RECENT CASES

Melissa Manchester fails to invalidate option given to Arista Records during eighth year of her employment contract, despite seven-year limit on employment contracts under California law

In California, personal service employment contracts are unenforceable beyond a term of seven years (under section 2855 of the California Labor Code). A decision long awaited by entertainment lawyers, concerning the effect of this seven year limitation on subsequent modifications of personal service contracts, has arrived in Melissa Manchester's suit to terminate her recording contract with Arista Records.

Manchester signed her recording contract with Arista Records in February of 1973. The contract provided for an initial term of 18 months, along with four one-year extensions at the option of Arista, and required Manchester to produce two albums during the initial term and during each option year. It also contained a standard "suspension and extension" clause. That is, if Manchester were late in producing these albums, Arista had the option of "suspending" the contract year, so that the contract year was not completed until the required two albums were produced. Manchester was late several times in fulfilling her two album per year commitment and, each time, Arista exercised its option to suspend the contract. Thus, eight years after the contract was signed, the parties were only in their fifth and final contract year.

In 1976, Manchester and Arista entered into another contract. In exchange for Arista's payment of a debt owed by Manchester to her former producer, Manchester granted Arista a one-year option that could be exercised at the completion of the 1973 contract. In December of 1980, Arista notified Manchester it would exercise its option under the 1976 one-year contract.

Manchester filed a lawsuit in California for a judgment declaring her contract with Arista Records no longer enforceable. Arista Records maintained that Manchester owed it two albums under the 1976 contract, in addition to one album remaining due under the 1973 contract.

A Federal District Court in California granted Arista's motion to dismiss the action with regard to the 1973 contract on the ground that Manchester failed to bring the action in the forum provided for by the parties, because the 1973 contract contained a provision that the agreement was to be governed only by New York law and only in New York courts.

The court could not so readily dispose of Manchester's action with regard to the 1976 contract. Though the 1976 contract contained a choice of law clause specifying New York law, it did not have a choice of forum clause. Because California courts will not enforce choice of law clauses that would require them to apply another state's law if it is against California public policy, the court determined that California law governed. Thus, an analysis of the merits of Manchester's claim under California Labor Code section 2855 became necessary.

Manchester took the position that the 1976 contract was not independent of the 1973 contract, and thus both became unenforceable on the seventh anniversary of the first agreement. She argued that since the 1976 contract was entered into before the 1973 contract expired, it necessarily must have been an extension of the 1973 contract and thus invalid under section 2855 because of the well-established rule that the protection of the statute cannot be waived by employees.

The court rejected this argument, however, saying it would effectively prevent an employee from entering into a new contract with his or her current employer until after the completion of all obligations between them. Instead, the court ruled that "The better course is to consider the circumstances surrounding the formation of the new contract in each situation. If the new contract was entered into at or near the time of formation of the earlier contract, and if the two contracts appear to have been entered into to avoid the application of section 2855 to a single agreement, then they should be considered a single contract for purposes of section 2855. However, if the latter contract was entered into toward the end of the first contract, it should be treated as a separate agreement for purposes of section 2855. Each employment situation will necessarily be interpreted according to its unique facts. The interpretation of the two contracts should be made in light of the policy consideration underlying section 2855 to protect employees, rather than by principles of formal contract law."

The court observed that whichever way the issue was decided in this case, Manchester could not prevail. If the 1976 contract were not an independent contract, the forum selection clause of the 1973 contract applied to it; and since the forum selection clause had been determined to be enforceable, the entire action, as one combined contract, had to be dismissed because it was filed in California rather than New York. Conversely, if the 1976 agreement were an independent contract, it would not yet violate section 2855.

The court said the 1976 contract differed in several material respects from the 1973 contract. It did not have a forum selection clause; it materially altered the royalty provisions; and it was entered into to pay the debt Manchester owed to another and thus was supported by different consideration. The only significant factor that supported treating the two contracts as one was that the 1976 contract was an option contract that Arista could only exercise if it had exercised all of its options under the 1973 contract.

Upon consideration of these facts, the court determined that the 1976 contract was separately entered into and that it was not entered into with the purpose of evading the seven-year employment limitation of the Labor Code. Accordingly, the court treated the 1976 contract as a separate agreement for purposes of the seven-year statute. "Since the 1976 agreement has not been in effect for seven years, the provisions of section 2855 are not yet applicable to it."

Manchester v. Arista Records, Inc., Case No. CV 81-2134 (C.D.Cal., September 17, 1981) [ELR 3:12:1]

The musical play "A Day in Hollywood/A Night in the Ukraine" infringed the Marx Brothers' right of publicity by simulating them for commercial gain rather than for biographical or educational purposes

The producers of the musical "A Day in Hollywood/A Night in the Ukraine" have been found liable for appropriating the right of publicity in the names and likenesses of Groucho, Harpo and Chico Marx.

Groucho Marx Productions was the assignee of Julius Marx's rights in the name, likeness and style of the character Groucho, both as an individual and as a member of the Marx Brothers. Marx Productions also executed a similar assignment with Leo (Chico) Marx's widow. Susan Marx was the trustee of the residuary trust under Adolph (Harpo) Marx's will. Together Marx Productions and Susan Marx filed suit alleging that the musical, which originally opened in London in January of 1979 and on Broadway in May of 1980, infringed their rights of publicity, interfered with their common law copyrights and violated section 43(a) of the Lanham Act. These infringements allegedly resulted from the presentation, in the second half of the musical, of performers who simulated the appearance, style and mannerisms of the Marx Brothers.

Federal District Court Judge William Conner noted that New York courts have never explicitly recognized a non-statutory right of publicity. The protection against invasion of privacy granted to living persons under Sections 50 and 51 of the New York Civil Rights Law is neither descendible nor assignable. However, federal courts have stated that a right of publicity does exist in New York (see Factors Etc., Inc. v. Pro-Arts, Inc., 579 F.2d 215, ELR 2:9:3 and Hicks v. Casablanca Records, 464 F.Supp. 426, ELR 1:1:5.) Further, in the recent decision of Brinkley v. Casablanca (N.Y.L.J., p.1, col. 3, 1st Dept., June 1, 1981) which involved an action by a model to enjoin the sale of an unauthorized picture, a New York court held that the statutory right of privacy embraces a public figure's commercial interest in the exploitation of his personality. Brinkley concluded that monetary relief is available in an action under Sections 50 and 51 for the invasion of the commercial value in one's name or likeness.

Judge Conner also observed that the right of publicity is descendible, particularly when it has been exploited during a party's lifetime. The producers of the musical argued that the Marx Brothers had not exploited their rights of publicity since they had not engaged in any commercial use of their celebrity other than as performers. However, unlike the case of Marlin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Productions, Inc., 508 F.Supp. 854 (ELR 3:7:5), the Marx Brothers "earned their livelihoods by exploiting an intent to capitalize on the commercial value of those characters. And Groucho Marx transferred his right of publicity during his lifetime. The court stated that the suggestion that the Marx Brothers did not exploit their rights of publicity because they "did not endorse dance studios, candy bars or tee shirts is wholly illogical."

The producers also failed with their argument that the First Amendment protected the musical. Judge Conner, citing Estate of Elvis Presley v. Russen, 513 F.Supp. 1339 (ELR 3:2:1), stated that "if the defendants' use of a celebrity's name or likeness is largely for commercial purposes, such as the sale of merchandise, the right of publicity may prevail over the First Amendment right of free expression." In Russen, the court enjoined the presentation of "The Big El Show," in which a performer presented an entire show consisting of imitating the appearance, dress and performing style of Elvis Presley. Judge Conner similarly concluded that "A Day in

Hollywood/A Night in the Ukraine" appropriated the Marx Brothers' characters by imitation of their act and was not protected expression. Richard Vosburgh, the author of the musical, declared that his intention was to write a satiric comment on Hollywood movies and that he used parody of the Marx Brothers movies as a literary device. But the court found that any literary comment intended by the author "was substantially overshadowed in the play itself by the wholesale appropriation of the Marx Brothers characters."

Also referred to by the court was the case of Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, which held that the First Amendment did not protect a television news show which broadcast a performer's entire act. In Judge Conner's view, "A Day in Hollywood/A Night in the Ukraine" primarily exploited the Marx Brothers characters. Since the musical was neither biographical nor informational, it therefore infringed the rights of publicity of the Marx parties, he ruled.

Groucho Marx Productions, Inc. v. Day and Night Company Inc., 80 Civ. 23 10 (SDNY, October 2, 1981) [ELR 3:12:2]

Television networks obtain injunction barring White House from excluding them from "pool" coverage of Presidential activities

The ABC, NBC and CBS television networks have obtained an injunction preventing the White House Press Office from excluding television news representatives from participating in "pool" coverage of Presidential activities.

In May 1981, Turner Broadcasting's Cable News Network filed suit charging the White House Press Office and the three television networks with violating CNN's constitutional rights by allegedly giving ABC, CBS and NBC favored status in the coverage of "limited coverage" White House events. Though the merits of CNN's lawsuit had not yet been decided, the suit triggered an immediate change in the Press Office's method of selecting television representatives for White House press pools.

The announced policy of the Reagan administration is to permit "open coverage" of White House and Presidential activities, allowing any properly accredited member of the media to attend, whenever possible. When, however, space limitations or other considerations require limiting the number of media representatives covering an event, only "limited coverage" is permitted. Traditionally, the Press Office designated a "pool" of representatives from the print and television media who would then share the news material they obtained with journalists not included in the pool. When it has been necessary to restrict media attendance to no more than thirteen people, a very small pool, called a "tight pool," has been used. The tight pool would consist of eight representatives of the print media and one television crew of five people. The television representation in the tight pool has been rotated among CBS, NBC and ABC.

In response to CNN's lawsuit, the Press Office declared that NBC, ABC, CBS and CNN should decide for themselves who will occupy the spaces to be made available for television media representatives in future press pools. It explained the White House was not requesting a majority vote of the four networks on the means of selecting their representatives, but was seeking a consensus among the networks "with the implied threat that if such a consensus cannot be agreed to, then there may be no coverage of the President by the television media until they arrive at that consensus."

Meanwhile, the Press Office had announced that space for a television crew of five people would be available for the July 10, 1981 White House press pool, and established a deadline by which the networks were to supply the names of the participating television crew members. Upon learning that the networks were unable to reach a consensus, the Press Office carried out its threat by announcing that though it would include eight representatives of the print media, the July 10th pool would not include representatives of the television media. On July 9th the networks were granted a temporary restraining order against implementation of the Press Office's policy, and on July 28th they obtained a preliminary injunction, effective until a trial can be held on the matter.

By granting the injunction, the court determined that the public and the press have a limited right of access to information concerning governmental activities and that right outweighs any interests served by the governmental restraint involved in this case. The court conceded that the reason for the exclusion may have been to induce the television media to arrive at a "self-selection" agreement, which would reduce the Press Office's administrative tasks relative to pool selection. This interest in cutting red tape, said the court, was a valid one, but was "too attenuated to be deemed significant." The court determined that it was not clear that the Press Office's policy could reasonably be expected to achieve self-selection. It appeared that the impediment to the desired consensus arose from provisions in CBS, NBC and ABC's respective contracts with their technicians' union, which prohibits these networks from accepting material that would be produced by CNN's non-union personnel.

Cable News Network, Inc. v. American Broadcasting Companies, 518 F.Supp. 1238 (N.D.Ga. 1981) [ELR 3:12:3]

Isaac Hayes' album "Hot Bed" and re-issues of other Hayes albums were exploited in good faith by record company and distributor, rules Federal District Court

"Union Planters National Bank" is far from a soulful sound, though the bank is the assignee of the rights of performer Isaac Hayes under a 1968 agreement with Stax Records. The agreement provided that Hayes would perform services as a recording artist or producer for Stax in exchange for royalties. In the late 1970s, Stax' assets were sold as part of a bankruptcy proceeding and were eventually acquired by Elan Enterprises. Elan then entered into an agreement with Fantasy Records to distribute and sell Stax product.

Union Planters - as the assignee of Hayes' rights - filed a lawsuit against Elan and others alleging that they had not properly accounted for royalties due Hayes and had not exploited Hayes' product in good faith. The product in question consisted of Hayes' album "Hot Bed," which had not been released previously in the United States, and four other albums which were re-issues of previously-released Hayes material from the Stax catalog.

Testimony at trial indicated that Fantasy had used standard marketing devices, such as advertising and air play. One witness testified that the company should have been able to secure air play on leading radio stations in certain markets. And in fact, air play sheets indicated that Fantasy had had success in obtaining considerable air play throughout the United States for Hayes' albums. There was also testimony that the advertising budget should have been five to seven percent of projected album sales, and testimony that the advertising budget had in fact been seven percent of sales.

The court found that any implied duty on the part of Elan to exploit the re-issue material was adequately disclaimed in the Hayes-Stax contracts. However, the court ruled that Elan did have a duty to make a good faith effort to exploit "Hot Bed," even though the album was four years old at the time of its United States release. The distinction was academic however, because Union Planters failed to demonstrate that Elan had not exercised its standard business judgment in good faith in exploiting the Hayes albums.

The court also found that an award of $75,000 paid to Elan by Pye Records in settlement of a trademark and copyright infringement claim represented royalties due from Hayes recordings sold by Pye (a former Stax licensee) in England. Elan could not evade its fiduciary duty to pay royalties on Hayes recordings sold by Pye by calling the settlement "damages for infringement," stated the court.

Elan was found not to have held unreasonably large reserves on the Hayes albums for an unreasonably long period of time.

Union Planters National Bank of Memphis v. Elan Enterprises, Case No. 78-2356-M (W.D.Tenn., March 13, 1981) [ELR 3:12:4]

Monopoly trademark was infringed by game entitled "Anti-Monopoly," Federal District Court rules

The makers of the game Anti-Monopoly have landed on the Boardwalk with four houses and it appears the game is nearing its end. Parker Brothers has obtained a judgment declaring the use of the title "Anti-Monopoly" infringes its Monopoly trademark.

In 1971 Ralph Anspach, a professor of economics, created a board game unsuccessfully marketed under the name "Bust the Trust." Professor Anspach decided the problem lay in the name, which, in 1973, he changed to Anti-Monopoly. Since then AntiMonopoly, Inc. has sold nearly 419,000 games, earning about $1,000,000 in revenues. Anti-Monopoly brought an action challenging the validity of Parker Brothers' Monopoly trademark and seeking its cancellation.

Anti-Monopoly contends the mark Monopoly has become the "generic" common descriptive name of a game. Parker Brothers, by its countersuit, had obtained an injunction prohibiting the use of AntiMonopoly as a trademark for a board game. A Federal Court of Appeals, however, reversed on the ground that the trial court had applied an improper standard in determining the validity of the Monopoly trademark. (ELR 1:17:6) The trial court had stated that "Monopoly" would be a generic term only if the name had come to signify "all board games involving real estate trading." Upon remand, the trial court struggled to apply the Court of Appeal's ruling that the trademark could be sustained only if its "primary significance is to denote the source or producer, as opposed to denoting the product itself." "This is a straightforward task," said the trial court, "in markets where several producers manufacture the generic item in question. In this case, the analysis is complicated by the fact that Parker Brothers has been, and remains, the only producer and manufacturer of Monopoly, since it acquired the rights to do so from Monopoly's creator, Mr. Clarence Darrow, in 1935."

Despite its admitted difficulty in applying the Court of Appeal's standard, the trial court found that the "primary significance" of Monopoly in the public's eye is to denote a "Parker Brothers game" (i.e., source) rather than that "popular game of Monopoly (product)." The court pointed out that AntiMonopoly's own study found that one in three consumers purchased or would purchase Monopoly primarily because they liked Parker Brothers' products. "Unless the Ninth Circuit's standard is meant to foreclose the possibility of trademark protection for any producer of a unique game whose corporate name does not appear in the title of the game ... then its test cannot be used to thwart Monopoly's trademark rights."

Having upheld the validity of the Monopoly trademark, the court reinstated its finding that the public would be deceived as to the source of the AntiMonopoly game and reentered its judgment prohibiting the use of Anti-

Monopoly as a trademark or corporate name by Anti-Monopoly, Inc.

Anti-Monopoly v. General Mills Fun Group, 515 F.Supp. 448 (N.D.Cal. 1981) [ELR 3:12:4]

Reader's Digest is fined $1.75 million for distributing deceptive facsimiles of checks in promotional mailings in violation of FTC consent order

The Reader's Digest has been fined $1,750,000 as a result of a Federal Court of Appeals decision upholding a penalty assessed against the magazine for multiple violations of a Federal Trade Commission consent order.

The Digest's ubiquitous direct mail solicitations offer prizes to a small percentage of winning "sweepstakes" entrants. The solicitations suggest that simulated checks are valuable and can be redeemed for United States currency or for a new car, though in fact the documents are neither valuable nor redeemable. In 197 1, the FTC found that the promotions were unfair and deceptive. When notified of the FTC's intention to charge the company with violating the Federal Trade Commission Act, the Digest entered into a consent order in which it agreed to cease and desist from .using or distributing simulated checks, currency, new car certificates, or using or distributing any confusingly simulated item of value." Nevertheless, in 1973, the Digest initiated a Sweepstakes Passport promotion and mailed out millions of travel checks which purported to pay a grand prize winner $100 a month for life. Although advised by the FTC that the travel checks violated the consent order, the Digest completed its mailing of the promotion by sending out an additional 4 million checks.

The Digest argued that the court's failure to require the Government to establish evidence of actual deception violated its First Amendment rights. The Court of Appeals noted, however, that the FTC's remedy - the consent order - was designed to prevent future consumer deception and that this goal outweighed the Digest's interest in its commercial speech. The Commission's effectiveness would be substantially diminished, stated the court, if it were required to prove that the travel checks actually caused consumer deception. The checks appeared to be valuable but were not. They were indistinguishable from the checks, currency and new car certificates which were referred to as "confusingly simulated items of value" in the consent order.

The District Court finding that the Digest was liable for 17,940,521 violations of the consent order also was affirmed. The Digest's conduct in mailing the additional travelers checks and its failure to consult with the FTC prior to the mailing did not demonstrate a good faith effort to comply with the order. And the Digest had profited from its violation of the order, because more than $5,000,000 in gross subscription revenues were obtained from the travel check promotion.

The District Court's injunction barring the Digest from future violations of the consent order also was upheld.

United States of america v. Reader's Digest Association, Inc., Case NO. 80-2445 (3d Cir., Aug. 24, 1981) [ELR 3:12:5]

College professor's scale for measuring romantic love held copyrightable and Boston Magazine's reproduction of it was an infringement

How do I love thee? A Professor of social psychology at Brandeis University counted the ways in a copyrighted dissertation entitled "The Social Psychology of Romantic Love." Included in Dr. Isaac Rubin's dissertation were a "love scale" and a "liking scale." The scales were based on 26 questions concerning the relationship between two persons. The scales also appeared in scholarly articles and in books in which Dr. Rubin held a copyright interest.

In August of 1977, Boston Magazine published an article on psychological and sociological theories of love - which set forth verbatim Dr. Rubin's scales. A Federal District Court ruled that the Boston Magazine article infringed Dr. Rubin's work and awarded him $5,000 in damages and $2,500 in attorneys' fees, and that ruling has been upheld by a Federal Court of Appeals in Boston.

The magazine argued that under the Copyright Act of 1909, the scales were not copyrightable since they were a scientific discovery. In copyright law, a discovery "refers primarily to the disclosure of a hitherto unknown fact, principle or theory," stated the court. The scales made no such disclosure. And Dr. Rubin had not claimed copyright protection for his theory regarding the components of love. The copyrighted elements were the scales, which were an original form of expression. Dr. Rubin's copyright in the scales would not result in a monopoly of a scientific theory.

The magazine's publication of the scales was not fair use, held the court. The scales were used in a quiz designed to entertain readers. This was a commercial use of copyrighted material.

The magazine also argued that the National Institute of Mental Health had funded Dr. Rubin's work and that his theories therefore should be made available freely to the public. Again, however, the expression of the theories was found protectable. The scales were an essential part of the copyrighted dissertation and the magazine's use of the material affected the potential marketability of the scales to other publications.

Rubin v. Boston Magazine Co., 645 F.2d 80 (1st Cir. 1981) [ELR 3:12:5]

Renewal copyright to textbook belonged to publisher rather than author; and publisher had right to request revised editions, and to hire others to write them, when author refused to do so

Forty years ago, a then-young UCLA professor agreed to prepare an accounting textbook for South-Western Publishing Company. The book was published and the professor, Harry Simons, subsequently prepared revisions to what had become, in 1949, two books, Advanced Accounting and Intermediate Accounting. Simons recently sought to assert ownership of the books charging that he owns the renewal copyrights to the basic texts and that South-Western's continued publication of the revised editions without his consent infringes his copyright. However, a Federal Court of Appeals has affirmed a judgment against Simons and in favor of South-Western Publishing Company.

The Court of Appeals agreed with South-Western that the renewal rights belonged to it. Under the original contract between Simons and South-Western, the professor assigned his copyrights without objection. Although that contract did not specify whether SouthWestern was to own the renewal copyrights as well as the original copyright, every contract between the parties after 1949 expressly transferred to South-

Western both the original and renewal copyright to each revision. "These latter acts," said the court, "confirm that the word 'copyright' in the original contract was intended by the parties to encompass both the original and renewal copyrights." Thus, South-Western, having been assigned the renewal copyrights in both the basic texts and the revisions, had not infringed the professor's copyright.

In the same case, South-Western obtained a judgment, also affirmed by the Court of Appeals, that Simons had breached their publishing contract by refusing to prepare further revisions. Under the contract, the professor agreed "to prepare a revision of the manuscript satisfactory to and without expense to Publisher whenever, in the judgment of the Publisher, this is considered necessary." The court found that this language gave South-Western, not Simons, the right to decide whether a revision was needed, and that South-Western exercised its judgment reasonably in requesting Simons to prepare fifth and sixth editions. The evidence amply demonstrated, said the court, that South-Western made the requests when it did in order to meet the competition.

Having failed to receive the revisions from Simons, South-Western was free, under the contract, to hire other authors to do the job, and "to make such division of royalties on the new edition as Publisher deems necessary in order to obtain satisfactory authorship." South-Western offered Simons more than 50% of the royalty distribution on the fifth and sixth editions, even though he never worked on the fifth and never completed the sixth. However, South-Western refused to pay him royalties for texts subsequent to the fifth and sixth editions.

The court determined that the money the professor received for the work he did was at least reasonable compensation, and the publisher's decision to discontinue paying his royalties beyond the sixth edition was justified. South-Western's longstanding editor, Mr. Crabbe, had testified at trial that Simons agreed not to be paid royalties beyond one edition after the last edition on which he worked, and he produced letters sent to Simons in the course of their business relationship that established Simons' awareness of the royalty termination policy.

South-Western Publishing Company v. Simons, 651 F.2d 653 (9th Cir. 1981) [ELR 3:12:6]

Hollywood Boulevard picture arcade may continue to operate; California court enjoins arrest of adult bookstore and arcade employees

A picture arcade adjacent to Le Sex Shoppe adult bookstore on Hollywood Boulevard contained booths where adult films on sale in the bookstore could be previewed. Customers entered the booths via a coinoperated machine. The Los Angeles Superior Court refused to enjoin the operation of the picture arcade and issued a preliminary injunction restraining further arrests of employees of the arcade. These rulings have been upheld by the California Court of Appeal.

The ordinance prohibiting the operation of a penny arcade in a commercial zone has been upheld as valid in City of Los Angeles v. Silver, 98 Cal.App.3d 745. But the court ruled that there existed a factual question as to whether the arcade in this case could be categorized as a "penny" arcade, which was defined in Silver as "an amusement center where coin operated devices for entertainment are made available to members of the public." And the arrest of the arcade's employees indirectly suppressed the exercise of First Amendment rights, stated the court. Other equitable factors such as the

City's delay in bringing suit, also were cited by the court in denying the City's attempt to enjoin the operation of the arcade.

Judge Lillie, in dissent, would have required the arcade to exhaust its administrative remedies prior to granting judicial relief because "The rule in this jurisdiction is that a claim of unconstitutionality of a zoning ordinance on its face and as applied to a party as an abridgment of his rights of free speech does not excuse his failure to exhaust the administrative remedies provided in the ordinance before seeking judicial intervention." A determination had been made that the picture arcade was a penny arcade for zoning purposes and that the business violated both zoning ordinances and police permit regulations. Judge Lillie rejected the majority's view that the arcade was not required to exhaust its administrative remedies while paying the "unconscionable" price of having its employees arrested.

City of Los Angeles v. Amber Theaters, Inc., Case 2 Civ 60327 (Cal.Ct.App., Sept. 21, 1981) [ELR 3:12:6]

Stuffed toy animals ruled copyrightable as soft sculptures

Even teddybears (of the stuffed variety) may have their day in court. A Federal Court of Appeals in California has decided that Kamar International's stuffed toy animals are copyrightable and that the copyrights on the animals were infringed by Berrie and Co., a competing toy manufacturer. A Federal District Court had concluded that the toy stuffed animals were taken from the public domain and, hence were not copyrightable. A Court of Appeals, however, pointed out that the animals were sufficiently original, despite their origin, to be copyrightable as "soft sculptures." The original elements in the animals consisted of their special texture and design.

Berrie argued that pictures of the animals had appeared in catalogs that did not contain copyright notices and that because of this omission, the cuddlies forfeited their copyright protection. Section 10 of the Copyright Act of 1909 requires the appearance of a copyright notice on each copy of a work. But the catalog pictures were not equivalent to copies of the tangible copyrighted item, the court ruled in rejecting Berrie's argument.

The District Court's rulings on the issues of access to, and substantial similarity between, the two companies' toy stuffed animals also were reversed. The question of substantial similarity was remanded for reexamination in accordance with the standards set forth in Sid & Marly Krofft Television v. McDonald's Corp. 562 F.2d 1157.

Kamar unsuccessfully alleged that Berrie had violated the Lanham Act by selling stuffed toy animals from which Kamar's labels had been cut out, and that Berrie sold exact copies of Kamar's toys. The court found that the evidence did not support these claims.

Kamar International, Inc. v. Russ Berrie and Co., Case No. 79-3666 (9th Cir., Sept. 28, 1981) [ELR 3:12:7]

Briefly Noted:

Labor Law.

A Federal District Court has denied a musicians' union's motion to dismiss a suit brought by two of its members, holding that whether a union's voting policies violate the Labor and Management Reporting Act of

1959 is a factual question stating a cause of action. The two union members had brought suit alleging that the union's delegate selection process and a voice vote on a dues-raising amendment to the union constitution were unreasonable and in violation of the Act.

Denov v. Chicago Federation of Musicians, 517 F.Supp. 980 (N.D. Ill. 1981) [ELR 3:12:7]

Trademark.

A Federal District Court in Georgia has held that the use of the name "Miss Teen U.S.A." for a beauty pageant violated the rights of the owner of the registered service mark "Miss U.S.A." The court found that the similarity between the two names was sufficient so that the "consumer may associate the defendant with the plaintiff," and assume that the "Miss Teen U.S.A." pageant is an offshoot of the 'Miss U.S.A." pageant, and "simply a warm-up for teenage girls in preparation for the contest for young women." The court rejected the argument that the secondary meaning of the "Miss U.S.A." mark was diluted because third parties had registered similar names. "The fact that third parties are using the contested term, or one similar to it, may rebut the proponent's claim of distinctiveness, but it follows from this same principle that third party uses must be inconsistent with, or negative, the plaintiff s claim of exclusiveness in its marks.... Therefore, the plaintiff need not prove that the mark is used exclusively by it in order to prevail in this infringement action."

Miss Universe, Inc. V. Miss Teen U.S.A., Inc., 209 U.S.P.Q. 699 (N.D.Ga. 1980) [ELR 3:12:7]

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[ELR 3:12:7]