LEGAL AFFAIRS

Tax Planning for Entertainers, Artists and Athletes: The Continued Viability of Loan-Out Corporations after Tax Reform

by Thomas N. Lawson and Bruce M. Stiglitz

Entertainment lawyers are frequently asked by their performing artist clients whether they should utilize a loan-out corporation. While entertainment lawyers cannot be expected to be tax experts, an awareness of the tax considerations related to the use of loan-out corporations is important. The purpose of this article is to provide a basic description of the historical benefits that were obtained through the use of loan-out corporations,

review the legislative and judicial changes that have reduced those benefits, and finally suggest certain reasons why loan-out corporations may still remain attractive for at least some performing artist clients.

Historical Benefits of Loan-Out Corporations

In prior years, there were significant advantages for an individual performing personal services in fields such as entertainment, arts or sports to form a corporation with which he would enter into an employment agreement to provide his exclusive services. The employment agreement would give the corporation the right to "loan-out" his services to others for a fee. There were four primary advantages that could be obtained.

1. Retirement Plan Benefits

The limits on contributions and benefits for a qualified retirement plan that was maintained by a corporation were substantially higher than those for self-employed individuals who were subject to the more limited Keogh plan requirements. Also, in the absence of a loan-out corporation, in many instances the individual would have been considered an employee of the entity using his services and would not have been eligible for any kind of retirement plan benefits other than relatively modest IRA contributions.

2. Fiscal Year

A newly formed loan-out corporation could elect any month end as its fiscal year for federal income tax purposes. By selecting a year that ended early in the calendar year (such as January or February), the income received by the corporation during a year could be

retained at the corporate level past the close of the individual's taxable year on December 31. By bonusing out the income to the individual prior to the corporation's year end in January or February, it could avoid having income taxed at the corporate level, while at the same time causing the bulk of its income to be taxed one year later to the individual.

3. Other Fringe Benefits

The corporation could deduct the cost of health insurance, whereas a self-employed individual usually could not. A corporation could even provide an uninsured medical reimbursement plan, the expenses of which would be deductible. A corporation could provide $50,000 of group term life insurance for its employee-shareholder upon which it could deduct the premiums and the shareholder did not have to include any amount

in his taxable income. None of these benefits were available in the case of self-employed individuals.

4. Corporate Tax Rates

For those corporations that could accumulate income at the corporate level without personal holding company concerns, the corporate tax rates have generally been lower than the individual tax rates, particularly on the first $100,000 of taxable income.

Legislative Changes Substantially Reducing the Benefit of Loan-Out Corporations

During the period beginning in 1982 with the Tax Equity and Fiscal Responsibility Act, and continuing through the Tax Reform Act of 1986, there have been a series of legislative changes that have substantially

reduced the benefits available through loan-out corporations. There were eight major changes.

1. Retirement Plan Limits

The maximum contributions and/or benefits that can be provided under a qualified retirement plan have been drastically curtailed. In 1982, a defined benefit pension plan could provide an annual annuity benefit of $136,425 per year. This benefit could commence in pay status at age 55. Currently, the maximum annual annuity benefit is $90,000 which cannot begin until age 65. [Section 415 of the Internal Revenue Code of 1986 ("IRC").] If benefits commence prior to age 65, full actuarial adjustment is required. The actuarial equivalent of this benefit commencing at age 55 is $42,400. (Further, Keogh plans now have these same limits.)

2. Retirement Plan Excise Taxes

A variety of excise taxes have been enacted to discourage the abuse of qualified plans.

Excess Distributions. A 15% excise tax is imposed on excess distributions from all qualified plans and IRA'S. [IRC Sec. 4980A.) In general, the tax applies to distributions in excess of $112,500 per year (adjusted for inflation) or lump sum distributions in excess of $562,500. Benefits that were accrued by August of 1986 are grandfathered; however, careful planning is required in order to take maximum advantage of the grandfather provisions.

Estate Excise Tax. A 15% excise tax on excess accumulations is imposed on the plan at the time of a participant's death in order to discourage people from leaving overfunded plans in existence until the time of their death. [IRC Sec. 498OA(d).]

Premature Distributions. A 10% penalty tax is applicable to any amounts distributed prior to age 59 1/2 unless the distributions follow the individual's death or a complete disability.

Reversions. A 15% excise tax is imposed upon the reversion of plan assets to the employer. [IRC Sec. 4980.]

3. Participant Loans

Loans from qualified retirement plans have been limited to $50,000. They must be paid back within 5 years unless they are for the purpose of purchasing a principal residence. [IRC Sec. 72(p).] Additionally, in the case of loans to key employees, interest is not deductible notwithstanding the use of the proceeds. [IRC Sec. 72(p)(3).]

4. IRC Section 269A

Enacted in 1982, Section 269A is designed to limit the benefits available to the "captive" loan-out corporation.

Section 269A applies where substantially all of the personal service corporation's services are performed for or on behalf of one other entity and the principal purpose for the corporation is the avoidance or evasion of federal income tax by securing for the employee-owner a significant tax benefit that would otherwise not be available.

Section 269A will not apply to the loan-out corporation of a performer who performs services for a variety of producers or other users of his talent. However, it could apply to a television actor whose only employment is in a particular television series. It could also apply to an athlete whose only employer is a team (if the athlete was otherwise permitted to use a loan-out corporation).

A safe harbor exists in Section 1.269A-I(c) of the proposed regulations. This section provides that a personal

service corporation will not be subject to Section 269A if no employee- owner's tax liability is reduced during the 12 month period by more than the lesser of: (i) $2,500, or (ii) 10% of what the employee- owner's tax liability would have been if he had not worked through the corporation. The safe harbor will be of little benefit since in most cases tax reduction is the very reason for using the loan-out corporation in the first place.

5. Fringe Benefit Restrictions

A stringent set of anti-discrimination rules has been applied to the provision of fringe benefits by IRC Section 89. An employer can no longer provide even health insurance coverage on a basis that discriminates in favor of highly compensated individuals.

Loan-out corporations may benefit from a small employer transition rule. If an employer employs less than

10 employees, for the 1989 plan year, employees who work less than 35 hours per week are not taken into account for purposes of non-discrimination testing. For the 1990 plan year, employees who work less than 25 hours per week are not taken into account. In 1991 even small employers must begin to count employees under the general rule whereby employees who work 171/2 or more hours per week must be taken into account for purpose of non-discrimination testing.

Section 89 has proved to be extremely controversial and its future is very much in question. The Internal Revenue Service has been bombarded by requests from major employers to suspend the enforcement of the provisions.

6. Fiscal Year Restrictions

The Tax Reform Act of 1986 enacted Internal Revenue Code Section 441(i) which requires a personal service corporation to adopt a calendar year. A limited exception to this provision was enacted in 1987 that will be discussed in a later section of this article. The required use of a calendar year eliminates the previous opportunities for tax deferral.

A personal service corporation is generally defined as a C corporation the principal activity of which during the testing period (i.e., the prior taxable year) is the performance of personal services, and during the testing period the services are substantially performed by 10% or more shareholders.

In proposed regulations issued in December of 1987, the Treasury surprised everyone land came out with a relatively narrow definition of personal services for purposes of determining the application of the calendar year

rules. This will be discussed in more detail subsequently.

7. Requirement of Accrual Accounting

C corporations are now required to use the accrual method of accounting. [IRC Sec. 448.] Two exceptions exist that may be useful for some loan-out corporations.

If a corporation's average gross receipts for the three year period ending prior to the cur-rent taxable year do not exceed $5 million, the corporation may use the cash method of accounting. However, this test must be satisfied for all taxable years beginning after December 31, 1985. [IRC Sec. 448(b)(3).]

Certain qualified personal service corporations may also use the cash method of accounting. [IRC Sec. 448(b)(2).] However, those personal service corporations that qualify to use the cash method are the same

personal service corporations that are required to use a calendar year.

8. Corporate Tax Rates

Personal service corporations are now denied the benefit of graduated rates and are taxed at 34% of all of their taxable income. [IRC Sec. 11 (b)(2).]

IRC Attacks on Loan-Out Corporations

Over the years, the IRS has advanced a number of theories to attack the use of loan-out corporations. Three theories are most common.

1. Loan-Outs are a "Sham"

The IRS has often raised the argument that a personal service corporation is a sham and should be totally disregarded. This argument has generally been rejected by the courts. [See, e.g., Silvano Achiro, 77 T.C. 881 (1981); Daniel F. Keller, 77 T.C. 1041 (1981); and Bernard L. Pacella, 78 T.C. 604 (1982).]

In abusive cases, however, the sham argument may prevail. For example, in Louis G. Horne, III, 45 T.C.M. 413 (1982), the Tax Court ignored the separate existence of a subchapter S corporation owned by the children of two doctors whose theoretical purpose was to provide x-ray services for the doctors' corporation.

2. Assignment of Income Doctrine

The Internal Revenue Service has had more success with the assignment of income doctrine, particularly

where there is a legal or other restriction against providing services in corporate form.

For example, in Elvan Jones, 64 T.C. 1066 (1975), a court reporter attempted to utilize a loan-out corporation. However, state law prohibited a corporation from rendering the services in question. The court held that the individual had attempted to assign income he earned to the corporation.

Of particular interest in the sports field is Charles Johnson, 78 T.C. 882 (1982), aff'd, 734 F.2d 20 (9th Cir. 1984). Johnson was a professional basketball player. The league rules of the National Basketball Association required a player to personally enter into a player contract with the team. Johnson attempted to assign payments due him from the team to a Panamanian corporation. The court held this to be an impermissible assignment of income.

In a ruling dealing with withholding tax issues, the IRS treated hockey players as employees of their team and not of their loan- out corporations. [PLR 8625003. See also, PLR 8624007.]

3. Section 482 Reallocation

Section 482 allows the IRS to reallocate income and expenses to reflect an arms-length standard in the case of two or more trades or businesses under common control. There has been disagreement in the courts as to whether Section 482 is applicable in the case of income received by the shareholder-employee from his wholly owned corporation. The Tax Court ultimately concluded, in the Foglesong case, that Section 482 can be applicable in this context. [Foglesong, 77 T.C. 1102 (1981); accord, Haeri, TCM 1989-20.]

However, in reversing Foglesong and remanding it to the Tax Court, the Seventh Circuit held that Section 482 does not apply where a shareholder employee works exclusively for his own corporation. [691 F.2d 848 (7th Cir. 1982).] The Seventh Circuit did suggest that Section 482 may be applicable to an individual who does not work exclusively for his personal service corporation. In that case, the "second trade or business" requisite for the application of Section 482 could be present and reallocation from the corporation to the individual could be appropriate.

This raises a concern where individuals are not able to render all of their services through a loan-out corporation. For example, an athlete may be precluded from receiving his team salary through a loan-out corporation by league rules, but may nevertheless use a loan-out corporation for personal appearances and endorsements. Similarly, an actor may use his loan-out corporation for

domestic performances only and not use it for foreign performances, at least in countries where withholding taxes are applicable, due to the inability to utilize the resulting foreign tax credit in the loan-out corporation.

Even if Section 482 is theoretically applicable, it should be avoidable by not accumulating any income at the corporate level. If all of the corporation's income is used to pay business expenses, salary and bonus for the employee and make retirement plan contributions, the individual has received from the corporation essentially the same amount he would have received without the corporation. In this case, the Tax Court would not apply Section 482 to make a further allocation. [See, Keller, Pacella, and Foglesong, cited above.]

Continuing Uses for Loan-Out Corporations

It is apparent that the advantages that could be obtained from loan-out corporations have been drastically diminished. Nevertheless, certain tax advantages may remain, although much less significant than in the past.

1. Use of Fiscal Year

Certain opportunities still exist, although more limited than before, to defer income through the use of a fiscal year.

Section 444 Election. A personal service corporation that is required by Section 441(i) to use the calendar year may nevertheless elect under IRC Section 444 to use a fiscal year that ends with the month of September, October or November. The cost of making the election is that the personal service corporation becomes subject to the minimum distribution requirements of IRC Section 280H.

To satisfy the minimum distribution requirements, the amount of salary, bonus and other payments to the employee-shareholder made during the deferral period of the taxable year must equal or exceed the portion of the prior years' salary and other payments to the employee-shareholder that is allocable to the deferral period of that year determined by pro- rating the prior year's salary based on a number of months in the deferral period of the year to the total number of months in the year. The deferral period is the period between the beginning of the fiscal year and the end of the calendar year within the fiscal year. If a corporation uses a September 30 fiscal year, its deferral period is October 1 through December 31, or three months. Alternatively, the corporation can pay out by the end of the deferral period 95% of its taxable income (determined without regard to payments to the employee-owner) for the deferral period of the current year.

These rules would generally allow a corporation with a September 30 fiscal year to defer 25% of the amount by which its earnings have increased over the prior year into the following year. More benefit may be obtained if the corporation's income can be bunched into October, November or December. For example, an athlete may negotiate in his contract for substantial lump sum payments to be paid during that portion of the year. To illustrate, suppose that a baseball player is paid $1 million per year and receives his entire salary on December 15. If he forms a loan-out corporation before entering into the contract and the corporation elects a November fiscal year, significant deferral can be achieved. In the first year, no payment of salary is required by December 31 since there is no prior year's salary. In the second year, only 1/12 of the $1 million needs to be paid as salary by December 31.

Corporations that are not Personal Service Corporations. C corporations that are not personal service corporations may continue to use any month end as their fiscal year. Due to a narrow interpretation of the meaning of personal services by the Internal Revenue Service, many corporations that would be thought to be personal service corporations are not.

Regulations issued under Section 441(i) refer to regulations issued under IRC Section 448 for the definition of personal services. These regulations provide that personal services include only services in the fields of health, law, engineering, architecture, accounting, actuarial science, Perform arts or consulting. [Temp. Reg. Sec. 1.448-1T(d)(4)(i); emphasis added.] The definition of "performing arts" means the provision of services by actors, actresses, singers, musicians, entertainers and similar artists in their capacity as such. The performance of services in the field of the performing arts does not

include the provision of services by persons who themselves are not performing artists- such as persons who may manage or promote such artists, and other persons in a trade or business that relates to the performing arts. The term does not include broadcast personnel, and significantly, it does not include the provision of services by athletes. [Temp. Reg. Sec. 1.448- IT(d)(4)(iii).]

Thus, directors, producers and writers can have loan-out corporations with any fiscal year. And if an athlete is permitted by applicable league rules or otherwise to use a loan-out corporation, his loan-out corporation can still use any fiscal year. However, if an athlete cannot use a loan-out with his team, but forms a loan-out corporation to make commercials, query whether those services would be considered to be services rendered as an athlete or as a performing artist?

Accrual Accounting Rule. Any loan-out corporation that is not considered a personal services corporation

and is thereby permitted to use any fiscal year (e.g., a corporation used by an athlete, producer, director or writer) is subject to the accrual accounting rule. [IRC Sec. 448.] Unless it qualifies for the $5 million gross receipts exception (discussed above), it will be required to use the accrual method of accounting. While this exception will exclude many loan-out corporations, a number of producers and directors and athletes with significant commercials, appearances and endorsements make substantially more than $5 million per year.

2. Fringe Benefits

Even though provision of fringe benefits by a loan-out corporation is subject to broad anti- discrimination rules, there are still a number of items such as medical expenses, medical insurance, life insurance and disability insurance the cost of which can be deducted by a

corporation but could not be deducted by a self- employed individual.

3. Limitation on Deduction of Miscellaneous Expenses

The Tax Reform Act of 1986 imposed a 2% of adjusted gross income floor on the deduction of miscellaneous itemized deductions. [IRC Sec. 67.] Miscellaneous itemized deductions would include such things as unreimbursed employee business expenses, employee auto expenses, and the like. The Secretary of the Treasury is directed to prescribe regulations to prohibit the indirect deduction of these items through the use of pass through entities such as partnerships or S corporations. [IRC Sec. 67(c).] However, no such limitation applies to the deduction of these items by C corporations. Thus, a C corporation can deduct things such such auto expenses and entertainment expenses that may

be subject to limitation if they were deducted directly on the individual's tax return.

4. Use to Avoid Employee Status

Many producers and studios will routinely treat individual performers as employees and withhold income taxes, FICA, and corresponding state payroll taxes. However, they will recognize a domestic loan-out corporation and pay it the gross contract amount without any withholding. This alone may be reason enough to use a loan- out corporation.

5. Foreign Performances

If it is determined that a loan-out corporation should be used, care must be taken with regard to performances in foreign countries. The loan-out corporation should not

be used for a performance in any foreign country where withholding taxes will be deducted from the amount paid to the loan-out corporation.

Increasingly, withholding taxes will become an issue as many countries are now including " artists and athletes" clauses in their income tax treaties that will require withholding on payments made to a corporation for the services of an artist or athlete. Since a loan-out corporation typically zeroes out all of its income, it rarely will have any tax liability to enable it to take advantage of the foreign tax credit that may result from the withholding.

To avoid this result, employment agreements with loan-out corporations sometimes are drafted to provide that the agreement is only applicable to the performer's services within the United States. This however raises the risk that Section 482 could become applicable based

on the Seventh Circuit's opinion in Foglesong (described above).

Should a Loan-Out Corporation be an S Corporation?

Assuming it is determined that a loan-out corporation is advantageous, consideration should be given to whether it should be an S corporation. There are advantages and disadvantages of doing so.

1. Fiscal Year Limitation

If the loan-out corporation would have the flexibility to select any fiscal year as a C corporation (as would a corporation used by a producer, director, writer or athlete), it will give up that flexibility by becoming an S corporation. As such, it will be limited to fiscal years ending in September, October, November or December. [IRC Sec. 444.]

2. Miscellaneous Itemized Deductions

Whereas a C corporation is not subject to the 2% floor imposed by IRC Section 67 on itemized deductions, an S corporation probably will be, at least as to certain types of expenses.

3. Pass Through of Foreign Tax Credit

If a loan-out corporation is an S corporation, any foreign tax credit generated from withholding in foreign countries will be passed through to the individual shareholder where it will more likely be useable. If the loan-out corporation is an S corporation, a single corporation can be used for both domestic and foreign performances thereby minimizing the risk that Section 482 could be applicable under the analysis of the Foglesong case (described above).

4. Zeroing Out after Death

An S corporation may provide a significant advantage after the death of its shareholder employee. If the corporation has profit participations or royalty contracts, significant income may continue to be generated after the employee's death. If a C corporation is used, unless the C corporation has an employment agreement in effect that provides for continuing payments after the employee's death, the corporation will not be able to pay these amounts out in a deductible fashion. Even with such an agreement, there may be a question of whether the amounts represent reasonable compensation for services performed before the employee's death.

If the corporation is an S corporation, amounts that it receives after the death of the employee will simply flow through to the shareholder. However, care must be taken in crafting the individuals' estate plan so that the shares

of the S corporation are not left to a non-qualifying shareholder.

Impact of General Utilities Repeal

The repeal of the General Utilities doctrine makes it virtually impossible to extract appreciated assets from a corporation without incurring both a corporate and shareholder level tax. It has always been the conventional wisdom that loan-out corporations should not accumulate appreciating assets. However, in the past if they did, the corporation could generally be liquidated using IRC Section 331 and/or 337 without recognizing the gain inherent in those assets at the corporate level.

Following the repeal of the General Utilities doctrine, it is critical that investments or other assets that may appreciate in value not be acquired in loan-out corporations, as there will be no way to remove those assets

from the corporation without incurring a corporate level tax.

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RECENT CASES

"Amityville Horror" family entitled to trial on unfair competition claim against producer and distributor of "Amityville" films

George and Kathleen Lutz adequately pleaded a cause of action for unfair competition in their fourth amended complaint against Dino de Laurentiis and Orion Pictures, the producer and distributor of the films

"Amityville II: The Session," and Amityville 3-D," a California appellate court has ruled.

The Amityville saga, as described by Judge Lynn Compton, began in 1974 when Ronald DeFeo murdered his parents and four siblings in their home in Amityville, New York; DeFeo claimed that he was "possessed by demons." In 1975, the Lutzes moved into the DeFeo house, and allegedly experienced various psychic phenomena. After a 28 day stay, the Lutzes moved out of the house. They then hired Jay Anson to write a book about their experiences; the book, entitled "The Amityville Horror," became a bestseller.

The Lutzes and Anson entered a contract with Professional Films, Inc., in which they granted Professional Films the right to produce a film based on the book; the production company also received the right to use the Lutzes' name in publicizing the film. The contract

reserved to the Lutzes the right to make sequels based upon their post-Amityville experiences.

Professional Films assigned its rights to American International Pictures, and in 1979 American International released the film entitled "The Amityville Horror."

In 1980, the Lutzes hired John Jones and Paul Kimatian to write a book about the post- Amityville years, and also granted the authors an option to produce a film about those events. Jones and Kimatian partially assigned those rights to Gotham Press Publishing, Inc. "The Amityville Horror II," written by Jones, was published in 1981.

In 1982, Orion Productions, the successor in interest to Professional Films, released a film entitled "Amityville II: The Session." The film depicted, in a fictionalized manner (according to the court), the events which occurred at the DeFeo house before the Lutzes moved into it. In the film's promotional advertising, Orion and

producer de Laurentiis used the phrase: "The night of February 5, 1976, George and Kathleen Lutz and their three children fled their home in Amityville, New York. They got out alive! Their living nightmare shocked audiences around the world in 'The Amityville Horror.'"

When the Lutzes filed their lawsuit, Orion and de Laurentiis modified the promotional advertising by eliminating the references t o the Lutzes and including the statement: "This film is not a sequel to 'The Amityville Horror.'"

In 1983, Orion and de Laurentiis released the film "Amityville 3-D," which portrayed totally fictitious events set in the Amityville house.

The Lutzes claimed that the Orion parties intentionally and deceptively used the word "Amityville" in each of the film titles, and used the Lutzes' name in the initial promotional campaign in 1982, in order to mislead the public into believing the two films were the anticipated

sequels to the Lutzes' story. The value of their proposed sequel was so diluted by these actions, stated the Lutzes, that they abandoned further production plans.

In finding that the Lutzes properly pleaded a cause of action for unfair competition, Judge Compton found that the question of whether words have achieved a secondary meaning can only be determined by a factual inquiry. The Orion parties, who prevailed in the trial court on a demurrer and a judgment on the pleadings, asserted that secondary meaning was unavailable as a matter of law because the word "Amityville" not only is the actual name of a town, but has been used in the titles of several works. Judge Compton rejected this argument and remanded the matter to the trial court for further proceedings.

Presiding Judge Lester Roth agreed with the court that the only cause of action available to the Lutzes was a cause of action for unfair competition. However, Judge

Roth would have found that the Lutzes could not, as a matter of law, allege a secondary meaning by claiming that the Amityville stories were identified in the public's mind as originating exclusively with them. In the absence of any precedent supporting a claim of nonexclusive secondary meaning, stated Judge Roth, the trial court properly dismissed the action.

Judge Roth found it significant that the dispute involved literary works, citing "the policy favoring freedom of artistic expression.... again commented that exclusivity is the " cornerstone" of the principle of secondary meaning; and noted that whatever secondary meaning "Amityville" has achieved "was not the exclusive property of [the Lutzes]" (emphasis by Judge Roth). The Lutzes did not significantly participate in the making of "The Amityville Horror," but it was the film, stated Judge Roth, that substantially contributed to the public's association of Amityville with horror stories.

The Lutzes' claim that they would prove at trial that "The Amityville Horror" was associated in the public's mind with the names George and Kathleen Lutz was described as "ludicrous."

According to Judge Roth, the Orion parties had as much right to the haunted house stories as the Lutzes, having paid for an interest in the copyright of Anson's book, and it was " astonishing that the Lutzes should sell exclusive and perpetual motion picture and television rights to the first book ... to a picture company, then claim that any proprietary rights in a resulting secondary meaning of that title still belong to them exclusively." Again, the only right reserved by the Lutzes was the right to make theatrical and television sequels depicting the family in subsequent events.

It was further noted that the public's association of Amityville with horror derived, in large part, from the well-publicized tragic mass murder in the Amityville

house and the house's purported " supernatural legacy." For Judge Roth, " a group of individuals who own two published books cannot claim to have a monopoly on the commercial exploitation of widely publicized events of public interest; such a claim is beyond the rights given them by either the copyright law or the law of unfair competition."

By conveying all motion picture and television rights "exclusively and in perpetuity" to Professional Films, the Lutzes and Anson no longer could claim that they remained the exclusive owners of the rights to exploit any secondary meaning "theretofore or thereafter attaching to the name Amityville." Given the careful and narrow contractual definition of the sequel rights reserved by the Lutzes, Judge Roth found it hard to understand the Lutzes' claim that they implicitly reserved the right to prevent Professional Films from making any sequels without their consent. The second and third films were

not about the Lutzes, noted Judge Roth, again commenting that the couple had no monopoly on the creation of horror stories set in the Amityville house.

The theory that the titles of the second and third films were mislabeled as to source also would not provide the Lutzes with any relief, stated Judge Roth, for evaluating the harm suffered by the couple would be speculative - any supposed "evidence" (quotes by Judge Roth) of the proportion of the profits attributable to the titling of the second and third films would be "mere guesswork." And the Lutzes would not be entitled to recover compensation for any depreciation of the value of their own plans to make a film based on the second book, for there would be "no way for a factfinder to determine, to even the slightest degree of probability, what profits, if any, such a picture might have produced."

Judge Roth concluded by observing that any films produced after "The Amityville Horror," no matter what

they were named, "were in fact sequels to the first picture, that is, pictures on a related subject which followed the first;" that the Lutzes' case was "nothing more than an unjustified attempt ... to arrogate unto themselves the right to commercially exploit the name of the town of Amityville to the exclusion of the literary, artistic, and commercial worlds;" and that the relevant facts were undisputed and so extreme that no reasonable trier of fact would find that secondary meaning existed.

Lutz v. de Laurentiis, Case No. B029439 (Cal.Ct.App., June 29, 1989) [ELR 11:3:9]

Warner Communications permitted to enter joint venture with Paramount Pictures to acquire theater chain, but Warner must hold its interest separate and submit to court review in late 1989

In a decision issued in late 1988, but only recently published, a Federal District Court in New York granted, with significant restrictions, Warner Bros.' request for an order modifying a 1951 antitrust consent judgment that barred Warner and other studios from owning or operating motion picture theaters.

Warner proposed to enter a joint venture with Paramount Pictures to own Cinamerica Theatres, the owner and operator of over 100 theaters, including the Mann chain. The Justice Department, after a year-long investigation, declared that it would not challenge Warner's acquisition of a fifty percent interest in Cinamerica. However, Judge Edmund J. Palmieri found that the court was not presented with an adequate factual record on which to base a long range decision, and therefore granted Warner's request on the express conditions that Warner continue to "hold separate" any interest in

Cinamerica, and that Warner and Cinamerica's bidding and licensing practices be reviewed by the court at the end of 1989.

Judge Palmieri reviewed the judgments entered on consent by several film studios after the studios were found liable, in Unites States v. Paramount Pictures, Inc., 66 F.Supp. 323 (S.D.N.Y.), aff'd in part, rev'd in part and remanded, 334 U.S. 131 (1948), of restraining and monopolizing the distribution and exhibition of motion pictures in violation of sections 1 and 2 of the Sherman Act. The "heart" of the consent judgment was the provision prohibiting the studios "From licensing any feature for exhibition upon any run in any theatre in any other manner than that each license shall be offered and taken theatre by theatre, solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres or others." And the studios were prohibited from engaging in the exhibition business unless demonstrating

to the court that such activity would not unreasonably restrain competition in the distribution or exhibition of motion pictures.

Warner claimed that entering the exhibition business would allow the company to diversify against risk and to demonstrate a commitment to the film industry. But Warner did not require " sweeping and permanent" exemptions from the consent judgments, nor a "day to day hand" in the operation of Cinamerica, to achieve its business purposes, stated the court, in finding that that expansion by Warner, without supervision, would not be appropriate.

Judge Palmieri next considered whether Warner's proposed acquisition would foreclose access to film product or exhibition space. Warner argued that the acquisition would be such a small part of the national market that the potential for foreclosure was de minimis. The court pointed out that many of Cinemerica's theaters had a

substantial market share of local markets, and that the acquisition would leave many of the local markets with "sizeable percentages" of the market controlled by integrated exhibitors, and therefore expressed unwillingness to give a "final blanket approval" to Warner's participation in the joint venture. Warner thus must hold separately its interests in Cinamerica, ruled the court, for the concentration and integration of film exhibition in certain areas presented " a temptation for abuse of market power."

Cinamerica was not required to divest any of the theaters in areas such as Westwood, California or Fairfield County, Connecticut, but will continue to be subject to the injunctive restraints of the consent judgments on licensing, along with court review of the company's bidding and booking practices and any planned expansion.

The need for continuing supervision of Warner's participation in the joint venture also was warranted on the

basis of the following factors: the significant concentration in both exhibition and distribution *in the film industry; barriers to entry into the industry; and the existence of a trend toward vertical integration, along with an "apparent climate of noncompliance with the Paramount decrees and with the antitrust laws..."

Judge Palmieri concluded that Cinamerica required the protection of a "hold separate" order, and the review by the court in late 1989 of Cinamerica's expansion in the local markets in which the company operates, as well as a review of its bidding and booking practices. At that time, the court will require Warner to show why its continued ownership and operation of theaters is not anticompetitive under the consent judgments.

United States of America v. Loew's Inc., 705 F.Supp. 878 (S.D.N.Y. 1988) [ELR 11:3:10]

Stunt coordinators not covered by Screen Actors Guild agreements, rules arbitrator

In early 1989, arbitrator Edgar A. Jones, Jr. determined that stunt coordinators are not included in bargaining units covered by the Screen Actors Guild Theatrical and Television Agreements.

Stunt coordinators organize, and sometimes perform on camera, the often hazardous stunt sequences in a film. Nationally, according to the arbitrator, there are about 500 stunt performers, of whom about 70 are stunt coordinators.

Testimony in the arbitration proceeding indicated that stunt coordinators often are consulted by the director and producer of a film, both prior to and during filming, regarding action sequences. Set designers and production managers may consult the coordinator regarding the costs of a sequence, and the coordinator may assist in

hiring stunt performers. Stunt coordinators, even if not performing on a production, receive the benefits of the Guild agreement, including producer pension and welfare contributions. However, several coordinators stated that it was their understanding that stunt coordinators who have not negotiated otherwise with the producer, would not be entitled under Guild minimum terms to receive residuals unless the coordinator was photographed.

The arbitrator, after reviewing the history of the Guild agreement's provisions concerning stunt performers and the longstanding industry acceptance of coordinators as bargaining unit employees, noted that the instant proceeding arose when Warner Bros., in 1986, stated that the studio would not employ stunt coordinators on Guild contracts, or under loanout agreements.

Arbitrator Jones, in determining that stunt coordinators have become "so supervisorially oriented" in their

responsibilities they no longer could reasonably be included as bargaining unit employees (if indeed they ever were so included), found it significant that coordinators' recommendations concerning stunt prices (albeit within the producer's budgetary guidelines) and the hiring of stunt performers usually are accepted. On the set, the coordinator plans the stunt sequences and gives directions to performers. Furthermore, according to the testimony, although coordinators do not discipline or fire performers, the parties responsible for taking such action generally rely on the coordinator's recommendation.

For the arbitrator, there has been a "visible and steady progression from a select few stunt performers working before the camera while, almost incidentally, doing the honchoing characteristic of early years" to "the highly proficient and experienced present-day stunt coordinators working with an elaborate knowledge of stunt performers, selecting the right ones for the particular stunt

needed, while innovatively planning detailed stunt sequences." Arbitrator Jones noted that several of the testifying stunt coordinators worked as second- unit directors under Directors Guild agreements, and concluded that stunt coordinators are not covered by the Screen Actors Guild Theatrical and Television Agreements.

In the Matter of the Arbitration between Warner Bros. Inc. and Screen Actors Guild, Opinion and Award (Jan. 30, 1989) [ELR 11:3:11]

Celebrity goodwill acquired during marriage was an asset subject to distribution in comedian Joe Piscopo's divorce proceeding

In a decision issued in August 1988, but only recently published, a New Jersey trial court has ruled that performer Joe Piscopo's "celebrity goodwill," if acquired during his marriage to Nancy Piscopo, was an asset subject to distribution in the couple's divorce proceeding.

The Piscopos met in 1970, were married in 1973, and filed for divorce in 1985. Nancy Piscopo claimed a share of the excess earning capacity which she was instrumental in obtaining together with her husband.

Judge Isabel B. Stark first noted that a celebrity is protected, at least during his/her lifetime, from infringement upon the commercial exploitation of the individual's identity, and that goodwill "is, and always has been, a component of this interest." Joe Piscopo argued that his excess earnings, unlike the earnings of professionals such as doctors and lawyers, were more vulnerable to factors such as politics, reputation and connections, and that valuing his goodwill thus was impossible.

But the court stated that "the linchpin of goodwill is ... objective as measured by past earning capacity and the probability not the possibility that it will continue." The seven factors set forth as relevant to the assessment of professional goodwill in the case of Dugan v. Dugan, 92N.J. 423 (1983) also would apply to determine the existence of celebrity goodwill. And while the factors cited by Piscopo might be considered in determining the value of celebrity goodwill, those factors did not preclude the distribution. Testimony concerning accepted accounting methods will enable a spouse to share in what the court characterized as "what could be the most significant asset of the marriage in this most lucrative of industries."

Judge Stark requested additional information from the parties in order to evaluate the average earning rate of an entertainer of Piscopo's age and experience, and an

appropriate discount rate for a person of Piscopo's "level of stardom."

Piscopo v. Piscopo, 555 A.2d 1190 (N.J.Superior Ct. 1988) [ELR 11:3:12]

United States Supreme Court rules that sculpture depicting the homeless is not a work-for-hire, but remands case for determination of whether sponsoring non-profit association was a joint author

Artist James Earl Reid's "Third World America" was not a work for hire, the United States Supreme Court has ruled in a 9-0 decision.

After describing the history of the sculpture's creation in 1985 (see ELR 10:9:15; 9:4:16) under the sponsorship of the Community for Creative Non-Violence, a

nonprofit advocacy group for the homeless, Justice Thurgood Marshall set forth the relevant provisions of the Copyright Act of 1976. Section 201(a) of the Act provides that copyright ownership "vests initially in the author or authors of the work." As a general rule, noted Justice Marshall, "the author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection." However, in the case of "works made for hire," the employer or other person for whom the work was prepared is considered the author and owns the copyright, unless there is a written agreement to the contrary.

Section 101 of the Act provides that a work is "for hire" if it is "(1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or

other audiovisual work ... if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."

The parties agreed that section 101(2) did not apply in this case because the sculpture was not within one of the nine categories enumerated in the section, and no written agreement between the parties established the sculpture as a work for hire.

In considering the application of section 101(1), Justice Marshall noted that there have been several interpretations of the section. The Community for Creative Non-Violence, citing Peregrine v. Lauren Corp., 601 F.Supp. 828 (1985; ELR 7:6:18), argued that a work for hire results whenever the hiring party retains the right to control the product. Another view, set forth in Aldon Accessories Ltd. v. Spiegel, Inc., 738 F.2d 548, cert. denied, 469 U.S. 982 (1984; ELR 6:12:10), is that a work is prepared by an employee under section 101(1) when

the hiring party has actually "wielded control" with respect to the creation of a particular work. A third view is that the meaning of "employee" is based on common law agency law; this view was adopted in Easter Seal Society for Crippled Children and Adults of Louisiana, Inc. v. Playboy Enterprises, 815 F.2d 323 (1987; ELR 9:11:12) and by the Court of Appeals in the instant case.

Reid (and numerous amici curiae, noted the court) argued that the term "employee" refers only to "formal, salaried" employees. The latter interpretation recently was endorsed by a Federal Court of Appeals in California in Dumas v. Gommerman, 865 F.2d 1093 (1989; ELR 10:9:14).

Justice Marshall agreed with the Court of Appeals that the term "employee" should be interpreted under the general common law of agency, stating that neither of the first two tests would be consistent with the text of the Copyright Act. It was noted that section 101(1)

focuses on the relationship between the hired and hiring parties, not on the relationship between the hiring party and the product.

The right to control the product test also would distort the meaning of section 101(2), stated Justice Marshall, by transforming into a work for hire under section 101(1) any " specially ordered or commissioned" work that is subject to the supervision and control of the hiring party. A party who hires a "specially ordered or commissioned" work usually has a right to specify certain characteristics of the product; the right to control the product test would mean that many works that would fall within section 101(2) already would be deemed works for hire under section 101(1). But section 101(2) sets forth nine specific categories of specially ordered or commissioned works eligible to be works for hire - the categories involve works that usually are prepared "at the instance, direction, and risk of a publisher

or producer," and "by their very nature" would be works by an employee under the Community for Creative Non-Violence's proposed right to control the product test.

Justice Marshall also rejected the Aldon Accessories actual control test, observing that there was no statutory support for "an additional dichotomy between commissioned works that are actually controlled and supervised by the hiring party and those that are not."

The legislative history of the Copyright Act indicated that Congress "at all times" viewed works by employees and commissioned works by independent contractors as separate entities. The term "employee" was meant to refer to a hired party "in a conventional employment relationship;" and, emphasized Justice Marshall, only enumerated categories of commissioned works may be accorded work for hire status - "the hiring party's right to control the product simply is not determinative."

The use of a right to control or actual control test also would "impede Congress' paramount goal in revising the 1976 Act of enhancing predictability and certainty of copyright ownership."

In all, "transforming a commissioned work into a work by an employee on the basis of the hiring party's right to control, or actual control of, the work is inconsistent with the language, structure, and legislative history of the work for hire provisions," stated the court. To determine whether a work is a work for hire under the Act, courts must determine, using principles of general common law of agency, whether the work was prepared by an employee or an independent contractor. Then the court can apply the appropriate subsection of section 101.

Justice Marshall, after consideration of the factors relevant to the general common law of agency, determined that Reid was not an employee of the Community for

Creative Non- Violence, but was an independent contractor. Association members may have directed certain aspects of Reid's works, but the artist was a skilled sculptor who supplied his own tools, worked in his own studio for a relatively short period of time, and had "absolute freedom to decide when and how long to work." Reid was paid on the completion of the sculpture, and had "total discretion" in hiring and paying assistants. The association did not pay payroll or social security taxes, provide any employee benefits, or contribute to unemployment insurance or workers' compensation funds.

Furthermore,"Third World America" did not satisfy the terms of section 101(2). The Community for Creative Non-Violence thus was not the author of the sculpture purusant to the work for hire provisions of the Copyright Act. However, the association might be a joint author of the work and a co-owner of the copyright if the District

Court, on remand, determines that the association and Reid prepared the work "with the intention that their contribution be merged into inseparable or interdependent parts of a unitary whole."

Community for Creative Non-Violence v. Reid, Case No. 88-293 (U.S.Sup.Ct., June 5, 1989) [ELR 11:3:12]

Composer obtained and assigned renewal copyright to song "Night Train," even though he did not survive into renewal term

The song "Night Train," written and composed by Jimmy Forrest, with co-authors, was registered with the Copyright Office on March 11, 1952 as an unpublished work and on June 5, 1952 as a published work. Under section 304 (a) of the Copyright Act of 1976, a renewal

copyright was available with respect to the March copyright from March 11, 1979 (the first day of the 28th year of the original copyright term) until December 31, 1980. The June copyright was renewable from June 5, 1979 until December 31, 1980. The copyrights were renewed on behalf of Forrest and one of his co- authors on July 31, 1980 and March 19, 1980, respectively. Forrest died on August 27, 1980.

On March 3, 1952, Forrest had assigned his fights in "Night Train," including any copyright renewal fights to which Forrest was entitled, to Frederick Music Company.

On July 11, 1987, Forrest's widow, Betty Tardy Forrest, assigned her rights in the renewal copyright in the song to Second Floor Music, a company owned by Don Sickler. Neither Betty Forrest nor Second Floor Music filed any applications for a renewal copyright.

A Federal District Court in New York described the issue before the court, an issue of first impression, as follows: "whether the fight to a renewal copyright vests in the author or his assignee on the date when the copyright is renewed during the statutory period prescribed for renewal and during the author's lifetime, or whether it vests only at the commencement of the renewal term, provided the author survives into that term."

Judge Walker stated that the language of the statute clearly provided that if a copyright is renewed by or on behalf of the author during the statutorily provided period, the author becomes "entitled" to the extension of the original copyright. The statute did not mention the survival of the author into the renewal term, but rather referred to the application for renewal.

Second Floor Music found support in Professor Nimmer's analysis of Miller Music Corp. v. Charles N. Daniels, Inc., 362 U.S. 373 (1960). According to Professor

Nimmer, the Supreme Court in Miller equated the phrase "renewal period" with "renewal term." Judge Walker, however, noted that Professor Nimmer had acknowledged that "renewal period" was not defined in Miller, and that in a subsequent decision, a New York District Court interpreted the phrase to mean "the last year of the original term of copyright." In Judge Walker's view, Miller, as well as the statute itself, compelled the court to conclude that in the instant case both copyrights were renewed within the prescribed renewal period and before the author died. Summary judgment therefore was granted to Frederick Music; the company's request for an accounting also was granted.

Frederick Music Company v. Sickler, 708 F.Supp. 587 (S.D.N.Y. 1989) [ELR 11:3:14]

Author Jonathan Kwitny's use, in book "Endless Enemies," of extensive material from unpublished non-fiction manuscript is copyright infringement rather than fair use, Federal District Court rules

Kennett Love, a former New York Times correspondent, wrote a manuscript in 1960 in which he described the events surrounding the 1953 overthrow of the Iranian government headed by Prime Minister Mohammed Mossadegh and the restoration to power of the Pahlevi monarchy. Love's work suggested that the United States Central Intelligence Agency may have been involved in the coup.

Jonathan Kwitny's 1984 book "Endless Enemies" quoted more than half of Love's unpublished manuscript, including not only Love's description of the events and incidents the journalist witnessed at the time of the August 1953 coup, but also Love's analysis of the

underlying political and social conditions in Iran. Kwitny viewed Love, according to Federal District Court Judge Michael B. Mukasey, "as at best an unwitting tool of the CIA, if not an actual agency hireling, and as a traitor to his profession for failing to report what he knew and did." Love has denied that he worked for the CIA.

In October 1984, Love registered the copyright for his 1960 manuscript, and subsequently sued Kwitny for copyright infringement. The court found that Kwitny did not have Love's consent to quote substantial portions of the manuscript. Any consent Love may have given Kwitny was limited to brief excerpts. Furthermore, Kwitny's publication was not protected by the fair use doctrine, stated Judge Mukasey. The discussion, in "Endless Enemies," of Love's activities might be considered criticism, comment, scholarship or news reporting, but this did not mean that Kwitny was entitled to use a

"huge proportion" of Love's protected words. The facts contained in Love's manuscript were not protected by copyright, emphasized the court - the narration of the facts was protected.

Judge Mukasey also cited the unpublished status of Love's work, and the restrictions the author had placed on the use of the manuscript; concluded that Love's very limited distribution of the manuscript did not serve to dedicate the work "to wholesale use in the academic or any other community"; and noted, again, that the fair use factor evaluating the amount and substantiality of the portion used in relation to the copyrighted work as a whole would be counted "overwhelmingly" in Love's favor, for the taking in the instant case involved "nearly every vital organ of the paper." Love was entitled to protect his opportunity to publish his manuscript, but Kwitny's book most likely impaired the marketability of

the copied work, declared the court, in concluding that Kwitny was liable to Love for copyright infringement.

Love v. Kwitny, 706 F.Supp. 1123 (S.D.N.Y. 1989) [ELR 11:3:14]

Paramount Pictures and exhibitor of "The Warriors" were not liable in wrongful death action arising from young man's stabbing by theatergoer

On February 15, 1979, sixteen year old Martin Yakubowicz was fatally stabbed by Michael Barrett. Before the incident, Barrett had seen the Paramount Pictures film "The Warriors" at a theater in Boston operated by Saxon Theatre Corporation.

William Yakubowicz, the administrator of his son's estate, claimed that Paramount and Saxon knew that gang

members had engaged in violent behavior during and after showings of the film in Boston and in California, and that Martin Yakubowicz's death was proximately caused by the negligent exhibition of the film to Barrett. it was alleged, in part, that Paramount produced, distributed and advertised "The Warriors" so as to "induce film viewers to commit violence in imitation of the violence in the film;" that Paramount did not warn exhibitors and public authorities of the danger of violence, and did not take reasonable measures to protect theater patrons; and that Saxon did not exercise proper supervision and control over its patrons since it appeared that Barrett was drinking alcohol while viewing the film and left the theater in an intoxicated condition.

A Massachusetts trial court decision finding that Saxon and Paramount were not liable for damages arising from Yakubowicz's death (ELR 9:7:20) has been upheld, although on different grounds.

Massachusetts Supreme Court Judge Francis O'Connor noted that "The Warriors" contained many scenes of juvenile gang-related violence, and that on February 12, 1979, two youths were killed near theaters showing the film in Palm Springs and Oxnard, California. On February 13th, a Paramount distribution executive notified his staff to advise each theater showing "The Warriors" to hire security guards; Paramount offered to pay for the extra security. Saxon agreed to increase its security and also reported to Paramount that there was a vandalism problem at showings of the film.

After Barrett viewed the film, he and several companions encountered another group of youths on a subway train. Yakubowicz, who had not seen the film, boarded the train with a friend in the "rival" group. Barrett made several threatening comments to Yakubowicz, including a line from the film - "I want you, I'm going to get you." Yakubowicz responded that he did not want to fight,

but, as the young men left the subway, the fatal stabbing occurred.

The court agreed that Paramount and Saxon owed a duty of reasonable care to members of the public with respect to producing, exhibiting, and advertising films. However, as a matter of law, concluded the court, Paramount and Saxon did not violate their duty of reasonable care by exercising protected rights of free speech.

"The Warriors" did not constitute unprotected incitement, stated Judge O'Connor, for although the film was "rife with violent scenes," it did not "exhort, urge, entreat, solicit, or overtly advocate or encourage unlawful or violent activity on the part of viewers ... [or] create the likelihood of inciting or producing 'imminent lawless action' that would strip the film of First Amendment protection. "

Paramount and Saxon also were entitled to summary judgment with respect to Yakubowicz's claim that the

companies did not take reasonable measures to protect theater patrons and others - a fatal assault occurring miles from the theater, stated the court, could not be attributed to a failure to warn Saxon or public officials of the dangers of possible film-related violence. And Saxon did not owe Martin Yakubowicz a duty to protect him from acts arising from Barrett's "self-induced intoxication" - the theater did not sell or distribute any alcoholic beverages to its patrons.

Yakubowicz v. Paramount Pictures Corporation, 536 N.E.2d 1067 (Mass. 1989) [ELR 11:3:15]

Paul Newman wins refund of overpayment of California tax on income from "The Sting"

In October 1972, actor Paul Newman entered into a contract with Universal Pictures to appear in the movie "The Sting." In the contract, he agreed to provide his exclusive services from January 29, 1973 through April 13, 1973. Newman spent 30 of the 54 weekdays, excluding one legal holiday, of the contract term in California.

In their tax California tax return for 1975, Newman and his wife -- who were not residents of California -- allocated (to California) their income from "The Sting" by using a denominator of 30 (days in California) and a numerator of 25 (days filming). For 1976 and 1977, the Newmans used a numerator of 30 (days in California) and a denominator of 54 (total contract days).

The California Franchise Tax Board rejected the Newmans' allocation, excluded all travel days and days of exclusivity, and included only the days on which Newman was called to work for actual filming. Newman was

called for filming during 27 days of the contract; 25 of those days involved work in California. The Board therefore allocated to California about 92.6% of the actor's gross income from "The Sting," and assessed deficiencies of about $24,600 for 1975, $7,300 for 1976, and $8,900 for 1977.

When the Newmans filed refund claims in 1984, the trial court accepted the actor's 30/54 allocation formula on the ground that under his contract, Newman provided exclusive services to Universal and was "on call" at his employer's discretion.

A California appellate court upheld the trial court's decision, noting the support provided by the Board's own rulings regarding the allocation of an athlete's income. Newman was required to report promptly "whenever and wherever" Universal required and was compensated for each day in the 54-day period "without regard to the activity engaged in by him on any particular day."

The California Supreme Court recently denied the Board's request for a hearing.

Newman v. Franchise Tax Board of California, Case No. B032783 (Ca.Ct.App., Mar. 16, 1989) [ELR 11:3:16]

Sacramento broadcaster not entitled to broad public-interest privilege in defamation action by private individual, rules California Supreme Court

Section 47(3) of the California Civil Code does not provide a broad public-interest privilege to the news media, the California Supreme Court has ruled.

In May 1984, KCRA-TV, a Sacramento television station owned by Kelly Broadcasting Company, presented two stories concerning contractor Shirley Brown on a

consumer affairs segment of the station's daily news show. The stories mentioned that a homeowner had been disappointed with remodeling work done by Brown.

Brown, claiming that KCRA did not attempt to contact her, that the allegations of substandard work, much of which was done by other contractors, were false, and that the Contractor's State License Board had told KCRA that there was no factual support on which to base an investigation of the homeowner's complaints, sued the broadcaster and its reporter for slander per se, negligence, and malice.

The trial court granted Kelly's motion for summary judgment on the grounds that the broadcasts were conditionally privileged under section 47(3) and that Brown did not raise a triable issue of material fact as to whether the privilege was overcome by the station's alleged malice.

An appellate court, although agreeing that the broadcaster had a conditional privilege, reversed the trial court judgment, finding sufficient evidence to raise an issue of fact as to whether Kelly had acted with malice.

The California Supreme Court has affirmed, unanimously, the appellate court's decision reversing the trial court judgment, but on the ground that the broadcaster was not entitled to the public-interest privilege.

Judge David Eagleson first declared that the broad public-interest privilege claimed by Kelly Broadcasting was not constitutionally mandated or appropriate. In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the United States Supreme Court declined to apply the malice standard of New York Times v. Sullivan, 376 U.S. 254 (1964), to defamation actions brought by private persons even if the complained-of statements concerned matters of general or public interest. Gertz, according to Judge Eagleson, held that the public-interest privilege

claimed by Kelly Broadcasting under California law was not required by the federal Constitution.

The court next found that the language of section 47(3) did not support a broad public- interest privilege for the news media. Section 47 states: "A privileged publication or broadcast is one made ... 3. In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information."

Noting that the statutory language contains no reference to a "public interest" or any special privilege for the news media (emphasis by the court), Judge Eagleson stated that it appeared that the Legislature did not intend to create a broad public-interest privilege for the news media.

The legislative history of section 47(3) and prior judicial constructions of the section also confirmed, for the court, the narrow scope of the subject privilege. Judge Eagleson, rejecting the argument that the public has an interest in the news sufficient to justify a broad privilege, emphasized that the court never has applied the statute in cases involving private individuals defamed in the mass media. Rather, the public interest sufficient to give rise to a privilege under section 47(3) was the public's interest in public officials, candidates for public office, and those who would be deemed public figures under current law.

The court proceeded to review two conflicting appellate court decisions. In Rancho La Costa, Inc. v. Superior Court, 106 Cal.App.3d 646 (1980; ELR 2:7:4), the court rejected a claim that an allegedly defamatory publication was privileged because the public at large, and thus a magazine's readership, was interested in

organized crime. However, a different appellate court, in Institute of Athletic Motivation v. University of Illinois, 114 Cal.App.3d 1 (1980) found that a privilege, albeit limited, was available under section 47(3) to the writer of a letter critical of certain psychological tests; the letter was sent, not to the public at large, but mainly to professionals with an interest in the subject matter.

Subsequently, the court in Rollenhagen v. City of Orange, 116 Cal.App.3d 414 (1981; ELR 2:21:1), although recognizing that its decision conflicted with Rancho La Costa, applied a general public-interest privilege to a television report concerning a consumer affairs investigation of automobile repairmen. The Rollenhagen court "misconstrued" the scope of section 47(3), stated Judge Eagleson, and the case was disapproved to the extent that it stated a public-interest privilege applicable against private figures.

The court held that "a publication or broadcast by a member of the news media to the general public regarding a private person is not privileged under section 47(3) regardless of whether the communication pertains to a matter of public interest."

Judge Eagleson, in addressing several public policy considerations raised by the news media amici curiae, declined to diverge "from the near unanimous authority that a private person need prove only negligence (rather than malice) to recover for defamation;" agreed with other courts that "a public-interest privilege would undercut the widely recognized distinction between public and private persons;" and noted that the California Constitution's free speech provision imposes responsibility on individuals for abusing the right of free speech, and that ,society's interest in the value of a private person's reputation weighs against the judicial creation of a

privilege ... that would impose burdens greater than those already required under the federal Constitution."

News entities receive considerable protection from the constitutional obstacles to recovery by private parties, and the expansion of the statutory privilege would unnecessarily complicate defamation law, stated the court. Furthermore, a negligence standard would not have a "chilling effect" on the free flow of information, as argued by the news media. No evidence of self-censorship was presented, stated Judge Eagleson, and the news media, again, have substantial protection deriving from New York Times, and may avail themselves of "the most powerful defense to a defamation action" - the ability to correct error.

In concluding observations, Judge Eagleson stated that "the injuries suffered from defamation can be more real and debilitating - at least emotionally and financially - than palpable physical injuries and are equally worthy of

compensation," particularly by news entities of "enormous financial resources." The judgment of the appellate court therefore was affirmed with directions to remand the matter to the trial court for further proceedings.

Brown v. Kelly Broadcasting Company, 771 P.2d 406 (Cal. 1989) [ELR 11:3:16]

Briefly Noted:

Stadium Security Guard Injury.

A Georgia appellate court has ruled that the City of Atlanta-Fulton County Recreation Authority and the Atlanta National League Baseball Club were not liable to security guard Nathaniel Leslie for the injuries he

suffered when shot by an armed robber. At the time of the shooting, which occurred on the stadium premises, Leslie . was engaged in guarding a concessionaire's receipts. Chief Judge Carley pointed out that "the possibility of a face-to-face encounter with a criminal is an ordinary and obvious risk incident to employment as an armed security guard. Leslie assumed the risk that he would have such encounters on the stadium premises when he accepted such employment, stated the court, and the trial court erred in denying motions for summary judgment by the Recreation Authority and the Braves. The concessionaire also was entitled to summary judgment, held the court, because Leslie's exclusive remedy was under the state's Workers' Compensation Act. There was no genuine issue of material fact as to Leslie's status as an employee, given that the concessionaire's security coordinator controlled Leslie's hours and responsibilities. Even if a question of fact were present, the holding

above was equally as applicable to the concessionaire as to the other parties, and warranted granting the concessionaire's motion for summary judgment, concluded the court.

Atlanta Braves, Inc. v. Leslie, 378 S.E.2d 133 (Ga.App. 1989) [ELR 11:3:18]

Musical Group Name.

"The Diamonds," a singing group formed in the mid-1950s had several successful records, including "Two Silhouettes on the Shade," "Little Darlin,'" and "The Stroll." Glen Stetson and Bob Duncan, who performed in separate groups using the name "The Diamonds," claimed trademark rights in the name. Attorneys for the performers, after extensive discussion,

drafted a proposed settlement agreement. When Stetson refused to sign the agreement, Duncan moved to enforce the settlement. A Federal District Court in New York, acting on the recommendation of Magistrate Sharon E. Grubin, rejected (in an order dated May 1988, but only recently published) Duncan's claim that Stetson's attorney had the authority to enter into a binding settlement agreement on Stetson's behalf and that the attorney had done so. There was considerable evidence that the attorneys and the performers intended the agreement to be binding and enforceable when it was in writing and signed; thus, there was no agreement for the court to enforce. The court also adopted Magistrate Grubin's recommendation to deny Duncan's motion for summary judgment for it appeared that Stetson raised a "critically material" question of fact concerning an alleged assignment of rights in "The Diamonds" name.

Stetson v. Duncan, 707 F.Supp. 657 (S.D.N.Y. 1988) [ELR 11:3:18]

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New York Loft Law.

Notwithstanding frequent absences, cinematographer and filmmaker Thomas Newton Sigel did not relinquish his right to retain occupancy of his rent regulated loft on Mott Street, a New York trial court has ruled. Sigel, who has worked on the films "Platoon" and "Wall Street," stated that he filed and paid New York City resident income tax and maintained his New York City voter registration during the period in issue, and did not maintain another residence outside of New York. The court rejected the landlord's theory that a tenant who uses an apartment as infrequently as Sigel and who travels extensively on business cannot be deemed to be

using the apartment as a primary residence. Sigel maintained a "substantial and ongoing physical nexus to his New York City residence" - the fact that he bought and registered a car in California and obtained a California drivers license did not preclude a finding that the Mott Street loft unit was Sigel's primary residence.

Jocar Realty Co., Inc. v. Sigel, New York Law Journal, p. 28, col. 6 (N.Y.Civ.Ct., July 17, 1989) [ELR 11:3:18]

IN THE NEWS

Delaware Supreme Court rejects Paramount's challenge to pending merger of Time Inc. and Warner Communications

The Delaware Supreme Court, in an opinion not yet available to the Entertainment Law Reporter, upheld a trial court ruling allowing the Time buyout of Warner although Time had not obtained shareholder approval of the proposed merger. Chancellor William T. Allen had concluded that Time's directors were entitled to select a merger opportunity in accordance with a long-term business plan, notwithstanding Paramount's offer of increased short-term profits to shareholders.

When the Delaware Supreme Court rejected Paramount Communications' attempt to prevent Time Inc.'s acquisition of Warner Communications Inc., Paramount announced that it would withdraw its bid for Time. [Aug. 1989] [ELR 11:3:19]

Dispute involving Walt Disney Company's 1984 buy-out of Saul Steinberg's stock is settled

Walt Disney Company and Saul Steinberg's Reliance Group Holdings have reached an agreement with former and current Disney stockholders to settle two lawsuits in which the stockholders challenged Disney's $325 million buyout payment to Steinberg in 1984 (ELR 7:3:8). The stockholders claimed that former and current Disney board members violated a fiduciary trust in making the above-market "greenmail" payment to Steinberg for his stock.

The settlement of a stockholder's derivative action, which was brought on Disney's behalf against Steinberg and the Disney directors, will involve a $60 million payment - Reliance Group, according to news reports, will contribute $20.8 million of this amount, and the Disney board will contribute $24.2 million. Although estimates

of the total value of the settlement vary, it appears that $69 million figure includes about $15 million in economic benefits attributable to the withdrawal of a cross-claim by Reliance against the Disney board.

About $29.5 million of the settlement fund will be used to settle a class action lawsuit brought by former Disney stockholders against Steinberg and the Walt Disney Co.; the stockholders suffered losses when they sold their stock following the 1984 takeover attempt by Reliance Group. The payment will be split between those who held Disney stock on June 8, 1984 and June 11, 1984 and sold the stock in the following seven months for less than $65 a share. News of the buyout of Reliance's holdings apparently caused Disney stock to drop from $65 to $45 a share.

The settlement, which ended a Los Angeles Superior Court jury trial, did not involve the acknowledgment of any wrongdoing or liability by any party, and stated that

the parties "contemplated a finding by the court" that the Disney directors "acted in good faith and in what they believed to be the best interests of the company..." [Aug. 1989] [ELR 11:3:19]

Federal Communications Commission grants waiver of cross-ownership rule to Capital Cities/ABC

Capital Cities/ABC Inc. has obtained a permanent waiver from Federal Communications Commission rules that might have forced the company to sell radio and/or television stations in several cities.

The Commission, under its recently relaxed cross-ownership rules (see ELR 10:11:19), will allow Capital Cities to own a television station and one radio station in San Francisco, and to own a television station and two radio stations in the following cities: Los Angeles, New

York, and Chicago. The broadcaster showed that its stations were located in four of the five largest markets in the country and that more than thirty separate companies owned stations in those markets. [Aug. 1989] [ELR 11:3:19]

DEPARTMENTS

Book Notes:

Entertainment Law & Business, by Harold Orenstein and David E. Guinn

A 545-page, one-volume "Guide to the Law and Business Practices of the Entertainment Industry." Part I outlines the "Law of Entertainment," and consists of chapters on U.S. Copyright Law, U.S. Trademark and

Unfair Competition Law, Publicity and Privacy, the Berne Convention, the Universal Copyright Convention, the Buenos Aires Convention and the Phonogram Convention. Part 11 contains "Commentaries on the Practice of Entertainment Law," consisting of chapters on General Principles of the Practice of Entertainment Law, Theater, Motion Pictures and Television, Publishing, and Music. Part Ill is comprised of 29 forms. Part IV is a directory of guilds, unions and other organizations. And Part V reproduces U.S. Copyright statutes.

The book is published by Butterworth Legal Publishers, 80 Montvale Avenue, Stoneham, MA 02180-9902; phone 800-548-4001, or (in Massachusetts) 617-438-8464. It is priced at $119 and is sold on 30-day approval. [ELR 11:3:20]

The Law of Defamation, Privacy, Publicity and "Moral Rights," by Sheldon W. Halpern

A 660-page, paperbound casebook intended for law school teaching, but also of value as a sourcebook or desk reference for practicing lawyers. Part I covers defamation, and consists of chapters on Historical Development, Publication, the Defamatory Utterance, Construction and Meaning, Ambiguity and Fact vs. Opinion, Special and General Damages, Immunities and Privileges, and the First Amendment. Part 11 concerns Privacy, including its Common Law and Statutory Development, the meaning of "Name or Likeness," Trade or Advertising, Newsworthiness, Private Facts, and False Light. Part Ill deals with the Right of Publicity, including its Development, Descendibility, and Preemption. Part IV covers Moral Rights, including recent statutory developments.

The book is published by Anderson Publishing Co., 2035 Reading Road, Cincinnati, Ohio 45202; phones 800-543-0883, 800-582-7295 (in Ohio), and 513-421-4142. [ELR 11:3:20]

Advertising Compliance Handbook, by Kenneth A. Plevan and Miriam L. Siroky

A 527-page, one-volume text and practitioner's guide to the law of advertising compliance. Part I concerns Advertising Litigation under the Lanham Act, and consists of chapters on False Advertising, Equitable Remedies, Damages, and Litigation and Settlement Strategies. Part 11 covers Federal Trade Commission Regulation of Advertising, and includes chapters on the Prior Substantiation Doctrine, Standards for Deception and Unfairness, FTC Remedies, Investigations and Negotiation of

Consent Decrees, and Rules Pertaining to Retail Sales. Part Ill consists of chapters on Other Claim Support Issues, including Clinical Studies and Tests, Testimonials and Endorsements, National Advertising and Network Challenges, and Guidelines for Interpreting Advertising. Part IV covers Copyright, Trademark and First Amendment Law as applied to advertising. Part V concerns State Law Advertising Issues, including State Regulation of Advertising, Product Disparagement and Corporate Defamation, Sweepstakes and Games of Chance, and the Rights of Privacy and Publicity. Part VI concerns Consumer Surveys, their Use in Litigation, and Designing and Conducting them. An appendix treats the Trademark Revision Act of 1988 and evaluates its anticipated impact on advertising law.

The book is published by the Practising Law Institute, 810 Seventh Avenue, New York, N.Y. 10019; phone

212-785-5700. It is priced at $85 and is available on 30-day approval. [ELR 11:3:20]

Premiums, Gifts, Competitions and Other Sales Promotions: Regulation and Self-Regulation in 42 Countries, by J.J. Boddewyn

A 160-page, paperbound report on a survey of the laws and practices concerning sales promotions in 42 countries. The survey's results are depicted in charts as well as in country-by- country digests of each country's major laws and regulations, governmental agencies, voluntary self-regulation practices, published sources of more detailed information, and names and addresses of specialist lawyers.

The book is published by the International Advertising Association, 342 Madison Ave., Suite 2000, New York,

N.Y. 10017; phone 212- 557-1133. It is priced at $30 for IAA members, and at $60 for non-members. [ELR 11:3:20]

In the Law Reviews:

Comm/Ent, Hastings Communications and Entertainment Law Journal, has published Volume 11, Number 3 with the following articles:

The Money of Color: Film Colorization and the 100th Congress by Dan Renberg, 11 Comm/Ent 391 (1989)

Validity of Post-Employment Non-Compete Covenants in Broadcast News Employment Contracts by Jon H. Sylvester, 11 Comm/Ent 423 (1989)

Pressing California Shield Law on Criminal Defendants: A Weighting Game by Amy R. Bach, 11 Comm/Ent 461 (1989)

Aural Sex: Has Congress Gone Too Far by Going All the Way with Dial-A-Porn? by Heidi Skuba Maretz, 11 Comm/Ent 493 (1989)

University of Miami School of Law has published Volume 5, Numbers 1 and 2, of its Entertainment & Sports Law Journal with the following articles:

Sports Labor Relations: The Arbitrator's Turn at Bat by Dean Roger I. Abrams, 5 Entertainment & Sports Law Journal (1988)

Imperfect Property: Defective Protection for Bona Fide Purchasers of Copyrights by Brenda J. Saunders, 5 Entertainment & Sports Law Journal (1988)

Constitutional Protection of the First Amendment Is Still Available Contrary to Falwell's Beliefs: Hustler Magazine v. Falwell by Andrea S. Froome, 5 Entertainment & Sports Law Journal (1988)

Tax Planning for the Professional Athlete and the impact of the Tax Reform Act of 1986 by Kevin M. Sargis, 5 Entertainment & Sports Law Journal (1988)

Privacy Rights of Entertainers and Other Celebrities: A Need for Change by L. Lee Byrd, 5 Entertainment & Sports Law Journal (1988)

Fumble: Bear Bryant, Wally Butts and the Great College Football Scandal by James Kirby, reviewed by Carol Rasnic, 5 Entertainment & Sports Law Journal (1988)

The Trademark Reporter, a publication of the United States Trademark Association, has published Volume 79, Number 3 concerning the Trademark Revision Act of 1988 with the following articles:

Section 44 Revision: After the 1988 Act by John B. Pegram, 79 The Trademark Reporter 220 (1989)

The "New" 43(a) by Marie V. Driscoll, 79 The Trademark Reporter 238 (1989)

The Supplemental Register Under the Trademark Law Revision Act: Additions, Deletions and Omissions by

Richard L. Kirkpatrick, 79 The Trademark Reporter 248 (1989)

Intent to Use-Its Time Has Come by Henry W. Leeds, 79 The Trademark Reporter 269 (1989)

The Trademark Law Revision Act of 1988: The 100th Congress Leaves Its Mark by Frank Z. Hellwig, 79 The Trademark Reporter 287 (1989)

"Intent to Use": On the Road Toward Adoption of a Registration-Based System of Trademark Protection by

Bruce R. Parker, 79 The Trademark Reporter 319 (1989)

Consumer Standing Under Section 43(a): More Legislative History, More Confusion by Scott E. Thompson, 79 The Trademark Reporter 341 (1989)

Housekeeping Amendments by Laurence R. Hefter, 79 The Trademark Reporter 355 (1989)

Trademark Definitions by Joan L. Dillon, 79 The Trademark Reporter 366 (1989)

Federal Registration and Incontestability by Richard A. Wallen and Michael J. MacDermott, 79 The Trademark Reporter 373 (1989)

Intent-to-Use in Canada After Three Decades by Daniel R. Bereskin, 79 The Trademark Reporter 379 (1989)

Communications and the Law, Volume 11, Number 2, has been published by Meckler Corporation, 11 Ferry Lane West, Westport, CT 06880, with Conference Proceedings of a Program Sponsored by the International Communications Committee of the American Bar Association entitled Calling It Piracy: Mass Media and Copyright in the U.S. and Canada as follows:

Introduction by Barbara L. Waite and T. Gregory Kane, 11 Communications and the Law 5 (1989)

The Compulsory License: How Did We Get There and How Does It Work? by Stephen R. Ross, 11 Communications and the Law 11 (1989)

Canada Updates Copyright Acts to Cover Cable and Satellite Retransmissions of Programming by Michel Hetu, 11 Communications and the Law 25 (1989)

Border Broadcasting from a Cablecasting Perspective by Philip B. Lind, 11 Communications and the Law 33 (1989)

Cable/Satellite Retransmission of Broadcast Signals Under U.S. and Canadian Law by Norman Alterman, 11 Communications and the Law 37 (1989)

Cable and Broadcast Copyrights: Some European Alternatives by Sa'id Mosteshar, 11 Communications and the Law 45 (1989)

Why Ascertainment Failed by Kim A. Smith, 11 Communications and the Law 49 (1989)

An Analysis and Review of News Cameras in the Courtroom: A Free Press-Free Trial Debate by Susana

Barber, reviewed by Murray 1. Franck, 11 Communications and the Law 61 (1989)

Copyright Law, A Practitioner's Guide by Harry G. Henn, reviewed by Theodore R. Kupferman, 11 Communications and the Law 67 (1989)

Reforming Intercollegiate Athletics: A Critique of the Presidents Commission's Role in the NCAA Sixth Special Convention by Rodney K. Smith, 64 North Dakota Law Review 423 (1988)

An Economic Analysis of Copyright Law by William M. Landes and Richard A. Posner, 18 The Journal of Legal Studies (University of Chicago Law School) 325 (1989)

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Information Products: A Challenge to Intellectual Property Theory by Rochelle Cooper Dreyfuss, 20 New York University Journal of International Law and Politics 897 (1988)

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Joint Authorship of Commissioned Works by Julie Katzman, 89 Columbia Law Review 867 (1989)

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

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News From the Front-The War on Obscenity and the Death of Doctrinal Purity by Alan Young, 25 Osgoode Hall Law Journal 305 (1987)

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[ELR 11:3:21]