the concert producer, Anaid Film Productions, Inc., to televise and videotape the event argued that it was not responsible for the management or control of the concert. Furthermore, the crowd apparently began running upon hearing shouts to " get out of the way, there's a lion, a lion." The crowd did not stop in the name of love, and Rotz was knocked down and trampled upon. According to Paramount and the city, the cause of the stampede was an unforeseeable intervening act that precluded liability.

The appellate panel stated that a finder of fact must determine the reasonable degree of care which was owed to Rotz. It was noted that an extremely large crowd was gathered in the park to hear the concert, and that a jury "could certainly find that, in the absence of adequate supervision and control of that crowd, it was reasonably foreseeable that disorder, unruliness, a melee or a riot could erupt from some cause ignited by ... myriad individuals 'jammed together' in a heightened atmosphere."

The city's indemnification agreement with Anaid did not relieve the city from the duty which it owed to Rotz, declared the appellate court. A jury might reasonably find that the risk of a riot or a stampede could have been prevented or minimized by adequate crowd control measures, and that the city did not exercise the reasonable care necessary under the circumstances to avoid the foreseeable risk. It was not necessary for the city to have foreseen the exact manner in which the disturbance occurred, and the fact that the acts of a third party or parties intervened between the city's crowd supervision conduct (or alleged lack thereof) and Rotz's injury did not necessarily sever the causal connection necessary to establish liability. A trial would be required to resolve the questions of whether the city provided adequate crowd control to avert the general risk reasonably to be anticipated and whether any intervening conduct of third parties was a normal or foreseeable consequence of the alleged failure to adequately supervise the crowd.

The appellate panel also reversed the entry of summary judgment on behalf of Paramount. Although the licensing agreement with Anaid did not impose upon Paramount any responsibility for the control, management or supervision of the concert, Paramount did agree to pay up to $10,000 of police overtime charges, and was physically present at a major event from which the company anticipated financial benefits. Rotz therefore was entitled to proceed with discovery, concluded the court.

Rotz v. City of New York, New York Law Journal, p.22, col.1 (N.Y.App., Sept.6, 1988) [ELR 10:5:11]

Contract between former college football player Brent Fullwood and sports agents Norby Walters and Lloyd Bloom is unenforceable, because in violation of public policy, in New York; in separate proceeding, federal grand jury in Chicago indicts Walters and Bloom on various charges, including racketeering, on account of allegedly improper dealings with college athletes

In December 1987, a Federal District Court in New York, citing "overriding policy concerns," refused to enforce a contract between former University of Auburn football player Brent Fullwood and sports agents Norby Walters and Lloyd Bloom.

Walters and Bloom, doing business as World Sports and Entertainment, Inc., entered a contract with Fullwood dated January 2, 1987, the day after the last game of Fullwood's college football career. The football player granted World Sports the exclusive right to represent him in negotiations with professional football teams. In August 1986, World Sports paid $4,000 to Fullwood; the player executed a promissory note for the amount. Subsequently, the company sent further payments, totalling about $4,000, to Fullwood or his family.

The court noted that neither World Sports nor Fullwood admitted that the agency contract was post dated, and "conspicuously avoided" identifying the actual date it was signed. There was a "powerful inference," in the court's view that the contract actually was signed before or during the college football season, perhaps on the same day as the promissory note, and " unethically post dated" as in other cases involving Walters and Bloom (see ELR 9:8:9).

At some point prior to the National Football League spring 1987 draft, Fullwood repudiated the contract with World Sports. In the draft, the Green Bay Packers selected Fullwood as the fourth player in the first round. Fullwood, represented by George Kickliter, an attorney in Auburn, signed a contract with the team.

Walters and Bloom sued Fullwood, alleging that the athlete breached the World Sports agency contract; that Fullwood owed them about $8,000 as repayment for funds characterized as loans; that Kickliter tortiously induced Fullwood's breach of the 1986 promissory contract; and that Fullwood and Kickliter tortiously interfered with World Sports' contractual relations with other players by breaching or inducing the breach of the World Sports agency contract by Fullwood.

Chief Judge Charles L. Brieant first determined that the court possessed jurisdiction over Fullwood pursuant to the athlete's contractual consent to jurisdiction, but that the state's long-arm statute did not extend to Kickliter. World Sports' third claim, and that portion of the fourth claim relating to Kickliter therefore were dismissed. The court also granted Fullwood's motion to dismiss the fourth claim for failure to state a claim upon which relief could be granted; it was not alleged that Fullwood knew of other contracts or that he intentionally procured any breach.

In turning to the question of the validity of the August 1986 contract, Judge Brieant noted that the constitution of the National Collegiate Athletic Association provides, in relevant part, that "Any individual who contracts or who has ever contracted orally or in writing to be represented by an agent in the marketing of the individual's athletic ability or reputation in a sport no longer shall be eligible for intercollegiate athletics in that sport." The NCAA also prohibits any player from accepting pay in any form for participation in his/her college sport, with certain specified exceptions.

The court accordingly concluded that the August 1986 loan security contract and the World Sports agency contract violated the NCAA constitution, "the observance of which is in the public interest of the citizens of New York State, and that the parties to those agreements knowingly betrayed an important, if perhaps naive, public trust." Describing the parties as in pari delicto, Judge Brieant held both Fullwood's arbitration rights under the National Football League Players Association Agents' Regulation and World Sports' alleged contractual rights unenforceable, even in the context of a non-criminal contract, as contrary to the public policy of New York. (The court observed, "in passing," that Bloom, as a provisionally certified NFL Players Association agent, was bound by a provision of the Agents' Regulations forbidding a contract advisor from " providing or offering to provide anything of significant value to a player in order to become the contract advisor for such player.")

Judge Brieant emphasized that the relevant NCAA regulations served to further both the "Olympic ideal" reflected in conducting amateur sports events, and to protect the academic integrity of member institutions from "sports- related evils such as gambling, recruitment violations, and the employment of mercenaries whose presence in college athletic programs will tend to preclude the participation of legitimate scholar-athletes." In this case, both sides of the transaction "knew exactly what they were doing, and they knew it was fraudulent and wrong," concluded the court, in dismissing the claims against Fullwood as well as Fullwood's requests to stay the action and compel arbitration.

Separate matters involving Walters and Bloom have arisen in the past few months. In June 1988, Walters agreed to pay the University of Alabama more than $200,000 and not to deal with Southeastern Conference athletes. Walters had faced misdemeanor charges on account of his alleged dealings with former Alabama basketball players Derrick McKey and Terry Coner. According to news reports, the university had to return about $250,000 in tournament revenue when the NCAA learned that the players were under contract to Walters during the latter part of the 1986-1987 season, before their college eligibility was completed.

In late August 1988, a federal grand jury in Chicago indicted Walters and Bloom on charges of racketeering, mail fraud, wire fraud and extortion. The indictment accused the sports agents of using money, gifts and threats of violence to obtain exclusive representation contracts with college athletes; the payments and contracts, in some case post dated, violated NCAA rules.

Cris Carter, a wide receiver with the NFL's Philadelphia Eagles, and sports agent Dave Lueddeke were indicted in a separate scheme in which Carter purportedly accepted $5,000 from Lueddeke; the parties allegedly concealed the payment from a federal grand jury investigating Walters and Bloom. Carter was charged with obstruction of justice, and Lueddeke was charged with perjury and obstruction of justice.

The indictment also named Michael Franzese, a reputed organized crime figure currently serving a 10 year prison term, as an unindicted co-conspirator; it was alleged that Walters and Bloom used Franzese's reputation to coerce athletes into signing contracts.

According to news reports, about 40 college athletes, who signed with Walters and Bloom (including Brent Fullwood) avoided prosecution by agreeing to perform community service and to repay portions of their university scholarships.

Walters and Bloom have pleaded innocent to the charges.

Walters v. Fullwood, 675 F.Supp. 155 (S.D.N.Y. 1987) [ELR 10:5:12]

Los Angeles Raiders are entitled to litigation expenses of more than $2.8 million arising from eminent domain action brought by City of Oakland

The City of Oakland will be required to pay the Los Angeles Raiders more than $2.8 million in legal fees and costs arising from the city's unsuccessful eminent domain action against the football team. A California appellate court held that in determining the amount of litigation expenses, including "reasonable" attorney fees, in an eminent domain action, the trial court was entitled to exercise its discretion and consider such factors as the unusual character and difficulty of the litigation, its "critical importance" to the prevailing party and the financial burden of delay between incurring the fees and the court's order fixing the amount and ordering payment.

The city began its lawsuit in 1980. After a series of proceedings (see ELR 7:7:8; 7:10:20), a trial court in Monterey eventually reached the issue of the costs award. Initially, the court multiplied the amount of hours devoted to the case by the hourly rates charged by top law firms in the Bay Area and arrived at the " starting point" figure of $853,756; the court then increased the fees to $2 million, citing the extraordinary novelty and complexity of the issues presented, the need for the Raiders' counsel to act quickly throughout the litigation, the deferral of payment of counsel's fees, and the critical importance of the litigation to the Raiders and the result obtained. The total amount awarded, including interest as of the date of the court's opinion, was $2,885,735.

Judge Donald King rejected the city of Oakland's argument that the trial court lacked the authority to award any attorney fees exceeding the $850,000 amount. The Raiders' request for an award of attorney fees for the instant appeal was granted, but Judge King directed the trial court to determine the amount of those fees.

City of Oakland v. The Oakland Raiders, Case No. A040245 (Ca.Ct.App., July 27, 1988) [ELR 10:5:13]

Academic publisher loses suit against former employee for interference with contractual relations and misappropriation of trade secrets

The Iowa Supreme Court has affirmed a trial court decision on behalf of Neil Rowe, a former employee of the Kendall/Hunt Publishing Company, and Waveland

Press, Inc., a competing academic publisher. Kendall sued Rowe and Waveland, alleging wrongful disclosure and use of trade secrets; unfair competition and conspiracy to unfairly compete; interference with business contracts; conversion; and breach of Rowe's fiduciary duty and oral employment contract.

Kendall employed Rowe as an associate editor from 1974 until 1977. However, in 1975, Rowe and other parties organized, without Kendall's knowledge, the Waveland Press. Rowe continued to search for authors for both Kendall and Waveland, apparently approaching writers as a Waveland representative when he thought their works might not be suitable for Kendall.

Kendall claimed that Rowe dealt with two teams of authors who had published with Kendall before switching to Waveland. Kendall's contract with the authors gave the company the right of first refusal for printing subsequent editions of the authors' original text.

However, in 1982, two professors granted Waveland the right to publish a new edition of their book, "Speak Up for Business." Two other professors entered a contract with Waveland for the publication of a second edition of their book on management science; upon Kendall's request, the authors sent the company a copy of the proposed Waveland contract. Kendall chose not to meet the contract's terms, and the book then was reprinted by Waveland, although under different terms than those in the contract shown to Kendall. The new edition of the management science book was described by Iowa Supreme Court Judge Lavorato as "a photo- reproduction of the Kendall text, with only minor changes' "

The Iowa Supreme Court first agreed with the trial court's ruling that the breach of fiduciary duty claim was barred by the statute of limitations. There was sufficient evidence to show that Kendall was aware, more than five years before the filing of its claim, that "some problem" existed with Rowe's obligation to the publisher.

The trial court also had concluded that Kendall failed to establish that Rowe and Waveland interfered with the contracts between Kendall and the two writing teams in such a manner as to cause the authors to breach the right of first refusal provision in their contracts with Kendall. Judge Lavorato found that there was substantial evidence to support the findings that the authors were dissatisfied with Kendall prior to approaching Waveland, that any lack of communication between the authors and Kendall arose out of the deteriorated relationship of the parties, and that Rowe and Waveland did not interfere with either contractual relationship.

The court also affirmed the finding that Kendall's list of authors, some of whom published with Waveland, was not a trade secret - the identities of the then-current Kendall authors were openly disclosed to the public.

And although the identities of those individuals who might have considered publishing with Kendall were not readily available to the public, such identities were not trade secrets, stated the court. A list containing constantly changing information, such as Kendall's list of potential authors, was not the sort of definite information which warranted trade secret protection. Furthermore, observed the court, the list did not have the definite value generally required of a trade secret.

Judge Lavorato concluded by upholding the trial court's ruling that the design and layout of the management science book was not the type of property to which the tort of conversion applied - Kendall was not deprived of the use of its design and layout by Rowe or Waveland. Furthermore, in view of the industry-wide practice of camera-copying books, Rowe and Waveland were acting in good faith when they reproduced the Kendall work.

Kendall/Hunt Publishing Company v. Rowe, 424 N.W.2d 235 (Iowa 1988) [ELR 10:5:13]

Preliminary injunction granted to manufacturer of Tylenol, in action seeking to prevent manufacturer of Advil from presenting allegedly misleading television commercial, is upheld on appeal

A Federal District Court in New York has granted a motion by McNeilab, Inc., a subsidiary of Johnson & Johnson, for a preliminary injunction to prevent American Home Products from presenting certain advertising claims. McNeilab, the manufacturer of Tylenol, brought an action under section 43(a) of the Lanham Act and under the New York General Business Law, claiming that American Home, the manufacturer of Advil, was falsely claiming superior effectiveness and safety for its pharmacologically different pain reliever. In a prior action, the court found that certain advertising claims of each party were false or misleading (ELR 9:11:20); the damage issues in the action remain to be tried.

In the instant proceeding, Judge William C. Conner observed that a significant feature of Advil advertising has been "an assurance of its safety and gentleness to the stomach." In the spring of 1987, American Home Products began a new television campaign in which an actor stated "Like Tylenol (emphasis added by the court), Advil doesn't upset my stomach." McNeilab argued that, on the basis of public opinion surveys, the Advil commercials which mentioned gastric side effects tended to create the erroneous impression that Advil was superior to Tylenol in that respect among others.

The evidence presented, stated Judge Conner, convinced the court that at the least, there was a probability that at trial McNeilab could establish that American

Home's television advertising campaign tended to mislead a "not insubstantial" number of consumers. It was noted that if it were not for the use of the phrase "like Tylenol," the Advil commercials probably would fall "within the acceptable range of commercial puffery." But the court had found, after a full trial, that Advil was not like Tylenol in terms of adverse effects on the stomach. American Home's misleading advertising violated section 43(a) of the Lanham Act, concluded Judge Conner, in granting McNeilab a preliminary injunction restraining the continued publication of any advertisements stating or implying that Advil was "like Tylenol" with respect to adverse effects on the stomach; the injunction did not extend to claims that Advil would not cause stomach upset (without a comparison to Tylenol).

A Federal Court of Appeals recently upheld the District Court decision.

Mcneilab, Inc. v. American Home Products Corporation, 675 F.Supp. 819 (S.D.N.Y.1987) [ELR 10:5:14]

Federal Court of Appeals upholds decision granting summary judgment to The Wall Street Journal in libel action brought by Liberty Lobby

A Federal Court of Appeals has affirmed a District Court decision granting summary judgment to Dow Jones & Co., the publishers of "The Wall Street Journal," in a $50 million libel action brought by Liberty Lobby, Inc.

In September 24, 1984, The Wall Street Journal published a column, as part of its coverage of the 1984 presidential campaign entitled "Controversial Publisher - Racial Purist Uses Reagan Plug." The article referred to a letter of commendation purportedly written by President Reagan to Roger Pearson. Since-retired Court of Appeals Judge Bork described Pearson as "an advocate of racial betterment through genetic selection." The letter, which Pearson used to promote his controversial publications, actually was composed by an associate of Pearson on the White House staff; President Reagan had never met Pearson.

The article mentioned that Pearson's writings had appeared in a magazine published by "the far right, anti-Semitic Liberty Lobby," and noted that some of Pearson's pamphlets were sold by the National Socialist White People's Party, an American Nazi group based in Arlington, Virginia.

In granting summary judgment to the Dow Jones parties, the District Court found, in part, that there was no evidence that any of the allegedly defamatory statements were published with actual malice.

Judge Bork first observed that, unlike the District Court, he considered the statements concerning Liberty Lobby's purported activities in publishing Pearson's works as having a defamatory content independent of the charge of anti- Semitism because a jury could find that the allegations might lower the organization in the estimation of the community or deter third persons from associating with the organization. But the court found the statements nonactionable because no reasonable jury could find by a fair preponderance of the evidence that the statements were false. Furthermore, even if a jury could find that the article falsely exaggerated the connection between Liberty Lobby and Pearson's writings, there was absolutely no evidence that the statements were made with actual malice.

In turning to the charge of anti-Semitism, Judge Bork stated that he tended to agree with the District Court that if the term "anti-Semitic" has a core, factual meaning, then the truth of the description was proved by the Dow Jones parties. However, the court chose to base its decision on the fact that Liberty Lobby presented no evidence to show that the charge of anti-Semitism was made with the requisite actual malice, again citing the numerous reputable sources upon which the author of the article relied.

Liberty Lobby also challenged a second column in The Wall Street Journal in which the author commented upon various Liberty Lobby libel actions. The District Court's entry of summary judgment for the Dow Jones parties was clearly warranted, stated Judge Bork on the ground that the column, which appeared on the editorial page of The Journal and was "shot through" with the language of personal opinion, not only was a fair and accurate account of judicial proceedings but also contained constitutionally protected expressions of opinion.

Judge Bork concluded by expressing the view that the instant action presented "one of the most troubling aspects of modem libel litigation: the use of the libel complaint as a weapon to harass." The Wall Street Journal was involved in over three years of litigation, and the ,'message" to the newspaper, and to the press at large, according to the court, was that "discussion of Liberty Lobby is expensive. However well-documented a story, however unimpeachable a reporter's source, he or she will have to think twice about publishing where litigation, even to a successful motion for summary judgment, can be very expensive if not crippling."

Liberty Lobby, Inc. v. Dow Jones & Company, Inc., 838 F.2d 1287 (D.C.Cir. 1988) [ELR 10:5:15]

Los Angeles Times reporter and photographer are not immune from contempt citation for refusing to testify about their eyewitness observations of police search

A Los Angeles Times reporter and photographer were not immune from being held in contempt, a California appellate court has ruled, if they refused to provide a trial court with unpublished information concerning their observations of an encounter between 23 year old Sean Patrick Delaney and Long Beach police officers.

On September 23, 1987, reporter Roxana Kopetman and photographer Roberto Santiago Bertero accompanied the members of the Long Beach downtown task force on patrol. During the patrol, the officers questioned Delaney, searched his jacket for weapons, and found a set of brass knuckles in the jacket. Delany was charged in a misdemeanor complaint with possession of brass knuckles in violation of the Penal Code.

The Times published an article about the task force on September 27, 1987; the article included information about the contact between Delaney and the police, and contained a photograph of the young man and his companion sitting on a bench in a mall.

When Delaney moved to suppress the brass knuckles as evidence, arguing that he had not consented to the search of his jacket and that the seizure therefore was illegal, he subpoenaed the Times reporter and photographer to testify at the suppression hearing. The Times parties moved to quash their subpoenas on the ground that they could not be compelled to testify about facts concerning the validity of the seizure of the brass knuckles because those facts constituted "unpublished information" under the shield law (Evidence Code section

1670 and article 1, section 2, subdivision (b) of the California Constitution). The motions were denied.

At a suppression hearing, the prosecution called the Times parties to testify. Although it was established that the reporter and photographer observed the events leading to the seizure of the brass knuckles, and had an opportunity to hear whether Delaney's consent had been requested and his response, the Times parties refused to answer questions specifically relating to Delaney's alleged consent.

The municipal court held that the shield law did not apply to the Times parties' eyewitness observations and that, in any event, the need for the neutral testimony on the consent issue outweighed any claim based on the shield law. The court therefore cited Kopetman and Bertero for contempt of court for their refusal to answer questions.

On petitions for writ of habeas corpus filed by the Times parties, the Los Angeles Superior Court found that the shield law provided immunity from contempt, and granted the petitions.

On appeal, Judge Robert R. Devich found that the definition of unpublished information in the statutory and constitutional shield law provisions did not include "the eyewitness observation of those present when a relevant event takes place in a public, nonconfidential context." The purpose of adding the unpublished information language to those provisions was to strengthen the protection of sources, stated the court. In the instant case, however, the subject matter of the testimony sought did not depend upon anyone's trust being placed in the Times reporter and photographer, and there was "no basis to differentiate the newsperson's observation of the event from that of any other citizen. In short, the testimony is wholly unrelated to the shield law."

The court accordingly issued a peremptory writ of mandate compelling the Los Angeles Superior Court to vacate its orders granting the petitions for writ of habeas corpus filed by the Times parties and to deny those petitions.

Judge L. Thaxton Hanson concurred in the decision, but Presiding Judge Vaino Spencer filed a dissenting opinion, stating the view that the shield laws cannot be limited so as not to apply to compelled eyewitness testimony regarding a public event. Judge Spencer noted that under both the statutory and constitutional provisions, newspersons cannot be adjudged in contempt "for refusing to disclose ... the source of any information procured while (employed as a newsperson) or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public" (emphasis added by the court). It did not appear to Judge Spencer that there was any limitation to unpublished information obtained from a private or confidential source. Given the clear and unambiguous language of the provisions, the court should not have considered legislative intent, or added limiting terms, stated Judge Spencer.

Judge Spencer cited the case of Playboy Enterprises v. Superior Court, 154 Cal.App.3d 14 (1984; ELR 6:10:11), in which it was observed that the shield laws provide two separate and independent protections as follows: "(1) that against disclosure of confidential sources, and (2) that against disclosure of 'unpublished information'...whether or not published information based upon or related to such material has been disseminated ... This language does not allow the conclusion that protection of unpublished materials or information is dependent upon the continued confidentiality of the source."

Also cited by Judge Spencer was the case of New York Times v. Superior Court (see below) in which another division of the appellate court declined to compel the disclosure in a products liability action of photographs, taken by a reporter for a non-party newspaper of an automobile accident.

Reporters are shielded from the civic duty of ordinary citizens to testify, when called by the courts to do so, as to their observations of public events when their observations are made while they are on the job, declared Judge Spencer - a protection granted in the interest of maintaining a free press, "even at the cost of the loss of relevant evidence at trials;" the writ thus should have been denied.

In order to accommodate Delaney's Sixth Amendment right to a fair trial, Judge Spencer suggested that the trial court could have held an in camera hearing, to examine the evidence, balance the competing interests, and determine whether Delaney could demonstrate a reasonable possibility that the evidence might result in his exoneration.

Delaney v. Superior Court, Case No. B032695 (Ca.Ct.App., July 7,1988, Aug. 8, 1988) [ELR 10:5:16]

Nonparty newspaper is not subject to contempt for refusing to provide court with photographs of automobile accident during discovery in product liability action

New York Times Company v. Superior Court, cited by dissenting Judge Spencer in Delaney v. Superior Court (ELR 10:5:16), arose when a reporter for the Santa Barbara News-Press (owned by The New York Times) took photographs of an automobile accident. One of the parties in the accident brought a products liability action against Volkswagen of America.

In late 1986, Volkswagen sought production of "all photographs, negatives, notes, letters" in the possession of the News-Press relating to the accident. A Santa Barbara County superior court quashed the subpoena, but ordered the newspaper to compare its unpublished accident photographs with 15 photographs taken by the California Highway Patrol to determine if the News-Press photographs contained any pertinent information not appearing in the highway patrol's photographs. The News-Press determined that its photographs would not be of considerable additional value and refused to relinquish the photographs to Volkswagen. Volkswagen then moved to compel production of the photographs.

The court found that the News-Press held only a qualified privilege in the photographs, and sought to review the photographs in camera to determine if the privilege was outweighed by Volkswagen's right to discover relevant information.

A California appellate court has granted the News-Press a writ of mandate ordering the superior court to set aside its order and memorandum of decision ordering the in camera inspection of the newspaper's photographs, and to enter a new order denying Volkswagen's motion to compel production of the photographs at issue.

Judge Gilbert found that the constitutional and statutory provisions granting news gatherers an immunity from the contempt power did not create a privilege, but that "as a rose is a rose by any other name, so too is a privilege." The immunity of nonparty news gatherers in civil litigation from compelled disclosure of unpublished information, stated the court, amounted to the "functional equivalent" of an absolute privilege, and the superior court's orders therefore were improper.

The appellate court has denied Volkswagen's petition for a rehearing, and also denied a nonparty's request for depublication.

The New York Times Company v. Superior Court, Case No. B032449 (Ca.Ct.App., June 24, 1988, July 19, 1988, July 21, 1988) [ELR 10:5:17]

Briefly Noted:

Contracts.

In an action for breach of contract and unjust enrichment, shopping bag manufacturer Ocor Products claimed that Walt Disney Productions arranged to have a Hong Kong manufacturer wrongfully duplicate Ocor's shopping bag, including its heavy-duty handles with a snap-style closure across the top of the bag, and that Disney then purchased the product at less cost than Disney had paid for the Ocor product. The back of Ocor's purchase order contained a provision stating that "All designs which may be submitted in whatever form to the customer, or copies or derivatives of such designs, remain the exclusive property of (the company). It is prohibited to reproduce, use, or remit to third parties such designs, artwork, etc., without our express written consent." A Federal District Court in New Hampshire found that an issue of material fact was present as to whether a Disney purchasing employee believed she had the authority to enter into an agreement, i.e., the purchase order, which changed the terms of her employer's order. A disputed issue of fact also was raised concerning whether the employee had the apparent authority to sign the purchase confirmation. The court therefore refused to find as a matter of law that Disney was bound by the cited provision of the purchase order. However, the court also declined to grant summary judgment to Disney with respect to Ocor's breach of contract and unjust enrichment claims.

Ocor Products Corporation v. Walt Disney Productions, Inc., 682 F.Supp. 90 (D.N.H. 1988) [ELR 10:5:18]

Music.

A New York trial court has allowed the Carsey-Werner Company to deposit a $7,000 license fee with the court pending the determination of a dispute involving the rights to the song "Shake a Hand." Carsey-Werner sought to use a Faye Adams recording of the song on the March 24, 1988 episode of "The Cosby Show;" Angel Music offered to license the use for

$7,000. However, Arista Records, which was engaged in a lawsuit with Angel over the ownership of the master recording, offered a license to Carsey-Werner for $3,500. In early March 1988, a trial court granted Arista the right to license the recording, but the opinion was withdrawn to give Angel an opportunity to present further arguments. No final determination of the rights in the recording has been reached. Although agreeing to allow Carsey-Werner's interpleader action, the court denied the company's request for expenses and attorneys' fees.

The Carsey-Werner Company v. Angel Music, Inc., New York Law Journal, p. 17, col. 4 (N.Y.Cnty., Sept. 7, 1988) [ELR 10:5:18]

Horse Racing/Jockey Injury.

A New York appellate court has reversed a trial court decision denying a motion for summary judgment by Samuel F. Morrell, the owner of a horse ridden by jockey Vincent Balzano, in a personal injury action brought by jockey Anthony Annonio. Annonio sought damages for injuries suffered when Morrell's horse clipped the hooves of the horse in front of it, causing Balzano to fall from his horse into the path of Annonio's horse; Annonio's horse then tripped over Balzano and fell, throwing Annonio to the ground and injuring him. The appellate court found that Morrell's motion should have been granted. Accepting as true Annonio's contention that Balzano deliberately threw himself off his horse, Morrell could not be held liable under the doctrine of respondeat superior, because such an unforeseeable willful act was not in furtherance of Morrell's business or within the scope of Balzano's employment. Furthermore, since the evidence indicated that Balzano's conduct was at most negligent and did not meet the requisite level of recklessness, and since it was not alleged that Balzano engaged in "foul riding," the court found that Annonio's claim was barred by the doctrine of assumption of risk, and dismissed the respondeat superior claim against Morrell. Morrell also was entitled to summary judgment dismissing Annonio's second cause of action alleging that the horse owner was negligent in hiring and supervising Balzano, because there was no showing that Morrell or his trainer had any reason to doubt Balzano's competence and skill.

Annonio v. Balzano, 527 N.Y.S.2d 923 (N.Y.App. 1988) [ELR 10:5:18]

IN THE NEWS

Federal District Court jury finds that John Williams' "Theme from E.T." did not infringe earlier song "Joy"

A Federal District Court jury has found that composer John Williams' "Theme from E.T." did not infringe Leslie T. Baxter's song " Joy." In response to a special verdict, the jury stated that the portion of one of the themes of the song "Joy" which was allegedly copied did not contain original material which was protectible by copyright.

A Federal Court of Appeals had reversed an initial ruling by the District Court granting summary judgment to Williams, and remanded the matter for a jury determination of the substantial similarity of the works in issue (ELR 8:10:12).

On remand, the District Court first allowed the jury to hear several versions of both works, including several tapes containing two bar phrases; the jury concluded that the average listener would find the works substantially similar.

However, after hearing the testimony of several expert witnesses and receiving special instructions from the court concerning the nature of copyright protection, the jury apparently concluded that the four to six note sequence allegedly shared by the compositions was too common to constitute protectible original expression. [Oct. 1988] [ELR 10:5:19]

Rev. Jesse Jackson settles lawsuit against video company

The Rev. Jesse Jackson has settled a lawsuit against MPI Home Video involving MPI's unauthorized sale of videocassettes featuring Jackson's speech at the 1988 Democratic National Convention. The terms of the settlement were not disclosed. [Oct. 1988] [ELR 10:5:19]

Arbitrator rules that Major League Baseball team owners acted in collusion to restrict free agent player movement after the 1986 season

The major league baseball team owners violated their collective bargaining agreement with the Major League Players Association by acting in collusion to prevent free agents from changing teams, arbitrator George Nicolau has ruled. The arbitrator's decision involved the owners' actions during the winter of 1986-1987. In a similar decision issued in 1987, arbitrator Tom Roberts (ELR 9:5:19) found that the owners had conspired to restrict player free agent movement after the 1985 season. [Oct. 1988] [ELR 10:5:19]

Hockey player receives one-day jail sentence and $1,000 fine for on-ice attack against opponent

A Toronto judge has sentenced Minnesota North Stars forward Dino Ciccarelli to one day in jail and fined Ciccarelli $1,000 for hitting another player with his hockey stick. Ciccarelli was charged with an on-ice attack against Luke Richardson of the Toronto Maple Leafs during a National Hockey League game on January 6, 1988. Richardson 'was wearing a helmet and was not injured. The court noted that hockey is a fast-paced physical game, but found that Ciccarelli used unacceptable force. [Oct. 1988] [ELR 10:5:19]

WASHINGTON MONITOR

Internal Revenue Service grants "safe harbor" from uniform capitalization rules to authors and other producers of creative properties"

Authors and other creative artists may follow a simplified method for complying with section 263A of the Internal Revenue Service's uniform capitalization rules, according to Notice 88-62, issued in May 1988. Under the elective, three year "safe harbor" which applies where the personal efforts of an individual predominantly create a work of art, authors and other producers of "creative properties" can spread the deductions of all operating expenses over three years - fifty percent of the aggregate "qualified creative costs" incurred in a taxable year may be deducted in that year, and twenty-five percent in each of the two succeeding years.

In Notice 88-62, the IRS described the costs required to be capitalized under section 263A by authors and other similar persons as the costs of "creating, researching, writing and preparing the literary works and other properties being produced, including costs of travel undertaken for business purposes (e.g., research); depreciation, rent and repairs on equipment and facilities used in producing the properties; all labor and compensation costs (including pension costs, where applicable) of any person involved in the production activity; office overhead; interest ... and any other direct or indirect costs relating to the production of such properties..."

The safe harbor is designed to reduce the administrative complexities" of complying with the uniform capitalization rules by eliminating the requirement of amortizing the capitalized costs under the income forecast method for taxpayers otherwise required to use this method. Taxpayers will not have to allocate total costs incurred in a trade or business between costs that are required to be capitalized and costs that are permitted to be expensed. Allocation also is not required between costs incurred with respect to separate properties produced by the taxpayer.

The Notice includes within covered "creative properties" the following works: films, sound recordings, video tapes, books (including articles and poems), photographs, plays and other dramatic works, musical and dance compositions (including accompanying words), graphic and pictorial compositions, fine art paintings and sculptures, and other similar fine art products (but not including jewelry).

In defining "qualified creative costs," the Notice excludes costs paid or incurred by a person in his/her capacity as an employee, or in producing creative properties where the personal efforts of the individual do not predominantly create such properties. And, with certain specified exceptions, qualified creative costs will not include costs incurred by a partnership, trust or corporation. Examples of qualified creative costs include the costs of marketing, selling, advertising and distributing creative properties, all office overhead and all otherwise deductible interest expense.

IRS Notice 88-62, I.R.Bulletin No.1988-22 (May 31, 1988) [ELR 10:5:20]

Federal Communications Commission will review regulation limiting term of network affiliation agreements; in separate proceeding, FCC seeks comments on proposal to repeal ban on cross-ownership of television networks and cable systems

The Federal Communications Commission plans to review a regulation that limits network affiliation agreements to two years. The regulation was adopted in 1941 for radio agreements, and was applied to television in 1945. The Commission, citing increased competition in broadcasting and the regulation's negative impact on long range planning by networks and stations, may decide, upon review, not to adopt any set term for affiliation agreements.

In a separate decision, the Commission announced that it will seek further comments on a 1982 proposal (ELR 4:10:2) to end a rule that bars common ownership of cable television systems and national television networks. It was noted that a recent Commerce Department report recommended that the rule be abolished due to the declining influence of network television since the rule was adopted in 1970. [Oct. 1988] [ELR 10:5:20]

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[ELR 10:5:22]