LEGAL AFFAIRS

EC 1992 and its Potential Effects on the United States Entertainment Industry

by Susan W. Liebeler and Arthur S. Lowry

I. Introduction

"EC 1992" is the catchword for the effort by the twelve nations of the European Community to create a single barrier free market spanning the continent by December 31, 1992. Both European and non-European businesses are positioning themselves to take advantage of the anticipated Community-wide single market.

United States firms have been confronted with two completely different perspectives of the post-1992

Europe. On the one hand, some experts are predicting that the single European market will provide American businesses with substantial opportunities for expansion into the European market, due in part to the removal of inconsistent standards and regulations among the member countries. On the other hand, some experts and firms fear that post-1992 Europe will readily construct barriers preventing foreign firms from competing in the integrated European market. The latter image has given rise to images of a "fortress Europe" with its borders effectively closed to American goods and services.

The following article describes some of the changes that Europe is experiencing as it moves toward the post-1992 internal market and investigates the effects of these changes on the television and film components of the entertainment industry.

II. Foundations of the European Community

The European Community ("Community" or "EC") began in 1951 as the European Coal and Steel Community, a loose agreement among six Western European nations attempting to rebuild their core industries in the wake of the Second World War. The Treaty of Rome establishing the EC came into force in January 1958.n1 From the start, the Treaty envisioned the creation of a single internal market permitting the free movement of goods, services, persons and capital across the borders of the member states. In 1969, the first major step toward this goal was accomplished with the removal of intra-Community import and export duties.

EC 1992 is the second major step toward the integrated European market. The plan envisions the removal of the remaining non-tariff barriers on trade between the member nations by the end of 1992. In June 1985, the Commission of the European Communities presented a "White Paper" listing approximately three hundred proposals for measures to be implemented by December 1992.n2 When adopted by the European Council, these measures will have the effect of establishing minimum Community-wide standards for goods and services, thereby permitting the free flow of goods and services among the member nations as long as these standards are met.n3

III. The Broadcasting Boom

A. Television Without Frontiers

One of the industries that will be most affected by the Community's relaxation on internal trade restrictions is broadcasting. The prospect of television programming spanning the entire European Community, however, has engendered a great deal of concern among Community members which believe that the new age of "television without frontiers" will be accompanied by the creation of a plethora of American-style television networks beaming inexpensive commercial programming across Europe - a startling concept to governments that are accustomed to complete control over the broadcasting monopolies.

For the past two years, the European Community has attempted to address these concerns with draft legislation governing broadcasting standards.n4 On March 14, 1989, the European Community reached a consensus on a broad directive detailing broadcasting standards. The proposed standards restrict the content of trans-European television broadcasts with respect to pornography, violence, racism, advertising, and national origin of the productions.

B. Content Restrictions And Foreign Programming

To the American entertainment industry, perhaps the most significant aspect of this agreement is the European Community's rejection of a proposal which would have imposed strict quotas on the content of transnational broadcasting. Sponsored by France, the proposal would have set a legal requirement on broadcasters to ensure that at least 60% of their programming during primetime broadcasts would be generated by European Community producers, a proposal that was opposed by, among others, Britain and West Germany, which wanted to avoid any binding minimum levels of EC programming. In the end, the Council adopted a compromise directive stating that European television stations should devote a majority of their air time to European programs "where practicable" (excluding air time devoted to news, sports events, games, advertising and teletext services).

The phrasing of the content restriction solely in precatory language was inevitable, given the current dependence of European television on imported productions. More than 70% of nondocumentary television in Europe is imported, and more than 50% of these programs come from the United States. A significant factor underlying Europe's dependence on foreign programming is cost: it is much less expensive for a European television station to purchase an American film, serial, soap opera or game show than it is for it to sponsor an original production. A one hour fiction program made in the United States may cost as little as ten to fifteen percent of the cost of a comparable original European program. Perhaps even more importantly, Europeans have an appetite for American culture, including television, that cannot be ignored. Thus, in 1988, American producers exported more than $800 million in television programs for European broadcast.

European dependence on American programming is likely to continue to grow at an exponential rate. The value of American programming exports to Europe is estimated to amount to as much as $2 billion in 1992. European broadcasters have expanded (and continue to expand) their capacity in what has been termed television's "big bang." Nearly 200 new transnational television channels are anticipated in the next few years.

C. The Restructuring of European Television

In fact, transnational broadcasting has already arrived in Europe. On February 5, 1989, Astra, a Luxembourg consortium, switched on a sixteen-channel direct broadcast TV satellite which may be received by households in Western Europe equipped with an inexpensive small dish antenna. Astra is planning to place a second direct broadcast satellite into orbit in 1990. France has already successfully launched a five- channel direct broadcasting satellite known as TDF-1, and Britain, Sweden and West Germany are expected to launch their own multi-channel television satellites later this year.

Britain is leading the way with satellite broadcasting in tandem with its push to make its television industry more competitive. Publisher Rupert Murdoch's Sky Television project is already broadcasting over four of Astra's channels. Later this fall, Astra's satellite broadcasts will be joined by broadcasts from Eutelsat II, a five channel satellite to be launched by a joint venture known as British Satellite Broadcasting ("BSB"), a project backed by Pearson PLC (the publisher of the Financial Times), Reed International, Grenada Television and Bond Corporation. Both Sky Television and BSB will rely heavily upon programming from other sources. Indeed, the two enterprises recently spent more than $1 billion between them for long term commitments for films and programs from American producers.

Nor will satellite broadcasting be the only source of new outlets for American programming. The British satellite ventures represent the latest in a series of United Kingdom moves to shake up its staid television industry. Late last year, the British government issued a "white paper" on national broadcasting which calls for the establishment of two new ground-based television channels and anticipates the increased reliance of the British broadcasters on independent programming.n5

France and West Germany are in the midst of restructuring their conventional ground transmission television industry and to that end have created new commercial channels to stimulate the industry. Italy's television also has been subjected to a restructuring of sorts in the form of the entrepreneur Silvio Berlusconi, who has managed to gain control over three of the four major commercial television networks in Italy. Berlusconi's recent attempt to enter the trans-Europe broadcasting by bidding for four of the five channels on France's TDF-1 satellite suggests that his broadcast empire may soon extend across Europe.

The unprecedented expansion of broadcast capacity will continue to benefit American film and television producers for the foreseeable future. European media entrepreneurs have concentrated their efforts on the control of television delivery systems in anticipation of a single European market, at the expense of developing a product for the market. The Community's current consumption of about 125,000 hours of television programming is estimated to increase in the near future to 300,000 hours. Yet, Europe's current television and cinema production stands at about 30,000 hours per year, a figure that falls far short of present (not to mention anticipated) Community demand for programming. Under these circumstances, European requirements for American programming will continue to increase and, indeed, have already given rise to a number of recent European takeover bids for American media properties.

American companies are taking advantage of this increased demand. NBC, Capital Cities/ABC, Turner Broadcasting's Cable News Network, ESPN, Walt Disney Company, Music Television ("MTV") and MTM Enterprises have all launched European ventures to take

of Time Inc. with Warner Communications was prompted, in part, by the expectations of a strong European market for the new company. Time's cable subsidiary, Home Box Office, will undoubtedly be a major player in trans-Europe satellite broadcasting, and Warner's Film Entertainment division reported about 40% of its profits last year from overseas activities, much of it in Europe, a figure that will increase when Warner's planned circuit of movie theatres in Europe and Britain becomes operational. Disney, for its part, is planning to open its Euro Disneyland theme park outside Paris in 1992, and the Disney Channel is scheduled to commence broadcasting in the United Kingdom this year under an arrangement with Sky Television.

D. Future Shocks

The opportunities for the American entertainment industry to expand as a result of the rapid changes in European broadcasting are clear. Advertising revenues are expected to increase to $12.5 billion in 1990 for European television, and some experts are predicting that European television may eventually rival the American market in terms of advertising revenue.

There are, however, a number of question marks on the horizon, starting with the EC's proposed content restrictions on trans-European broadcasting. Obviously, the existence of content restrictions, even if phrased in precatory language, is antithetical to the interests of the United States entertainment industry due to its negative effect on exports. One problem that is likely to arise is the question of how strictly the content restriction will be enforced: the language of the EC directive calling for a 50% EC programming minimum "where practicable" is so vague that its meaning will not be known for a number of years. Another problem with the proposed directive may arise from the lack of a definition of what constitutes "European" programming. There have been suggestions in the past that the EC should recognize a distinction among European firms based on national corporate origin to ensure that the benefits of EC 1992 accrue only to "indigenous" European firms. These efforts, if successful, might have the effect of excluding programming produced by European entities affiliated with

American entertainment firms from the definition of European programming. Finally, there is no guarantee that a strict quota proposal limiting air time for foreign programming will not be revived at a later time once trans-European Community broadcasting is established.n6

Second, it should be understood that the issue of content restrictions on programming is a local as well as a Community issue. Belgium was recently reprimanded by the EC for Flemish regional regulations requiring all private television channels in Flanders to be at least 50% Flemish owned and to broadcast at least 50% Belgian programming. These restrictions contravened EC rules outlawing restrictions on the free movement of goods and services within the Community. France requires that its television channels dedicate at least 60% of their broadcast time to European Community programming (and 50% of that time must be of French origin).n7 Italy also has a local content quota, and requires that Italian television reserve at least 40% of its broadcasting time to Italian and EC member countries' films. Local content restrictions are likely to present a continuing problem to United States firms, since Community member states are explicitly permitted by the proposed directive to require television broadcasters under their jurisdiction to comply with "more detailed or stricter rules" in the areas covered by the directive, which includes content restrictions.

Third, the advent of television without frontiers has raised issues similar to those that arose in the United States when satellite transmission first appeared. Entertainment firms are concerned about the use of unauthorized signal decoding devices to improperly intercept satellite signals, and desire more certainty in the law concerning the rights of copyright holders with regard to cable retransmission of broadcast signals.

Finally, it is anticipated that trans-European Community broadcasting will eventually be subject to a regulatory body to monitor compliance with the EC broadcasting directive. The composition and actual authority of that entity has yet to be determined.

IV. Challenges for the Film Industry

The United States film industry has a large stake in the success of EC 1992. Most of the larger studios have long-established affiliates in Europe, and will be well-positioned to take advantage of the free flow of goods and services among the member countries of the EC.

However, there are a number of issues that remain to be addressed. These include rampant videocassette piracy, inconsistencies among the copyright laws of the member states, local content quotas for movie theatres, and the existence of non-tariff barriers that discriminate against films made outside the European Community.

A. Piracy and Copyright Reform

The lack of a uniform copyright law among the EC members has caused a number of problems, particularly in the area of unauthorized copying and rental of audio-visual and sound recordings. Piracy of videocassettes is a serious problem in the European Community.n8 Part of this problem rests on the fact that the scope of the copyright holder's rights is governed by the specific copyright law of each member nation. The differences in the laws among these nations are of concern to the film industry, since the Community nations do not all grant as broad a spectrum of rights to the copyright holder and enforcement practices vary between member states. Thus, concentrations of piracy occur within the

Community resulting from relatively weaker copyright laws of certain nations. In these pockets, cheaper, pirated versions of commercial films are readily available. Since the pirated versions are easily transported between EC member countries, the market for authorized versions of the videos in those countries where the rights are more stringent tends to be distorted at a loss to the copyright holder. Thus, for example, the existence of pirated home videos in Luxembourg is due in large part from the influx of these tapes from West Germany and Belgium.n9

In June 1988, the European Commission issued a study on Community copyright laws known as the "Green Paper."n10 Intended to serve as a general discussion document to identify existing and potential Community copyright issues, the Green Paper makes a number of suggestions for future Community directives resolving these issues. Among the suggested solutions are directives that would clearly define the rights of producers of films, video and sound recordings to authorize the reproduction and distribution of their works, the creation at the Community level of a register of copyright holders in film, video and sound recordings, and the harmonization of Community members' copyright law to provide copyright holders with the right to control the rental of video and sound recordings. Another aspect of the Green Paper that will help to solve the piracy problem is the Commission's focus on uniform EC enforcement measures against piracy, including the availability of search and seizure orders and the destruction of counterfeit goods. Adoption of the Commission's suggestions should help to minimize the piracy problem by 1992.

B. Rental Rights and the Limits of Exhaustion

Exhaustion is the legal term that describes the point at which the rights holder no longer exercises control over the protected object. Many European states fix this point at the time that the copyrighted work is first lawfully placed on the market. Once it has been purchased on the market in such a state, the rights holder's rights are said to be exhausted, and the product cannot be prevented from being distributed in other countries within the EC. This principle is illustrated by the decision in Musik-Vertrieb v. GEMA, 1981 E. Comm. Ct. J. Rep. 147, 2 Comm. Mkt. L.R. 44, where the European Court of Justice concluded that a copyright holder could not claim the difference between the royalty payable in the importing state and the royalty it was paid in the exporting state where the sound recording had been lawfully placed on the market, since such a claim would be incompatible with the EC's rules promoting the free movement of goods within the Community.

Although the European Court of Justice has repeatedly held that a copyright holder cannot prevent the free circulation of copyright protected goods among the member states once such goods have been placed on the market within the EC, this doctrine has some important limitations. In a recent decision, the Court has held that national performance royalties must be paid to the rights holder even when the work has been imported from another member state in which all performance royalties have been paid. See Bassett v. SACEM, (1987) 3 Comm. Mkt. L.R. 173 (French disco must pay additional " mechanical reproduction fee," a supplementary royalty required under French law to play imported sound recordings, even though it had already paid the performance royalty required under the exporting state's law, thereby exhausting the copyright owner's rights).

Similarly, in Warner Brothers v. Christiansen, case no. 158/86 (filed May 17, 1988), the Court held that Warner

Brothers could assert its right under Danish law to control the rental distribution of a prerecorded videocassettes against a video rental store in Copenhagen which had purchased the videocassette in London, despite the fact that Warner Brothers did not have any right to control the rental of the videocassette under U.K. law.

In the area of video rentals, the Commission examined the differences in the member nations' laws on the rental of copyrighted audio-visual and sound materials. The Commission concluded in the Green Paper that a directive should be introduced providing for the copyright holder's right to authorize the rental of sound and video recordings in all EC member states.

C. Home Video Taping

A number of member states now impose a tax or levy on blank videocassette tapes. The proceeds from the levies are intended to compensate the copyright holder for unauthorized reproduction of the audio-visual work. However, many aspects of these levy systems discriminate against foreign film makers. For example, Finland does not pay any proceeds from its levy fund to non-Finnish authors, and levy fund disbursements in West Germany overcompensate local film producers at the expense of foreign copyright holders. The levy system, which is apparently increasing in popularity, is likely to continue to subsidize local interests. Spain's proposed levy system will only distribute proceeds to foreign rights holders whose countries provide for reciprocal treatment (which will deprive United States rights holders to any claim to the fund, since the United States does not have a levy system). Moreover, governments may claim a share of the levy fund which is not returned to compensate the rights holder. Thus, 25% of the levy collected on blank video cassettes in France is allocated to general cultural purposes, and Belgium has proposed a levy system in which it would retain 50% of the fund for such purposes.

Obviously, the present patchwork of levy systems leaves much to be desired from the perspective of United States film producers. Any action to correct the local bias in the levy systems must be exerted on a country-by-country basis, since it is highly unlikely that the Community will adopt a solution to this problem: the Commission has decided that a Community-wide levy system is not justified, basing this determination on what it found to be inconclusive evidence of the deleterious effects of home copying on rights holders.

D. Screen Quotas, Non-tariff Barriers, and Other Problems

Local content restrictions in the form of screen quotas are prevalent in Europe. France requires theatres to reserve at least five weeks per calendar quarter for French feature films. Italy's screen quota requires that exhibitors show Italian features for at least 25 days in each quarter. Spain requires that an EC origin film be shown for at least one day for every two days that a dubbed film from a non-EC country is shown.

Non-tariff barriers to foreign films are also prevalent in the EC. Spain requires distributors of non-EC films to obtain a "dubbing license" for each dubbed non-EC film distributed in Spain. To obtain this license, a distributor must either finance the production of a Spanish film or acquire the rights to distribute Spanish films. The estimated cost of this license ranges from $100,000 - $200,000 per picture. France requires that dubbing of all foreign films for release in France be completed in

French studios or in French-speaking countries of the EC.

With the advent of television without frontiers, the broadcasting of films over a wider geographical reception area than authorized by the rights holder may also present a problem. In theory, the copyright holder should be able to prevent the transmission of the film in unauthorized areas. See Coditel v. Cine Vog, 1980 E. Comm. Ct. J. Rep. 881, 2 Comm. Mkt. L.R. 362 (holder of performing rights for a film in Belgium may prohibit a Belgium cable company from retransmitting a German broadcast of the film authorized by the German rights holder). In practice, however, satellite broadcasting will require adjustment on the part of the entertainment industry, both in the form of increased monitoring as well as by performance agreements that take into account the larger broadcast territories.

A related problem arises from the retransmission of satellite and ground broadcast signals over commercial cable systems under member nation "must carry" regulations, such as those in effect in the United Kingdom requiring cable operators to retransmit BBC and ITV broadcasts, without obligation to remunerate the copyright holder. Such regulations arguably contravene the Berne Convention on the Protection of Literary and Artistic Works, which provides, inter alia, for the exclusive right of the author of the work to authorize the broadcast performance of the work.n11 All of the EC member states are parties to the Berne Convention, and the United States became a member of the Berne Convention on March 1, 1989.

Other problems on the horizon include efforts to create a distinction between European firms based on national origin. If this effort is successful, it may discriminate against affiliates of American entertainment companies.

There is also a movement in the EC to revoke the preferential value added tax (VAT) treatment accorded to motion pictures which it shares with other cultural products such as books and periodicals. Moreover, some states have imposed taxes on videocassettes inconsistent with the preferential VAT treatment accorded to films shown in theatres. These problems, along with others that may become apparent as Europe approaches 1992, will need to be addressed.

V. Conclusion

EC 1992 will create a number of new opportunities for the entertainment industry, particularly in the area of broadcast programming, and the Community appears to be moving steadily to increase the protection necessary to enforce copyright holders' control over the public performance of artistic works. On a number of fronts -

particularly programming content restrictions, screen quotas and discriminatory levy systems - the United States entertainment industry should continue to press for improvement. All in all, however, it appears that 1992 promises great benefits not only to the EC, but to all firms participating in the Community's economy.

NOTES

1. Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 11.

2. Commission of the European Communities, Completing the Internal Market: White Paper from the Commission to the European Council (1985).

3. The Council of the European Communities, in consultation with the European Parliament, is charged with

adopting directives and regulations proposed by the Commission. It should be noted that although regulations, once adopted, create law in the member states, directives do not constitute substantive law in the member countries, but rather require the passage of implementing legislation by the member states in order to become effective.

4. Council of European Communities, Common Position Adopted by the Council on 13 April 1989 With a View to the Adoption of a Council Directive on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities (1989).

5. Home Office, Broadcasting in the '90s: Competition, Choice and Quality: the Governments's Plans for Broadcasting Legislation (1988).

6. Indeed, there has already been some dissatisfaction expressed with the flexible "where practicable" language governing European content in the proposed broadcasting directive. On May 24, 1989, the European Parliament voted to adopt an amendment that would have removed the "where practicable" qualification from the directive, thereby requiring transnational broadcasters to ensure that a strict majority of the entertainment programs broadcast would be European produced. This amendment was not accepted by the Commission, however, and the adoption of the " where practicable" qualification is now up to the Council.

7. France is in the process of increasing compliance with its quotas. Formerly, French television stations engaged in a practice of airing French-made programs overnight and broadcasting popular foreign programs during primetime viewing hours, thereby meeting the quota over the course of the broadcast day. Now, however, the French government is defining primetime viewing hours during which the quotas must be met. Daily Variety, April 4, 1989, at 1, col. 1.

8. The Motion Picture Export Association of America ("MPEAA") reports that the EC countries with the worse record in controlling pirated videocassettes include: Belgium (pirated videocassettes are estimated to comprise 25% of the market); France (where pirate versions of films are estimated to make up nearly 20% of the French videocassette market); West Germany (pirated videos constitute 25% of the market); Ireland

(counterfeits constitutute nearly half of the market); Italy (more than 35% of the videocassette market is estimated to be pirated and 25% of the programs telecast on the plethora of private tv stations are pirated); Spain (20% of the videocassette market is counterfeit); and the United Kingdom (more than 20% of the market is pirated). See generally, MPEAA, Report to the United States Trade Representative: International Trade Restrictions Facing MPEAA Member Companies (1989).

9. Id.

10. Commission of the European Communities, Green Paper on Copyright and the Challenge of Technology - Copyright Issues Requiring Immediate Action (1988).

11. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, art 11bis, 828 U.N.T.S. 221.

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[ELR 11:1:3]

RECENT CASES

U.S. Supreme Court upholds use of racketeering statutes in civil actions against owners of adult bookstores, but rules that pretrial seizure of expressive material is unconstitutional

The United States Supreme Court, in 6-3 decision, has upheld the state of Indiana's use of racketeering statutes in civil actions against owners of adult bookstores, but has ruled unconstitutional the provisions of the statutes authorizing the pretrial seizure of books and films.

The court, in reviewing two cases arising from unrelated incidents, first considered an action brought by the state of Indiana against Fort Wayne Books, Inc. and two other corporate owners of adult bookstores. It was alleged that the corporations and certain of their employees had accrued 39 criminal convictions for selling obscene publications; were engaged in a pattern of racketeering activity due to their repeated violations of state laws barring the distribution of obscene books and films; and thereby were violating the state's Racketeer Influenced and Corrupt Organizations Act and Civil Remedies for Racketeering Activities statute. (Only Fort Wayne Books sought certiorari and entered an appearance in the Supreme Court.)

The complaint, in addition to seeking civil injunctive relief to bar further racketeering violations, requested the forfeiture of all of Fort Wayne Books' property that "was used in the course of, intended for use in the course of, derived from, or realized through" the bookstores' alleged racketeering activity. The state also requested an order authorizing the immediate seizure of all property subject to forfeiture under the racketeering statutes. After the state presented testimony and exhibits in support of its petition, the trial court entered an order finding that probable cause existed to conclude that the bookstore parties were violating state RICO law, and directing the immediate seizure of the real estate, publications and other personal property of the bookstores.

Fort Wayne Books, subsequent to the March 1984 seizure of its inventory, sought to vacate the ex parte seizure order. The Indiana Supreme Court upheld the constitutionality of the Civil Remedies statute and the pretrial seizure of the stores.

In the second action brought before the Supreme Court, an investigation of adult bookstores in Howard County, Indiana, led prosecutors to charge Ronald W. Sappenfield with six counts of distributing obscene matter. The prosecutors used the alleged predicate acts of obscenity, which were misdemeanors under Indiana law, as a basis for charging Sappenfield with two felony racketeering offenses.

A trial court dismissed the two RICO counts on the ground that the RICO statute was unconstitutionally vague as applied to obscenity predicate offenses (Sappenfield did not challenge the obscenity indictments). An appellate court reversed the trial court decision, and reinstated the charges against Sappenfield; the Indiana Supreme Court declined to review the appellate court's holding.

Justice Byron R. White first determined that the court possessed jurisdiction to review the parties' claims even in the absence of a judgment of conviction and the imposition of a sentence, stating that "resolution of this important issue of the possible limits the First Amendment places on state and federal efforts to control organized crime should not remain in doubt."

Justice White then rejected Sappenfield's claim that the Indiana RICO statute was unconstitutionally vague as applied to obscenity predicate offenses, and found that there is no constitutional bar to including substantive obscenity violations among the predicate offenses under the RICO statute, notwithstanding the fact that the criminal penalties for a RICO violation under Indiana law - in this case, a maximum sentence of 10 years in prison and a $20,000 fine if found guilty of the two RICO counts - would be more severe than those authorized for an obscenity offense - in this case, six years in jail and $30,000 in fines if Sappenfield were convicted of the six predicate obscenity offenses.

Justice White also rejected Sappenfield's arguments that the alleged predicate acts used in a RICO/obscenity prosecution must be "affirmed convictions;" that all of the predicate offenses charged must have occurred in the jurisdiction where the RICO indictment was brought (it was observed, all of Sappenfield's alleged predicate acts of distributing obscenity did take place in the same jurisdiction where the RICO prosecution was initiated); and that there should have been a prompt adversarial hearing, shortly after Sappenfield's arrest, on the question of the obscenity of the materials in issue - Sappenfield did not request such a hearing and there was no seizure of any books or films. The judgment in the Sappenfield matter therefore was affirmed.

However, the judgment sustaining the pretrial seizure order in the Fort Wayne Bookstore matter was reversed, as Justice White cited the Supreme Court's repeated holding that "rigorous procedural safeguards must be employed before expressive materials can be seized as 'obscene.'"The Indiana Supreme Court had noted that the pretrial seizures were not based on the nature or suspected obscenity of the contents of the items seized, but upon the ground that the property represented assets used and acquired in the course of racketeering activity. Justice White, assumed, without deciding, that bookstores and their contents are forfeitable in the same manner as a bank account or a yacht, when it is proved that such items are property actually used in, or obtained from, a pattern of violating the state's obscenity laws. But even with such assumptions, the pretrial seizure at issue was unconstitutional - there was no determination that the seized items were "obscene," or that a RICO violation had occurred. There may have been 39 predicate crimes which had been adjudicated and on which the seizure was based, but the petition for seizure sought to establish only that there was probable cause to believe (emphasis by Justice White) that a RICO violation had occurred. And, declared Justice White, mere probable cause to believe that a legal violation has occurred is not adequate to remove books or films from circulation - the elements of a RICO violation other than the predicate crimes had not been established, and the pretrial seizure at issue therefore was improper.

Justice White cautioned that although the Supreme Court accepted the Indiana Supreme Court's finding that the state's RICO law was not "pretextual" as applied to obscenity offenses, the state could not avoid constitutional standards by merely recategorizing a pattern of obscenity violation as "racketeering." The presumption that expressive materials are protected by the First Amendment is not rebutted in a RICO proceeding until the claimed justification for seizing books or other publications is properly established in an adversary proceeding, stated Justice White. In this case, thousands of books and films were improperly taken out of circulation by the pretrial order without proof that the seizure was warranted under Indiana's RICO statutes.

Justice Blackmun agreed with Justice O'Connor (below) that the Sappenfield case was not properly before the court. However, Justice Blackmun noted that the majority on the jurisdictional issue was divided 4-3 on the merits of the question presented in the case. Expressing the view that the case should be resolved by a majority of the participating Justices, Justice Blackmun, notwithstanding his dissenting jurisdictional view, felt obligated to agree that "what may be punished under Miller v. California, 413 U.S.15 (1973), may form the basis of a racketeering conviction."

Justice O'Connor, emphasizing that Sappenfield had not been tried or convicted on the RICO charges, dissented from the Court's disposition of Sappenfield on the basis that jurisdiction was lacking. Justice O'Connor concurred in the disposition of Fort Wayne Books because although the petition also was from an interlocutory appeal to the Indiana appellate courts, pretrial sanctions already had been imposed on the bookstore owners.

Justice Stevens, with whom Justice Brennan and Justice Marshall joined, agreed with the majority's disposition of the jurisdiction and pretrial seizure issues, but questioned the Court's refusal to evaluate the Indiana racketeering statutes as an "interlinked whole," authorizing "wide-ranging civil sanctions against both protected and unprotected speech."

Justice Stevens pointed out that the complained-of conduct involved the sale of three allegedly obscene magazines to "the same willing purchaser" in each of two stores - there was no allegation that anyone engaged in sexual misconduct on the bookstore premises, that the stores' inventory was displayed or advertised in an offensive way, that children were given access to any publications or films, or that the bookstores were public nuisances operating in inappropriate places, manners, or times.

According to Justice Stevens, Indiana's RICO statutes may be applied so as to transform two obscenity misdemeanors into a felony punishable by up to eight years of imprisonment. And proof of a RICO violation may subject a party to civil sanctions such as the forfeiture of the property of an enterprise, even if only a small fraction of the activities of the enterprise have been found unlawful. Justice Stevens would have found the RICO statute unconstitutional "even without the special threat to First Amendment interests" presented by the Civil Remedies Act. The dissent also disagreed with the Court's view that questions relating to the civil sanctions that may follow a RICO conviction were not ripe for review; stated that successful prosecution under the Indiana statutes "would advance significantly the State's efforts to silence immoral speech and repress immoral thoughts;" and would have extended the Court's holding to prohibit the seizure of bookstore inventories, even after trial, based on nothing more than a "pattern" (quotation marks by Justice Stevens) of obscenity misdemeanors.

For Justice Stevens, there is "a difference of constitutional dimensions" between a bookstore and other enterprises, for "a bookstore receiving revenue from sales of obscene books is not the same as a hardware store or pizza parlor funded by loan-sharking proceeds," and the presumptive First Amendment protection extended to bookstores does not apply either to the predicate offenses or to the business use of other enterprises. Indiana's RICO statutes "arm prosecutors not with scalpels to excise obscene portions of an adult bookstore's inventory but with sickles to mow down the entire undesired use," stated Justice Stevens, who would have reversed the decision in Sappenfield, invalidated the pretrial seizures in Fort Wayne, and dismissed the complaint.

Fort Wayne Books, Inc. v. Indiana, Case No. 87-470; Sappenfield v. Indiana, Case No 87-614 (U.S.Sup.Ct., Feb.21, 1989) [ELR 11:1:10]

Public opinion survey and expert testimony concerning obscenity of charged materials were properly excluded from trial of bookstore owners on racketeering charges

United States v. Pryba, one of the cases cited by the United States Supreme Court in Fort Wayne Books (ELR 11:1:10), involved an indictment charging Dennis and Barbara Pryba and other parties with racketeering in connection with the interstate sale of obscene videos and magazines and tax fraud. According to news reports, the Prybas were found guilty of three counts of racketeering and seven counts of distributing obscene materials, and acquitted on two counts of filing false tax returns; apparently, the jury also returned special verdicts ordering the Prybas to forfeit a warehouse and the inventories of three adult bookstores and eight videotape rental stores.

The Prybas challenged the verdict on several grounds, including whether the court correctly excluded certain survey results and expert testimony on the issue of whether the charged materials were legally obscene.

Federal District Court Judge Ellis noted that evidence concerning a public opinion survey was irrelevant and therefore inadmissible because the survey questions "were not designed to elicit information about whether there was community acceptance of the actual materials in question or similar materials..." Rather, the poll inquired into the interviewees' opinions on the viewing of "nudity and sex," defined broadly. "Community acceptance is the touchstone of admissibility," declared Judge Ellis, but "community tolerance or availability does not equate with acceptability."

The expert testimony which the Prybas sought to introduce also was properly excluded, stated the court, because in this case the testimony was "unreliable, unfairly prejudicial, and confusing and misleading to the jury" and was not competent expert evidence of the prevailing community standards.

United States v. Pryba, 678 F.Supp. 1225 (E.D.Va. 1988) [ELR 11:1:12]

Contract dispute involving screenplay based on the life of the late singer Harry Chapin is ordered to trial

A New York trial court has ruled that screenwriter Kyle Morris may proceed with a breach of contract action against Sandra Chapin, the widow of singer and composer Harry Chapin, and granted Morris a preliminary injunction, conditioned on the posting of a bond, to prevent the Chapin parties from contracting with third parties to revise Morris' screenplay or to produce any film based thereon.

Morris entered into a contract in October 1987 with Harry Who' Productions to write a screenplay based upon the life of the late composer. Sandra Chapin, in response to Morris' action, claimed that the contract specified that the screenplay was a work for hire.

Acting State Supreme Court Judge Leonard N. Cohen, assuming as true for purposes of the motion before him Morris' allegations of a substantial and willful breach of the contract, stated that such a breach would be sufficient to rescind the contract and terminate Harry Who's ownership rights in Morris' work product: The contract itself therefore did not provide sufficient evidence to require the dismissal of Morris' cause of action for a declaratory judgment.

Judge Cohen also refused to dismiss Morris' motion seeking an order of specific performance of an alleged oral agreement by Sandra Chapin to permit the use of Harry Chapin's musical works in a film to be made from Morris' screenplay. And the Chapin parties' request for the dismissal of Morris' causes of action for certain consequential damages was denied, as were motions to dismiss claims against the estate of Harry Chapin and against Sandra Chapin personally, and to transfer the action to Surrogate's Court.

Morris v. Chapin, New York Law Journal, p. 23, col.3 (N.Y.Cnty., May 1, 1989) [ELR 11:1:12]

Shubert Organization's advance ticket sale activities for "Phantom of the Opera" did not violate antitrust laws

The Angel of Music did not look kindly upon Theatre Party Associates in early 1987. The Shubert Organization allegedly refused to allocate dates to the theater party agent for the much-anticipated production of "Phantom of the Opera" at the Shubert-owned Majestic Theatre. However, the Shubert Organization began to provide date allocations to theater party clients which had contacted the theater directly. And contrary to the customary practice of providing agents with advance notice of opening dates, Shubert announced the opening date of "Phantom" in a newspaper ad.

When Theatre Party claimed that Shubert violated section 2 of the Sherman Act, Judge Peter K. Leisure found that the relevant product market proposed by the agent -

advance sales of selected tickets to the early run of a "theater party hit," i.e., "Phantom" - did not comprise a viable antitrust market. The court declined to define the relevant market on the basis of a theater party agent's perception of the success of a show in the forthcoming season. Furthermore, Theatre Party did not explain why other forms of entertainment would not provide alternative sources of, and substitutes for, Shubert's product.

Shubert, concededly, had a monopoly over the distribution of the tickets to "Phantom." But the theater owner had the right to control the distribution of its own product, and, in so doing, did not violate the antitrust laws.

Judge Leisure next rejected the theater party agent's allegation that Shubert willfully acquired or maintained monopoly power through unlawful conduct, noting that "Shubert could have decided to be the sole distributor of

Phantom tickets without running afoul of the antitrust laws."

Theatre Party's attempted monopolization and pendent state law claims also were dismissed.

Theatre Party Associates, Inc. v. The Shubert Organization, Inc., 695 F.Supp. 150 (S.D.N.Y. 1989) [ELR 11:1:13]

Syufy Enterprises prevails in government antitrust action involving motion picture exhibition in Las Vegas

A Federal District Court in California has rejected the United States Department of Justice's claim that the motion picture exhibition activities of Syufy Enterprises and Raymond Syufy in the area of Las Vegas, Nevada, violated section 2 of the Sherman Act and section 7 of the Clayton Act, and has denied the government's request for an injunction requiring Syufy to divest certain theaters.

Judge William H. Orrick, in a 45-page opinion, reviewed the distribution practices of the motion picture industry and determined that the contemporary product market in the instant case consisted of "first-run exhibits of motion pictures, sub-run exhibits of motion pictures, and exhibition on home video, cable television, and pay-per-view television." The government, following United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948), had proposed to limit the definition of the relevant product market to first-run exhibition of motion pictures. But Judge Orrick characterized the government's approach as "outdated" in view of the "vast and rapid technological changes in the industry resulting in substantial nontheatrical exhibition..." Syufy had presented "conclusive and uncontroverted" evidence at trial that consumers view the ancillary markets as substitutes to first-run exhibition, and that sub-run exhibits also must be included with first-run exhibits as the relevant product market.

The court then stated that the government "totally failed to even address, let alone prove" that Syufy possessed monopoly power in the contemporary relevant product market. Even under the government's "antiquated" definition of the relevant product market, the court declared that it would find that the government did not establish that Syufy possessed monopoly power or that the exhibitor willfully acquired such power. Judge Orrick cited substantial evidence to support the findings that there were no entry barriers in the Las Vegas motion picture exhibition market and that Syufy's high share of gross box office receipts in the market was attributable to the superior quality of its theaters and management. The court also had found that distributors collected what they considered to be fair and reasonable film rentals with respect to the licensing of motion pictures for exhibition in Las Vegas, and that "the percentage of film rentals paid in Las Vegas [was] consistent with film rentals paid nationally on a film-by-film basis."

With respect to the government's charge of attempted monopolization, the court found that it was not shown that Syufy had the specific intent to control prices or destroy competition in the Las Vegas market, or that Syufy had a "dangerous probability of success" in monopolizing the market. The government's claim under section 7 of the Clayton Act also was rejected since there was not "one shred of evidence" showing that Syufy's theater acquisitions were likely to substantially lessen competition in the relevant market.

United States of America v. Syufy Enterprises, Case No. C-86-3057 (N.D.Ca., Feb. 3, 1989) [ELR 11:1:13]

Film booking agent is acquitted of conspiracy to engage in anticompetitive product-split in Altoona, Pennsylvania

In June 1988, a Federal District Court jury in Pennsylvania acquitted Cinemette Corporation of America and two company officials of charges of engaging in a conspiracy to eliminate competition in film exhibition in the Altoona area.

The District Court, in a decision issued in April 1988 but not published until late in the year, had refused to dismiss the indictment in which the government claimed that from at least early January 1985 until about August 1986, Cinemette, a film booking company, and other alleged co-conspirators participated in a split agreement to allocate films.

The court rejected Cinemette's claim that the company was not given fair notice that split agreements could constitute violations of section 1 of the Sherman Act. Also rejected was the argument that the case law regarding split agreements was so vague and undefined that the company had no reason to believe that conduct such as that charged in the indictment would expose the Cinemette parties to criminal liability. And the court concluded that there was no support for Cinemette's claim that the government misled the film industry by representing that split agreements were considered legal or that criminal liability would not follow for participation in a split.

Cinemette's exhibition operations were not involved in the product split proceeding.

United States v. Cinemette Corporation of America, 687 F.Supp. 976 (W.D.Pa. 1988) [ELR 11:1:14]

Dismissal of libel suit against authors and publisher of Elvis Presley biography is affirmed, because portrayal of plaintiff was not defamatory

A Federal Court of Appeals in Mississippi has upheld the dismissal of a libel claim brought by Lucille Ware Magouirk Mitchell against the co-authors and the publisher of the book "Are You Lonesome Tonight?: The Untold Story of Elvis Presley's One True Love - and the Child He Never Knew." The book, written by Lucy de Barbin and Dary Matera, focused on the purported love affair between de Barbin and Elvis Presley. De Barbin's story of her childhood included a brief description of her arranged marriage, at age eleven, to a 45-year old man. Lucille Mitchell alleged that she was the sister of the groom, and claimed that the book falsely portrayed her as a participant in the coerced marriage of an underage girl.

The District Court found that Mitchell failed to state a claim because the passages in issue were not susceptible to the defamatory meaning suggested by Mitchell. Federal Court of Appeals Judge Garwood agreed, noting that the words that were "of and concerning" Mitchell did not clearly and unmistakably defame her, and that while the treatment of Mitchell in de Barbin's book may have been unfair, the portrayal, under Mississippi's defamation standard, was not defamatory.

Mitchell's causes of action for false light invasion of privacy and negligent infliction of emotional distress also were dismissed.

Mitchell v. Random House, Inc., 865 F.2d 664 (5th Cir. 1989) [ELR 11:1:14]

Film producer properly obtained default judgment against financier on breach of contract claim arising from third party's failure to return deposit, but court remands RICO claim

In September 1981, Alan Neuman Productions, Inc., signed a film financing contract with Dutch financier Gerritt Mueller. The contract, which was arranged with the assistance of Jere Albright, required the production company to pay $92,500 to Mueller as a deposit which would be refundable if the company did not open Mueller's standby letter of credit. Subsequently, although the letter of credit was not opened, Mueller, notwithstanding Albright's request, refused to return the deposit.

When the production company sued Albright, a Federal District Court ordered judgment on default in favor of the company on its breach of contract and RICO claims; the action against Mueller was dismissed for want of prosecution. After holding an evidentiary hearing to determine damages, the court, according to news reports, ordered Albright to pay the company about $690,000 in trebled damages.

A Federal Court of Appeals has found that the record supported the District Court's findings concerning Albright's conduct and statements associated with the service of summons and complaint in the action. Albright knew that the complaint had been filed, and it was not clearly erroneous for the District Court to have found that Albright's intentional failure to appear and to answer the complaint constituted culpable conduct. The entry of default judgment and the award of about $400,000 in damages on the production company's non-RICO claims therefore was affirmed.

However, stated Judge O'Scannlain, the complaint did not allege, with sufficient particularity, the predicate acts of fraud which would support the production company's claim alleging the violation of the Racketeer Influenced and Corrupt Organizations Act, based on mail and wire fraud. The entry of default judgment on the RICO claims was reversed accordingly. On remand, noted the court, the production company may move to amend its complaint; Albright then would have an opportunity to respond to the company's claims.

In March 1989, the panel amended its decision in minor respects such as deleting a reference to Rule 11 with respect to sanctions on appeal - a motion to impose sanctions had been denied. The panel denied the petition for a rehearing and rejected the suggestion for rehearing en banc.

Alan Neuman Productions, Inc. v. Albright, 862 F.2d 1388 (9th Cir. 1988); Case No. 86-6085 (9th Cir., Mar. 2, 1989) [ELR 11:1:14]

Financier may proceed with legal malpractice action based on default judgment obtained by film producer, rules Illinois appellate court

After a default was entered on January 30, 1984 by a Federal District Court in California against Jere Albright in the Neuman matter (ELR 11:1:14), Albright's attorney, John Anderson, assured his client that it was routine to vacate such defaults. Anderson prepared, and Albright signed, an affidavit dated February 17, 1984, stating that Albright had never been personally served. On March 27, 1984, Anderson's law firm of Seyfarth, Fairweather, Shaw and Geraldson, filed the affidavit with a motion to quash the return of service and set aside the default. However, the court denied Albright's motion to vacate the default, conducted a hearing on Neuman's prima facie case, and entered a default judgment against Albright in the amount of about $690,000 (see ELR 11:1:14 for subsequent developments).

Albright sued Anderson and his law firm, but an Illinois trial court dismissed with prejudice Albright's fourth amended complaint alleging legal malpractice and fraud.

An Illinois appellate court has reversed and remanded for further proceedings the trial court's ruling with respect to the legal malpractice claim, stating that Albright's allegations concerning the law firm's conduct sufficiently stated a malpractice claim, and sufficiently alleged that, but for the negligence described, Albright could have defended the federal suit on its merits and would not have suffered the default judgment.

The court upheld the dismissal of Albright's cause of action for fraud.

Albright v. Seyfarth, Fairweather, Shaw & Geraldson, 531 N.E.2d 948 (Ill.App. 1988; rehearing denied, Jan. 6, 1989) [ELR 11:1:15]

Attorney for convicted killer retains royalties received under assignment of book publishing contract, because New Jersey's "Son of Sam" law does not apply retroactively

In August 1975, Joseph Kallinger entered into a contract with Flora Schreiber whereby Schreiber acquired the book, magazine and movie rights to Kallinger's life story. Kallinger was to receive 12.5 percent of all future net earnings from any book or movie.

Kallinger retained attorney Paul Giblin to represent him in defending charges arising out of Kallinger's killing of Maria Fasching. Kallinger assigned his rights under the Schreiber contract to Giblin. In October 1976, Kallinger was convicted of murdering Maria Fasching, and was sentenced to life imprisonment.

Maria Fasching's next of kin sued Kallinger, Schreiber and the publisher of Schreiber's "psycho-biography" of Kallinger, seeking to prevent Kallinger from receiving any proceeds from the book. The Faschings relied on a 1983 amendment to New Jersey's Criminal Injuries Compensation Act of 1971; the amendment, entitled "An Act Concerning Certain Moneys Received by Persons Accused of Crime," better known as the "Son of Sam" law, voids certain contracts entered into by persons convicted or accused of a crime unless the contract contains a provision for payment to the state's Violent Crimes Compensation Board of money otherwise due the convicted/accused person or his/her agent or assignee.

A New Jersey appellate court ruled that the 1983 amendment was not intended to reach the money earned by authors and publishers from the recounting of a crime (ELR 9:2:9).

The Faschings also claimed that any funds received by Giblin as royalties under the assignment of the Kallinger-Schreiber contract should have been paid to the Board.

The appellate court, in affirming a trial court ruling that Giblin was entitled to retain the moneys he received under the contract assignment, found that the legislature did not intend the Son of Sam law to apply to contracts entered into before the effective date of the statute - January 26, 1983. Judge D'Annunzio noted that retroactive application would make the statute "unworkable" and would be "manifestly unfair" to Giblin.

Fasching v. Kallinger, 546 A.2d 1094 (N.J.App. 1988) [ELR 11:1:15]

Heritage Broadcasting wins specific performance of contract for its purchase of two Michigan television stations

Heritage Broadcasting was entitled to specific performance of a contract to purchase two television stations from Wilson Communications, Inc., a Michigan appellate court has ruled. In 1983, representatives of the companies orally agreed on a purchase price of $10.4 million, with Wilson retaining its accounts receivable worth $600,000. The parties also agreed to enter into a letter of intent, one provision of which would be that Wilson would not negotiate with any other buyer for 45 days, during which the parties would seek to agree on contract terms. However, in December 1983, Wilson, claiming that the 45 day period had expired, terminated negotiations, indicating that it intended to retain and operate its stations.

A trial court found that the letter of intent was a "contract to contract;" that it was binding because it contained all of the essential terms to be included in the final contract; and that Wilson breached the contract.

In affirming the trial court's decision, the appellate court noted that although Wilson may have "subjectively entertained a different interpretation of the letter's effect upon expiration of the forty-five-day period," under Michigan law, this was insufficient to show that a meeting of the minds did not occur. The letter of intent identified the parties, the assets to be sold, the consideration, the schedule for payments, the handling of the accounts receivable, the rights and remedies of each party upon breach, and mutual termination rights if the closing did not occur within 360 days of the definitive agreement.

Heritage Broadcasting Company v. Wilson Communications, Inc., 428 N.W.2d 784 (Mich.App. 1988) [ELR 11:1:16]

Football player's state claim for wages is preempted by federal labor law governing arbitration award obtained by player under collective bargaining agreement

A Federal Court of Appeals, in a per curiam ruling based on the opinion issued by a Federal District Court, has affirmed the finding that football player Vince Evans' state law claim against an agent of his former employer, the Chicago Football Franchise Limited

Partnership, was preempted by section 301(a) of the Labor Management Relations Act.

In the District Court's opinion, which was attached to the Court of Appeals opinion as an appendix, the court reviewed Evans' contract and a grievance filed on behalf of the player in May 1985. The grievance concerned the franchise's failure to purchase a surety to guarantee the deferred compensation provisions in Evans' contract. Evans obtained an arbitration award against the Chicago Football Franchise Limited Partnership of about $1.3 million, and sought to enforce the arbitration award under section 301 of the Labor Management Relations Act, along with a claim against Edward Einhorn, an officer and agent of one of the franchise-related corporate parties, for the payment of wages under the Illinois Wage Payment and Collection Act.

Evans obtained default judgments against Chicago Football, and against the corporate general partner of the limited partnership, Edjer Corporation. But the District Court agreed with Einhorn that the wage claim was an action arising out of the breach of a collective bargaining agreement, and that Evans' claim against Einhorn under Illinois state law was preempted.

Evans v. Einhorn, 855 F.2d 1245 (7th Cir. 1988) [ELR 11:1:16]

Forum sports arena did not breach any duty to basketball fan injured while climbing fence, rules California appellate court

In the spring of 1984, Thomas Edwards climbed up on an exterior driveway guard fence located at the Forum sports arena in Inglewood and then fell to the pavement below. Edwards, who, according to witnesses, was in an intoxicated condition, suffered tragically severe head injuries as a result of the fall.

Edwards filed a personal injury action against California Sports, Inc., the operator of the Forum. A jury apportioned 27 percent of the fault to California Sports and 73 percent to Edwards; of the $2 million damages assessed by the jury, California Sports was held liable for $540,000. The trial court entered judgment on the jury's verdict.

A California appellate court reversed the judgment, noting that there was no evidence that California Sports breached any duty of care in constructing the fence, and the matter should not have been permitted to go to the jury. The 50 inch high fence was "clearly adequate," stated Acting Presiding Judge Compton, for its designed purpose - preventing anyone of average height who was standing at the edge of the area or walking near the edge of the area from falling over the edge as a result of slipping, tripping, losing balance or even being bumped or pushed.

Furthermore, Edwards could not use "his own voluntarily induced state of intoxication" to claim that he was unaware of the "obvious peril" of climbing a fence designed to prevent a fall from a height of 15 feet to a concrete surface.

The matter was remanded to the trial court with directions to enter judgment for California Sports. In March 1989, the California Supreme Court declined to review the case.

Edwards v. California Sports, Inc., 254 Cal.Rptr. 170 (Ca.Ct.App. 1988) [ELR 11:1:17]

Arizona trial court must find whether security company breached duty to minor patron of baseball stadium who was injured after drinking at game

Professional Sports, Inc., also known as the Phoenix Giants, operates a baseball stadium in Phoenix. Professional had a contract with Gillette Security, Inc. to provide security at the stadium during baseball games. The company's guards were required, in part, to monitor the sale and consumption of alcoholic beverages at the stadium.

In July 1983, David Ford, then 16 years old, attended a Phoenix Giants baseball game at the stadium; the legal drinking age at the time was 19 years old. The game attended by Ford was advertised on the radio as "KDKB 50-cent Beer Night." Two 17 year old friends of Ford apparently purchased between six and eight rounds of beer at the concession stands; Ford, as described by the court, became intoxicated. When the boys left the stadium, Ford, in attempting to cross a street, was struck by an automobile and severely injured.

Ford sued Professional and other parties alleging that the company was negligent in providing him with alcohol and allowing him to become intoxicated. Professional filed a third- party complaint against Gillette for contribution. When Professional later settled with Ford, Gillette moved for summary judgment, claiming that it owed no duty to Ford.

An Arizona appellate court has reversed a trial court decision granting summary judgment to Gillette. Judge Greer concluded that the contract between Professional and Gillette "created a duty in negligence to protect minors such as David Ford from illegally consuming alcohol..." It was observed that Gillette undertook to provide services to Professional which Gillette reasonably should have recognized were necessary to protect minor patrons of the stadium; privity of contract between Gillette and Ford, the injured third party, was not necessary.

Judge Greer next found that evidence was presented which indicated that although Gillette's guards were on duty, they failed to detect or prevent underaged patrons from purchasing and consuming alcohol, and did not take any action in response to Ford's "obviously loud and unruly behavior." The question of whether Gillette breached its duty was a question on which reasonable persons could differ, and the matter therefore was remanded for a determination by the finder of fact as to whether Gillette failed to exercise reasonable care to protect minor patrons, thereby increasing the risk of harm to third parties such as Ford.

Professional Sports, Inc. v. Gillette Security, 766 P.2d 91 (Ariz.App. 1988; review denied, Jan. 31, 1989) [ELR 11:1:17]

Briefly Noted:

Copyright Infringement/Music.

A Federal District Court in Oregon has granted an injunction barring restaurant owner John Santillanes from presenting unauthorized performances of copyrighted musical compositions. The court also awarded damages totalling $4,000 as well as attorney fees and costs.

Stone City Music v. Santillanes, 702 F.Supp. 249 (D.Ore. 1988) [ELR 11:1:18]

Broadcast License.

The National Black Media Coalition, Inc. and the Beaumont Branch of the NAACP were entitled to a hearing in their lawsuit challenging a Federal Communications Commission decision to renew the broadcast license of Pyle Communications for two local Texas radio stations, a Federal Court of Appeals in Washington, D.C. has ruled. The Coalition, in an unsuccessful petition to deny the renewal, charged that Pyle had discriminated against its black employees and had failed to meet its affirmative action obligations. The Commission decided not to hold a hearing because it found without merit the Coalition's allegations of race discrimination, leaving no significant factual issues in dispute. The Court of Appeals held that the Commission's decision was not consistent with the provision of the Communications Act requiring a hearing upon the presentation of "a substantial and material question of fact." According to Judge Mikva, who reviewed the FCC employment report forms filed by the two stations, Pyle did not adequately respond to several important questions concerning the broadcaster's employment practices, such as the substantial underrepresentation of blacks at the stations, the inconsistencies or misstatements contained in Pyle's communications with the FCC, and Pyle's deficient equal employment record. The Commission abused its discretion in issuing even a short-term license renewal, stated Judge Mikva. The matter therefore was remanded to the Commission with directions to hold a hearing to resolve the factual issues raised concerning Pyle's allegedly intentional employment discrimination and the broadcaster's failure to meet its affirmative action obligations.

Beaumont Branch of the NAACP v. Federal Communications Commission, 854 F.2d 501 (D.C.Cir. 1988) [ELR 11:1:18]

Torts/Baseball Spectator Injury.

A Texas appellate court has affirmed a decision granting summary judgment in favor of The Texas Rangers baseball team in an action for damages brought by Lizabeth Dent. Dent was struck by a foul ball while attending a game at Ranger Stadium in August 1984. The court stated that a stadium owner has a duty to provide an adequate number of screened seats for those individuals wishing to sit behind a screen, and that the Texas Rangers had provided such screened seating. Dent's argument that the stadium owner had the additional duty of informing spectators of the availability of screened seats was rejected.

Dent v. The Texas Rangers, Ltd., 764 S.W.2d 345 (Tex.App. 1989) [ELR 11:1:18]

Torts/Photographer Injury.

An appellate court in FLorida has upheld a trial court decision pursuant to a jury verdict imposing liability on the Jacksonville Racing Association for about $150,000 and Julian Klein for about $160,000 for personal injuries suffered by Dwight Alan Harrison. Harrison was injured when a wrecker truck hit him while he was filming a friend who was participating in an automobile race at a track owned by the Association and leased to Klein. The appellate court agreed that the evidence showed that the

Association and Klein were negligent because of their own acts or acts of employees whom they directly supervised. There was substantial evidence that the pit area where Harrison was filming was dangerous and improperly supervised, and that Klein and his employees breached their duties to warn or otherwise supervise the area. Furthermore, the Association had admitted that it controlled the condition of the premises, including an unmarked road in the pit area, and the lack of warning signs. Jacksonville Racing Association, Inc. v. Harrison, 530 S.2d 1001 (Fla.App. 1988) [ELR 11:1:18]

IN THE NEWS

Los Angeles radio station KABC obtains injunction barring KFI from using "Talk Radio" slogan in conjunction with KFI's call letters

Los Angeles radio station KFI-AM may not use the slogan "Talk Radio" in conjunction with the station's call letters, a Federal District Court has ruled. Judge Richard A. Gadbois, in granting a preliminary injunction to KABC-AM, noted that KABC had used the term "Talk Radio" for about 17 years to describe its program format, and that KFI's use of the slogan might confuse listeners. However, the court stated that the injunction does not extend to KFI's use of the slogan itself, apart from the station's call letters, to describe the all-talk format. [June 1989] [ELR 11:1:19]

Recording Industry Association anti-piracy update

The Recording Industry Association of America, Inc. has announced year-end figures with respect to the association's anti-piracy activities during 1988 (see ELR 10:4:17 for a report on anti-piracy efforts during the first half of 1988). The seizure of counterfeit cassettes increased from about 314,000 in 1987 to about 910,000 in 1988, and the seizure of counterfeit labels increased from about 2 million in 1987 to over 7.6 million in 1988. Year-end figures also showed increases in the RIAA's seizure of counterfeit/pirate cassettes, pirate video cassettes, audio/video master tapes, bootleg cassettes, and bootleg video cassettes. Fifteen bootleg CDs, a new category, were seized. The RIAA also confiscated a variety of manufacturing equipment.

According to the RIAA, illicit product seized in California during 1988 accounted for fifty percent of all illicit product seized throughout the United States. The largest seizure ever of alleged counterfeit cassettes took place in the greater Los Angeles area in October 1988, with the recovery, among other items, of 217,000 alleged counterfeit cassettes.

The RIAA also participated in an increased number of civil actions and investigations, and in criminal proceedings resulting in prison sentences for piracy offenses and the payment of restitution to the RIAA on behalf of victim member companies.

In October 1988, Congress, acting largely in response to the association's lobbying efforts, extended the Record Rental Act for eight more years. [June 1989] [ELR 11:1:19]

Virginia increases penalties for piracy of sound recordings

Virginia has adopted legislation, effective July 1, 1989, which will increase the penalties for the crimes of piracy, counterfeiting and bootlegging of sound recordings. Virginia's statute is similar to legislation enacted in California (ELR 10:8:16) in providing for a graduated system of penalties, taking into account the number of recordings involved. Under the Virginia statute, the piracy of pre- 1972 sound recordings or bootlegging may result in a three year prison sentence and $100,000 in fines. A similar penalty may be imposed for parties deceiving consumers by not stating, on the cover or jacket of a recording, the proper name and address of the manufacturer of the work. [June 1989] [ELR 11:1:19]

Unauthorized importer of compact discs agrees to pay $125,000 to record companies to settle lawsuit, and to stop importing and distributing activities

Several major record companies have settled an action filed in the Federal District Court in New Jersey alleging that All Titles Compact Disc, Inc. and its affiliated retailer, Compact Disc World, Inc., engaged in the unauthorized importation and distribution of compact discs. All Titles agreed to pay $125,000 to the record companies and to cease importing and distributing compact discs which, although lawfully manufactured outside the United States, were imported into the country without the consent of the owners of the copyrights or exclusive United States distribution rights in the works. The compact discs in issue included albums by Tracy Chapman, Bryan Adams, the Eurythmics, INXS, Michael McDonald and David Lee Roth. [June 1989] [ELR 11:1:19]

Federal Communications Commission repeals network affiliation rule and begins inquiry on licensee transfer of control

The Federal Communications Commission has voted to repeal a rule which had restricted the term of network affiliation contracts to two years. The Commission apparently anticipates that allowing a longer contract term will increase the financial stability of the networks, and will encourage media diversity by allowing new networks to attract capital.

In a separate proceeding, the Commission began an inquiry into how to identify transfers of control involving nonstock groups. For membership organizations and governmental licensees, the Commission has proposed to treat changes in a licensee's board of directors in the same manner as changes in the boards of directors of corporations. Thus, changes in the majority of the board occurring at one time or within a short period of time might be considered a transfer of control and would require the prior consent of the Commission. Changes in self-perpetuating boards would be treated similarly. [June 1989] [ELR 11:1:20]

Canadian record companies will increase royalty payments to songwriters and music publishers

Canada's major record companies have agreed to increase the royalty rate paid to songwriters and music publishers from two cents to five and 1/4 cents for each album sold. Royalty payments from the sale of albums containing a writer's work will be divided equally between the songwriter and his/her publisher. The agreement was made retroactive to October 1988 and terminates in September 1990. [June 1989] [ELR 11:1:20]

DEPARTMENTS

In the Law Reviews:

RICO vs. Dealers in Obscene Matter: The First Amendment Battle, 22 Columbia Journal of Law and Social Problems 71 (1988)

Colors in Conflicts: Moral Rights and the Foreign Exploitation of Colorized U.S. Motion Pictures by Jane C. Ginsburg, 36 Journal of the Copyright Society of the USA 81 (1988)

Oh Say Can You See: A Broadcast Network for the Audience by Ralph Nader and Claire Riley, 5 The Journal of Law and Politics 1 (1988)

Hustler Magazine v. Falwell and the Role of the First Amendment by R. George Wright, 19 Cumberland Law Review (1988)

Computer/Law Journal, Volume 8, University of Southern California Law Center, has been published with the following articles:

Regulating the Media's Coverage of Terrorist Activities by Kafin Anderson Moffitt, 8 Computer/Law Journal (1988)

Cable TV User Taxes: A First Amendment Challenge by Carlos Victor Yguico, 8 Computer/Law Journal (1988)

Regulation of Music Videos: Should the FCC "Beat It?" by Aloma H. Park, 8 Computer/Law Journal (1988)

Challenging Cable Television Exclusive Franchise Agreements: Has "State Action" Immunity Gone Too Far? by Mark T. Kawa, 8 Computer/Law Journal (1988)

Is the NFL an Illegal Monopoly? by John A. Gray and Stephen J.K. Walters, 66 University of Detroit Law Review 5 (1988)

The Media and a Public Faith by Quentin J. Schultze, 65 University of Detroit Law Review 619 (1988)

Copyright, Compilations, and Public Policy: Lingering Issues after the West Publishing-Mead Data Central

Settlement by Cary E. Donham, 64 Chicago-Kent Law Review 375 (1988)

Disc, DAT and Fair Use: Time to Reconsider? by Therese A. Ehlke, 25 California Western Law Review 97 (1988-89)

A Comparative Analysis of Name and Likeness Rights in the United States and England, 18 Golden Gate University Law Review 301 (1988)

From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern by Stephen Allred, 64 Indiana Law Journal 83 (1988-89)

Art and Law, At Home and Abroad by Douglass G. Boshkoff, 64 Indiana Law Journal 83 (1988-89)

A Tax on Advertising: First Amendment and Commerce Clause Implications, 63 New York University Law Review 810 (1988)

Closing the Book on the Public Lending Right, 63 New York University Law Review 878 (1988)

The Libel Tort Today by Randall P. Bezanson, 45 Washington and Lee Law Review 535 (1988)

The Evolving Doctrine of Right of Publicity: Judicial Protection of Celebrity's Pecuniary Interest from Commercial Exploitation of His or Her Identity and Theatrical Style by Addison E. Dewey, 22 Creighton Law Review 39 (1988-89)

"Unbundling" the Channels: A Functional Approach to Cable TV Legal Analysis by Don R. LeDuc, 41 Federal Communications Law Journal 1 (1988)

A Solution to Indecency on the Airwaves by Helene T. Schrier, 41 Federal Communications Law Journal 69 (1988)

Digital Audio Tape Machines: New Technology or Further Erosion of Copyright Protection? by Todd Page, 77 Kentucky Law Journal 441 (1988-89)

Pornography: The Symbolic Politics of Fantasy by John McConahay, 51 Law and Contemporary Problems, Durham, North Carolina 31 (1988)

Porno-Symbolism: A Response to Professor McConahay by Katharine T. Bartlett, 51 Law and Contemporary Problems, Durham, North Carolina 71 (1988)

A Trade Policy Goal for the 1990s: Improving the Adequacy and Effectiveness of Intellectual Property Protection in Foreign Countries by David 1. Wilson, 1 The Transnational Lawyer 421 (1988)

Cardozo Arts & Entertainment Law Journal has published Volume 7 with the following articles:

Copyright in the People's Republic of China: A Foreigner's Guide by Joseph T. Simone, 7 Cardozo Arts & Entertainment Law Journal 1 (1988)

Communications Policy-Making at the FCC: Past Practices, Future Direction by Stuart N. Brotman, 7 Cardozo Arts & Entertainment Law Journal 55 (1988)

Retroactive Protection of Visual Arts Published Without a Copyright Notice: A Proposal by Martin Bressler and Robert L. Seigel, 7 Cardozo Arts & Entertainment Law Journal 115 (1988)

The Snowballing Cost of Skiing: Who Should Bear the Risk? by Diane Bernstein, 7 Cardozo Arts & Entertainment Law Journal 153 (1988)

Pope v. Illinois: The Reasonable Person as the Supreme Court's Latest Arbiter of Obscenity by Penny E. Paul, 7 Cardozo Arts & Entertainment Law Journal 185 (1988)

Essentials of Amateur Sports Law by Glenn M. Wong, book review by Robert M. Jarvis, 7 Cardozo Arts & Entertainment Law Journal 215 (1988)

The Obscenity Exception: Abusing the First Amendment by Simon Roberts, 10 Cardozo Law Review 677 (1989)

Does the National Collegiate Athletic Association's Drug Testing Program Test Positive If It Is Subjected to Constitutional Scrutiny?, 37 Drake Law Review 83 (1987-88)

Repeal of the Fairness Doctrine: Prologue to a Farce, 41 Rutgers Law Review 663 (1989)

When Good Preferences Go Bad: A Critical Analysis of the Anti-Tax Shelter Provisions of the Tax Reform Act of 1986 by Lawrence Zelenak, 67 Texas Law Review 499 (1989)

Why Have Anti-Tax Shelter Legislation? A Response to Professor Zelenak by Calvin H. Johnson, 67 Texas Law Review 591 (1989)

Sports, Antitrust, and the Single Entity Theory by Lee Goldman, 63 Tulane Law Review 751 (1989)

Fundamental Concepts in Japanese and American Copyright Law by Dennis S. Karjala and Keiji Sugiyama, 36 The American Journal of Comparative Law 613 (1988) (published by Boalt Hall, University of California, Berkeley, CA 94720)

The Case of the Sarah: A Testing Ground for the Regulation of Radio Piracy in the United States, 12 Fordham International Law Journal 67 (1988)

Returning Fairness to the Broadcast Media by Milda K. Hedblom, 7 Law and Inequality 29 (1988) (published by the University of Minnesota Law School)

Student-Athletes, Athlete Agents and Five Year Eligibility: An Environment of Contractual Interference, Trade Restraint and High-Stake Payments by Marianne Jennings and Lynn Zioiko, 66 University of Detroit Law Review 179 (1989)

Copyright Protection of Fictional Characters in Japan: The Popeye Case-It's Not Just a Mick[e]y Mouse Affair, 7 Wisconsin International Law Journal (1988)

Stopping the End-Run by Public Plaintiffs: Falwell and the Refortification of Defamation Law's Constitutional Aspects by Arlen W. Langvardt, 26 American Business Law Journal 665 (1989) (American Business Law Journal, Gettysburg, PA 17325)

Media Malpractice: The Legal Risks of Voluntary Social Responsibility in Mass Communication by Robert E. Drechsel, 27 Duquesne Law Review 237 (1989)

Journalistic Malpractice: The Need for a Professional Standard of Care in Defamation Cases by Hugh J. O'Halloran, 72 Marquette Law Review 63 (1988)

Reconciling the First Amendment with the Individual's Reputation: The Declaratory Judgment as an Option for Libel Suits by Geoffrey C. Cook, 93 Dickinson Law Review 265 (1989)

International Sports Competition: The America's Cup 1988-The Legal Battle, 30 Harvard International Law Journal 264 (1989)

The Effects of Flexible Specialization on Industrial Politics and the Labor Market: The Motion Picture Industry by Susan Christopherson and Michael Storper, 42 Industrial and Labor Relations Review 331 (1989)

Communications Technology: New Challenges to Privacy by Fred W. Weingarten, 21 The John Marshall Law Review 735 (1988)

Privacy, Pornography, and the Supreme Court by Richard F. Hixson, 21 The John Marshall Law Review 755 (1988)

Celebrity Endorsement: Recognition of a Duty by Jay S. Kogan, 21 The John Marshall Law Review 47 (1987)

Newsgathering by Satellites: A New Challenge to International and National Law at the Dawn of the Twenty-first Century by Luc Frieden, Fall Stanford Journal of International Law 103 (1988)

Taxation of Intellectual Property in International Transactions by John J. Cross, III, 8 Virginia Tax Review 553 (1989)

Comment, Hastings Journal Communications and Entertainment Law Journal, has published Volume 11, Number 2 with the following articles:

The Sports Lawyer's Duty to Avoid Differing Interests: A Practical Guide to Responsible Representation by

Robert E. Fraley and F. Russell Harwell, 11 Comm/Ent 165 (1989)

May It Rest in Peace: Public Interest and Public Access in the Post-Fairness Doctrine Era by Richard E. Labunski, 11 Comm/Ent 219 (1989)

Alternatives to the Fairness Doctrine: Structural Limits Should Replace Content Controls by Christopher A. Hilen, 11 Comm/Ent 291 (1989)

Ideological Exclusions: A Prior Restraint Analysis by Daniel M. Torrence, 11 Comm/Ent 335 (1989)

Advertiser Liability: Soldier of Fortune Cases Take Deadly Aim at Publishers by Neil L. Shapiro and Karl Olson, 11 Comm/Ent 383 (1989)

Columbia-Volunteer Lawyers for the Arts Journal of Law & the Arts, Volume 13 has been published with the following articles:

One Hundred and Two Years Later: The U.S. Joins the Berne Convention by Jane C. Ginsburg and John M. Kernochan, 13 Columbia-VLA Journal of Law & the Arts 1 (1988)

The Register's Second Report: An Update on Library Photocopying by Ralph Oman, 13 Columbia-VLA Journal of Law & the Arts 39 (1988)

Public Lending Right-The UK Experience by Gerald Dworkin, 13 Columbia-VLA Journal of Law & the Arts 49 (1988)

Reflections on the State of American Software Copyright Law and the Perils of Teaching It by Pamela Samuelson, 13 Columbia-VLA Journal of Law & the Arts 61 (1988)

Direct Broadcasting by Satellite(DBS): The Implications for Copyright by Michael J. Freegard, 13 Columbia-VLA Journal of Law & the Arts 77 (1988)

Culture Vultures: Artistic Appropriation and Intellectual Property Law by John Carlin, 13 Columbia-VLA Journal of Law & the Arts 103 (1988)

Amicus Brief: Community for Creative Non-Violence vs. James Earl Reid, 13 Columbia-VLA Journal of Law & the Arts 145 (1988)

Television Docudramas: Is the Titillation Worth the Risk? by Suzanne Cooperstein, 20 Rutgers Law Journal 461 (1989)
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