RECENT CASES

Trial is required to determine reasonableness of NAB Television Code limitations on the number and placement of television commercials; but multiple product standard of Code is ruled a per se violation of the Sherman Act

That familiar, if unwelcome, refrain "And now, a word from our sponsor," has become the theme of an antitrust action brought by the United States Department of Justice against the National Association of Broadcasters. Since 1952, the NAB, an industry trade association whose membership includes the three major commercial television networks and more than 500 individual television stations, has sponsored a Television Code. By complying with the Code's standards governing television programming and advertising, a broadcaster presumably will substantially meet its statutory obligation to serve the public interest.

The government challenged the Code's multiple product, time, and program interruption standards. The multiple product standard prohibits the advertising of two or more products or services in a single commercial if that commercial is less than 60 seconds. The time standard limits the amount of commercial material which may be broadcast each hour. Network-affiliated stations are limited to 9 1/2 minutes of commercials per hour of prime time (plus 1/2 minute for promotional announcements), and 16 minutes per hour at all other times. Independent stations are allowed more advertising time, and the amount of advertising material on children's programs also has a time limit. The program interruption standard sets a maximum number of commercial interruptions per program as well as a maximum number of consecutive announcements per interruption. Network-affiliated stations may interrupt prime-time programs four times per hour; they may schedule a maximum of five announcements consecutively within an interruption; and they may schedule three announcements consecutively within each station break. The government complained that the NAB had conspired with others to restrain trade by agreeing to restrict the supply of advertising and by standardizing the format for the presentation of television commercials.

A Federal District Court in Washington, D.C. has granted summary judgment to the government with respect to its claim that the multiple product standard is a per se violation of section 1 of the Sherman Act, and has ordered a trial to determine the legality of the time and program interruption standards.

Judge Harold H. Greene noted that the multiple product standard requires an advertiser seeking to promote more than one product to purchase 60 seconds of time, which may be more commercial time than is actually wanted or needed. The standard raises the price of advertising time, adds millions of dollars to broadcaster revenues and indirectly increases the cost to consumers of the products advertised. Whether viewed as an artificial device to increase advertiser demand for commercial time, as a means to limit the supply of such time (by making time available in specified segments), or as a coercive use of market power "akin to a tying arrangement," the standard was found to be an unreasonable restraint of trade and a per se violation of the Sherman Act. It was pointed out that the rationale underlying the rule against tying "that sellers should be barred from using their market power to force a buyer to purchase and to pay for something he does not want" - applies "precisely" in this case.

The NAB claimed that because subscription to the Code is voluntary, it is not a "contract, combination ... or conspiracy" prohibited by section 1 of the Sherman Act. Judge Greene, however, characterized the Code as an agreement among competing television stations and networks to restrict the availability of commercial announcements - a "classical horizontal agreement" - and a contract within the meaning of the Act. The fact that the Code may not be legally enforceable also is not a valid defense because "combinations of entities which fix prices, manipulate supplies, or engage in other anticompetitive conduct are almost always 'voluntary' in the sense that a recalcitrant co-conspirator cannot be required in a court of law to keep his bargain." Moreover, the NAB Code is not merely a set of advisory standards. The NAB maintains a comprehensive monitoring and enforcement program, with the sanction of suspension serving as a powerful incentive for broadcaster compliance with the multiple product standard.

The court refused to find that the time and program interruption standards of the Code were per se violations of the Sherman Act. The Government argued that the NAB and its subscribers had agreed to limit the supply of time for commercials and that the standard constituted illegal price fixing. But the per se approach was found inappropriate in the television broadcasting industry, because the industry possesses certain unusual characteristics which influence the usually direct link between supply and price. Broadcast frequencies and time are not unlimited; broadcasters are subject to government regulation; and they must operate their stations in the public interest. Thus, even in the absence of the Code, the supply of commercial time might not expand in response to high demand.

Under the rule of reason analysis, it must be determined whether the time standard of the Code has more than a de minimis effect on the price of commercial time. If other factors, such as the type of programming, a program's schedule, audience size and demographics, or advertiser marketing strategy essentially set the price of commercial time, the time standard may not violate the Sherman Act. Due to these factual issues surrounding the question of the extent to which the supply and price of commercial time are influenced by the Code, the government's motion for summary judgment on the time standard was denied by the court. At trial, the court noted, the government may attempt to show that the price non-subscribers charge for equivalent time is lower than that charged by Code subscribers. On its part, the NAB might seek to establish that the demand for commercial time is so high that any restraint on its supply caused by Code provisions has no effect upon price.

The program interruption standard also will require a trial. Agreements between horizontal competitors to standardize products on occasion may increase price competition. But the Code appears to foster a standardized station format which would preclude such station options as the designation of a commercial-free hour (balanced by the addition of commercials in another time period). Evidence as to the economic effect of such standardization will be required in order to determine the legality of the program interruption standard.

The court also stated that the government was not required to show that the Code was formulated with an anticompetitive purpose as long as an anticompetitive effect was established. Nonetheless, an anticompetitive purpose could be deduced from: the NAB's statement that the self-regulation manifested by the Code "advances the reasonable self-interest of broadcasters"; from the fact that the time and program interruption standards for network affiliates differ from those which apply to independent stations, and that different rules apply to the "more lucrative" prime time hours; and from the NAB's statements regarding the beneficial effect on broadcaster revenues of an 80-second commercial break and a recommended reduction in prime time. Any further consideration of the NAB's purpose will have to occur during the trial, stated the court.

In conclusion, the court reviewed the NAB's arguments that its Code fosters the public interest by preventing the overcommercialization of television, and that in the absence of the Code, either commercial time would increase or the FCC would assume a regulatory role in this area. The government suggested that even with the elimination of the Code provisions at issue, television stations will hold down the length or improper placement of commercials due to the presence of competition from other entertainment sources such as cable and satellite. In other words, competition should prevent overcommercialization as effectively as the NAB Code. And, if necessary, regulation by the FCC, as opposed to "economically-interested" supervision by the NAB, would remain available to protect the public interest.

United States of America v. National Association of Broadcasters, Case No. 79-1549 (D.C. Cir., March 3, 1982) [ELR 3:22:1]

Arbitration clause in agreement between Atlantic Records and the Robert Stigwood Organization did not require arbitration of dispute concerning royalties from "Saturday Night Fever" album

Disco may be dead, but legal disputes involving music of the disco era have been stayin' alive, as in the case between Atlantic Records and the Robert Stigwood Organization over royalties from sales of the hit motion picture soundtrack album "Saturday Night Fever."

In 1972, RSO, a British record company, entered into a three year contract granting Atlantic Records the right to market and distribute in the United States certain recordings on the RSO label. Paragraph 18 of the contract provided that when it expired, RSO would have the option in its "sole discretion" to continue (or refrain from) marketing any such recordings previously distributed by Atlantic, subject to the payment to Atlantic of 50% of the net royalties earned by RSO.

Among the records exploited by Atlantic under the contact was a studio rendition of the song "Jive Talkin," performed by The Bee Gees. Sometime after the expiration of the contract, the hit motion picture "Saturday

Night Fever" was released, featuring the music and recorded performances of The Bee Gees, including the studio version of "Jive Talkin." RSO then released the original soundtrack album of the movie, an album which became an instant success and sold four million copies in this country. RSO shared its royalties from this album with Atlantic, in accordance with paragraph 18 of the contract.

Later, RSO released a second soundtrack album of the film, which was the same as the first album, except that RSO substituted for the studio version of "Jive Talkin'" a live version of the song recorded by The Bee Gees during a concert appearance. Over eleven million copies of this second album were sold in the United States. RSO, however, shared none of the royalties from this later release with Atlantic.

Believing it was entitled to royalties from the second album, Atlantic sought arbitration of its claim on the basis of the arbitration clause contained in the contract. A New York appellate court has ruled, however, that the dispute is not arbitrable.

The arbitration clause provided, in pertinent part, that "The provisions subject to arbitration shall be limited to [the parties' rights after expiration] and any other provisions of this agreement relating to accounting procedures, methods of computation and payments."

The court said that "controversy between the parties only incidentally relates to `accounting procedures, methods of computation and payments.' In essence the dispute is rather over whether Atlantic has continuing rights to royalties realized from Stigwood's exploitation of the album containing the substituted rendition of The Bee Gees' composition 'Jive Talkin'.' The reference in the limited arbitration clause to [the paragraph concerning rights after expiration] may be read as covering only disputes respecting 'accounting procedures, methods of computation and payments' or as applicable to all controversies arising under that paragraph including the subject alleged breach of contract."

The court concluded that since the arbitration provision was equivocal and subject to either reading, an order staying arbitration was proper. Atlantic must therefore proceed with its claims, if at all, in state court.

Robert Stigwood Org. v. Atlantic Recording, 443 N.Y.S.2d 726 (App.Div. 1981) [ELR 3:22:3]

Arbitrator's award of more than $250,000 against Robbins Music for having infringed Barry Manilow's copyrighted musical compositions is upheld, despite arbitrator's erroneous finding that noncopyrighted personality folios were infringed

Barry Manilow may write the songs, but in 1976 he licensed the right to publish and sell his compositions to Robbins Music Corp. Robbins was granted the exclusive right to print and distribute sheet music, personality folios (publications featuring songs by Manilow) and mixed folios (publications containing a collection of songs not associated with a particular artist or writer). The date on which this agreement expired has been the subject of "arduous" litigation.

Kamakazi Music Corp. (Manilow's wholly-owned corporation and the registered owner of the copyrights in musical compositions written by Manilow) claimed that the termination date was December 31, 1979; Robbins alleged that its rights extended to December 31, 1980. In May of 1980, when Kamakazi sought a preliminary injunction to bar Robbins from manufacturing and selling copies of the personality folios while Kamakazi's action for copyright infringement was pending, Robbins challenged the court's jurisdiction on the ground that the agreement required arbitration of disputes between the parties. A Federal District Court in New York City retained jurisdiction, finding that the action arose under the copyright laws. However, the court granted Robbins' motion to stay proceedings pending arbitration. (ELR 2:10:5)

After eight months of arbitration, the American Arbitration Association determined that Robbins had not met certain reporting and payment conditions in the agreement and therefore was not entitled to an extension of the term beyond December 31, 1979. Although Kamakazi contended that 45 separate infringements had occurred, the arbitrator ruled that Robbins' continued use of Kamakazi works after December 31, 1979 constituted willful infringement of 25 copyrights - those in 12 individual works and in 13 compilations or derivative works. The "in lieu" damages which Kamakazi elected to receive under section 504(c) of the Copyright Act amounted to $250,000, plus costs, and attorneys fees of $50,000.

Robbins, with a bravado worthy of its opponent's namesake, then moved to vacate the arbitrator's award. Robbins argued that the arbitrator only was authorized to interpret the licensing agreement and had exceeded his jurisdiction by considering the application of federal copyright laws. However, Judge Sweet found that the arbitration clause in the licensing agreement was broad enough to include the Kamakazi's infringement claims. The arbitrator's authority and award therefore were upheld, as this was not a case "in which the question of infringement must be decided as a prerequisite to the determination of the meaning of a contract."

Prior to confirming the arbitrator's award, the court requested the parties to address the issue of the validity of Kamakazi's copyrights. Copyright validity is a prerequisite to a finding of infringement. The arbitrator had not expressly considered this issue. Instead, certificates of registration of the copyrights in Kamakazi's compositions were accepted as prima facie evidence of their validity, and the arbitrator had refused to hear Robbins' rebuttal evidence.

In response to the parties' submissions, Judge Sweet noted that Robbins actually had never challenged the validity of the 45 individual Kamakazi copyrights, but rather had argued that Kamakazi never had copyrighted the allegedly infringed compilations. A compilation or rearrangement of existing works may be copyrighted but none of the personality folios had been copyrighted as folios. The court therefore ruled that the arbitrator committed an error of law "to the extent that his assignment of specific infringements could be construed to cover entire personality folios, which were not covered by valid copyright. . . ." But the court also ruled that this error was an insufficient ground on which to vacate the arbitrator's findings, noting that it was at Robbins urging that the compilations, rather than the 45 individual compositions, were considered the "basic units" infringed. Kamakazi's motion to confirm the arbitrator's award therefore was granted.

Kamakazi also was granted a permanent injunction barring Robbins from printing or selling Kamakazi's compositions except those included in mixed folios, which Robbins may continue to sell provided the required royalty payments are made to Kamakazi. Kamakazi had claimed that it would be irreparably harmed by further sales by Robbins and Hal Leonard Publishing Co. (to which Robbins had sold its rights in the licensing agreement on December 30, 1980) in that money damages could not be adequately ascertained. In Kamakazi's view, its compositions were the primary attractions in the mixed folios and therefore were entitled to a greater than a pro rata share of royalties. The court found that money damages most likely would be determinable, including an amount to compensate for any loss of goodwill.

Robbins also was ordered to pay arbitration costs totalling some $8,600.

In a subsequent opinion, the court also ruled on Robbins' counterclaim against Warner Bros. Publications, Inc. (the present publisher of Kamakazi's compositions) in which Robbins alleged that Warner Bros., without authorization, printed the music to four songs copyrighted by Robbins' affiliate, Big 3 Music. Robbins had issued a license to Warners to print the songs in a music folio entitled "Urban Cowboy." Subsequently, Big 3 printed a music folio entitled "Urban Cowboy Music," which included the same four songs, previously licensed to Warners, from the movie "Urban Cowboy." The cover of the Big 3 folio contained the title and logo of the movie; Warners held licenses to the trademarks in both the title and logo. Warners' suit against Big 3 for trademark infringement was settled. Big 3 then claimed that it had rescinded Warners' license to use the four "Urban Cowboy" songs. After several more volleys, the court scored the round in favor of Robbins. Warners' motion to dismiss the counterclaim was denied due to the presence of factual issues as to the existence of a "reciprocal" licensing agreement between the parties and the effect of such an agreement on the alleged rescission.

Kamakazi Music Corp' v. Robbins Music Corp., 522 F.Supp. 125 (S.D.N.Y. 1981); Kamakazi Music Corp. v. Robbins Music Corp., Case 80 Civ. 2877 (S.D.N.Y. Sept. 15, 1981) [ELR 3:22:3]

Federal Court of Appeals upholds injunction barring The Gap Clothing Stores' unauthorized radio play of copyrighted songs

A Federal Court of Appeals in New York has upheld a lower court's recent ruling that The Gap Stores, Inc., a well-known chain of some 420 clothing stores, infringed the copyrights to songs played over radios in some of its stores.

As previously reported (ELR 3:2:4), the lower court ruled that The Gap stores did not enjoy the protection of the Section 110(5) exemption in the federal Copyright Act, under which radio play through stereo equipment "commonly used in private homes" does not result in copyright infringement even though copyright owners neither authorized the radio play nor received performance royalties. The lower court found that The Gap stores used elaborate commercial-type sound systems rather than equipment "commonly used in private homes."

The Court of Appeals agreed. The court found that The Gap stores are "of sufficient size to justify, as a practical matter, a subscription to a commercial background music service." The court therefore held that Congress could not have intended that establishments such as The Gap would be exempt from copyright infringement liability for their unauthorized radio play of copyrighted songs.

The Gap insisted that the injunction prohibiting them from "rendering any public performances by means of radio broadcasts over loud speakers which would infringe ... copyrighted musical compositions" is unconstitutionally vague. The court disagreed. Citing International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n 389 U.S. 64, 74-76 (1967), the court found that "the injunction is sufficiently clear to notify

The Gap stores that broadcasting radio programs as it does now is forbidden." The court concluded that the injunction fulfills the requirement of Rule 65(d) of the Federal Rules of Civil Procedure in that it is, as it must be, sufficiently "specific in terms to give the parties subjected to the injunction fair notice of the forbidden conduct."

In February 1982, a Federal Court of Appeals in California heard oral argument in a case involving issues similar if not identical to those raised in The Gap case. A decision in Broadcast Music, Inc. v. The United States Shoe Corp. (No. 81-5162 (9th Cir.)) is expected to be handed down within the next several weeks.

Sailor Music v. The Gap Stores, Inc., No. 81-7543 (2d Cir., Dec. 15, 1981) [ELR 3:22:4]

Sights and sounds of video game displays qualify for copyright protection

The visual images and accompanying sounds comprising the audiovisual display of the video game "Scramble" meet the "fixation" and "originality" requirements of the Copyright Act, a Federal Court of Appeals in New York has ruled. The court gave quarter to the contention that the only copyrightable element of the game was the written computer program which determined the audiovisual display.

Stern Electronics is the authorized distributor of "Scramble," which had an initial two-month sales volume of about $20 million. Stern obtained a preliminary injunction barring Omni Video Games, Inc., the distributor of a "knock-off" version of "Scramble" from infringing Stern's copyright in the display. The District

Court order granting an injunction has been upheld on appeal.

Omni had argued that the display was neither "fixed in any tangible medium of expression" nor "original." Some images appearing on the screen during a game vary, depending upon the actions of the player. But player participation does not affect the copyrightability of a video game display as an audiovisual work, stated the court. The sequence of the sights and sounds of the game differ each time the game is played, yet there is constancy amounting to "fixation" in many clements of the game, and "The repetitive sequence of a substantial portion of the sights and sounds of the game qualifies for copyright protection...."

Further, the display exhibits sufficient originality to be copyrighted apart from the underlying written program.

Also upheld was the District Court finding that Omni attached the label "Scramble" to certain games in a bad faith attempt to preempt Stern's trademark.

Stern Electronics, Inc. v. Kaufman, Docket No. 81-7411 (2d Cir., Jan. 20, 1982), aff'g, 523 F.Supp. 635 (E.D.N.Y. 1981) [ELR 3:22:5]

Book manufacturer is enjoined from selling copies of its works in competition with its licensed distributor despite manufacturer's claim that licensing agreement was entered into under economic duress

The difficulty of calculating damages in a dispute over a book distribution agreement has prompted a Federal District Court in New York City to issue a preliminary injunction preventing a book manufacturer from selling or marketing, on its own, the works which were the subject of the agreement.

In April of 1980, Craftique, Inc., a subsidiary of Curtis Publishing Company, granted Bookthrift, a division of Simon & Schuster (which is wholly owned by Gulf & Western), the exclusive right to market 19 books to book and department stores, including book chains. The works included six Norman Rockwell "Blank Books," 10 state edition "Blank Books" and "Baby's Own Book." These books were designed primarily for use as "premiums," that is, the books were to be sold in large numbers to banks, corporations and associations for use as gifts in conjunction with promotion campaigns. Upon execution of the agreement, Bookthrift paid $81,000 in outstanding invoices which were due to Craftique. Craftique proceeded to ship 200,000 copies of the works to Bookthrift. Then, in December of 1980, the shipments ceased and Craftique began to sell certain works itself, claiming that the April 1980 agreement was the product of fraud and coercion because Bookthrift allegedly would not have paid Craftique the $81,000 due if the agreement had not been signed.

Bookthrift responded with an action for breach of contract and sought a preliminary injunction on the ground that as a result of Craftique's action, Bookthrift would lose sales and profits, which, for several reasons, would be difficult to ascertain. Bookthrift stated that there had been a break in the continuity of sales to customers the company had established in its specialized market; that it had not approached large prospective markets because of the disruption in its supply; and that it had lost significant Christmas holiday sales due to its concern over the availability of adequate supplies of the works. The market for the works was "highly volatile" and could not be measured until the product actually was offered for sale. And Craftique's sales of the works would not provide an adequate basis for measuring Bookthrift's damages, the company alleged, because Bookthrift might receive returns and issue credits for books sold by Craftique. Further, customer confusion might result from Craftique's sale of the same books as Bookthrift. A likely increase by Craftique in the suggested price of the book would add to the difficulty of calculating lost profits. Bookthrift established that it had sold over 315,000 copies of the works in a six month period in 1980,.while Craftique had received very little response to its marketing efforts. Bookthrift also has a larger sales force and greater access to markets than Craftique, which only has a novice sales organization.

Judge Motley rejected Craftique's claim of economic duress with the observation that the company could have refused to sign the April 1980 agreement and then could have sued for the amount owed by Bookthrift. Craftique also had alleged that the contract price at which it was required to supply the works to Bookthrift was below its own cost of production and therefore unfair. But Craftique based this claim on a calculation of costs derived from the initial printing for two of the works, and a first printing absorbs costs generally not present in subsequent printings. Furthermore, Craftique had made no effort to renegotiate the suggested prices at the time the contract was drawn, although the prices were the same as those previously used in its dealings with Bookthrift.

Injunctive relief therefore was granted to Bookthrift due to the irreparable harm likely to occur in the absence of a method for calculating damages. There was a potential sales range for the works of between 200,000 and one million copies. The court suggested that "the only reliable method for determining how many of these books can be sold is to let someone go out and sell them." Sales by Craftique would not fairly represent damages to Bookthrift because of the disparity in the sales capabilities of the two companies.

Consequently, Bookthrift was authorized to proceed with sales of the works pending trial, and Craftique was ordered to decide whether to continue to supply the works at the prices set in the April 1980 agreement or whether, pursuant to a contractual alternative, the company would provide Bookthrift with the films necessary to manufacture the works and receive a set royalty payment.

Gulf & Western Corp. v. Craftique Productions, Inc., 523 F.Supp. 603 (S.D.N.Y. 1981) [ELR 3:22:5]

Encydopedia Britannica allowed to deduct advances paid to writer of book

Encyclopedia Britannica, Inc., an accrual basis taxpayer, deducted payments made by it to David-Stuart Publishing Company. David-Stuart was under a contract to Britannica to prepare a work entitled "The Dictionary of Natural Sciences." Prior to its 1964 taxable year, Britannica had entered into an agreement with David-Stuart providing that David-Stuart would research, prepare, edit, and arrange a manuscript and all illustrative material for the dictionary. Britannica agreed to pay David-Stuart certain amounts needed by it, which payments were to be considered as advances against royalties. In its 1964 fiscal year, Britannica deducted all of the payments made to DavidStuart in connection with the dictionary.

The IRS disallowed the deductions on the basis that the payments constituted a capital expenditure. Britannica claimed that the expenses were deductible as prepublication expenditures under Section 2119 of The Tax

Reform Act of 1976 or, alternatively, were ordinary and necessary business expenditures currently deductible under Internal Revenue Code section 162. Prior to this controversy, Britannica had consistently reflected similar expenses by treating them as a cost of goods sold. Since Britannica utilized the installment method of accounting for its sales, these expenses were, in a sense, deducted only as income from sales was realized.

The Tax Court has held that the agreement between David-Stuart and Britannica was one for the rendition of services and not for the purchase of a capital asset. Section 2119 of The Tax Reform Act of 1976 directed the Internal Revenue Service to apply and administer certain sections of the Internal Revenue Code without references to Revenue Ruling 73-395. Revenue Ruling 73-395, 1973-2 C.B. 87, held that an accrual basis taxpayer in the business of publishing and distributing textbooks must capitalize its expenditures for writing, editing, design and artwork for those textbooks. However, the Tax Reform Act provides that this does not have to be done where regulations dealing with prepublication expenditures had not been issued and where the expenditures were consistently applied by the taxpayer prior to the Revenue Ruling.

In this case, the Tax Court found that Britannica had not shown that its practice prior to the 1973 Revenue Ruling was to currently deduct such expenditures, since it had a custom of utilizing such expenditures as a cost of goods sold. These costs of goods sold were then deducted according to the installment method of reporting over the period of the sales of such work.

However, the Court went on to rule that Britannica had paid David-Stuart for services to be performed. The payments were held to be deductible in the year they were made, because the Finance Committee Report to The Tax Reform Act of 1976 dealing with Section 2119 contained specific language authorizing the deduction of reasonable and necessary expenses by authors, and because in Faura v. Commissioner, 73 TC. 849 (1980) (ELR 1:24:6), the Tax Court allowed an author a current deduction for producing two manuscripts on the grounds that these expenditures were currently deductible as ordinary and necessary business expenditures under IRC section 162.

Encyclopedia Britannica, Inc. v. Commissioner, TC Memo 1981-255 (1981) [ELR 3:22:6]

Toy manufacturer's repeated use of the name of its competitor's game constitutes trademark infringement

The games people play are serious business to toy manufacturers such as Invicta Plastics, the seller of the "hidden code logic game" Mastermind. Invicta brought an action alleging that Mego Corp., the seller of the game Sixth Sense, which is in direct competition with Mastermind, had violated the Lanham Act, state law, and the common law of unfair competition. The package containing the Sixth Sense game displayed two statements referring to Mastermind; Invicta's trademark registration notice appeared along with the name of its game, and a separate reference to Invicta's ownership of Mastermind also was included on the package. In addition, Mego's name appeared 23 times on what obviously was not a "plain wrap" container. References to Mastermind were featured in Mego's television and radio campaign to promote Sixth Sense; Mordechai Meirovitz, the inventor of both games, appeared in these ads, and stated "Sixth-Sense is my most challenging invention since Mastermind."

A Federal District Court in New York City logically concluded that the use of the name "Mastermind" on the Sixth Sense package constituted trademark infringement and false designation of origin in violation of sections 1114 and 1125 of the Lanham Act. Mego did not create a mark which was confusingly similar to Invicta's, did not utilize similar trade dress, prominently displayed its own name and trademark on the Sixth Sense package and identified Invicta, albeit subtly, as the owner of Mastermind. Nevertheless, members of the buying public would likely be confused as to the producers of the games named on the Sixth Sense box. The television advertisement, while true, also might result in confusion as to the source of the products being advertised.

Mego argued that it was entitled to identify previous games invented by Meirovitz, citing the publishing industry's practice of listing past works by an author which may have been published by a different company. But Meirovitz was not the type of "public figure" whose name would sell games, and the game and toy industry does not customarily promote its inventors.

In all, Mego was found to have deliberately sought to connect its game with Mastermind and to benefit from the public's "familiarity and satisfaction" with Mastermind, stated the court. Therefore, the likelihood of public confusion would be inferred. Invicta also had introduced evidence of actual confusion on the part of certain customers who tried to order Sixth Sense from lnvicta, rather than from Mego.

Damages under section 1117 of the Lanham Act will be based on Mego's profits from Sixth Sense gross profits of approximately $218,0000 less Mego's demonstrable costs - plus any actual damages proven by Invicta, and costs. Attorneys fees were denied because the infringement was not malicious, fraudulent, deliberate or willful. Mego had identified itself on the Sixth Sense package and in its advertising, and Invicta's ownership of Mastermind was indicated on the Sixth Sense package, observed the court.

Invicta Plastics (USA) Ltd, v. Mego Corp., 523 F.Supp. 619 (S.D.N.Y. 1981) [ELR 3:22:7]

Briefly Noted:

Copyright.

A defendant in a copyright infringement action is not denied his Seventh Amendment right to a trial by jury even though the copyright owner seeks only an injunction and minimum statutory damages, a Federal Court of

Appeals has held. Gnossos Music sued Mitkin, a nightclub owner and operator, alleging copyright infringement by public performance of Gnosses' copyrighted songs. The Court of Appeals found the use of the term "as the court considers just" in the statutory damages section of the Copyright Act to be ambiguous, because the word "court" could mean "judge" or "judge and jury." The court determined that defendants retain their right to a trial by jury in such circumstances, because the rights and duties created by the Copyright Act are analogous to those historically recognized at common law and are legal rather than equitable in nature.

Gnossos Music V. Mitkin, Inc., 211 U.S.P.Q. 841, CCH Copyright Law Reports, para. 25,274 (4th Cir. 1981) [ELR 3:22:7]

Telecommunications.

A decision by the National Telecommunications and Information Administration, an agency within the U.S. Department of Commerce, to issue a grant to an educational foundation for the purpose of constructing a public radio station in New Orleans was found not subject to review by a Federal Court of Appeals. Xavier University and Notre Dame Seminary contended that the foundation had misrepresented information on its grant application. The statute authorizing the Secretary of Commerce to distribute such grants is a part of the Communications Act of 1934. But the Act, while providing for judicial review of FCC decisions, did not similarly authorize review of decisions by the Secretary of Commerce or by the NTIA, the court held in dismissing the action.

Xavier University v. National Telecommunications and Inforniation Administration, 656 F.2d 306 (5th Cir. 1981) [ELR 3:22:7]

Previously Reported:

The following cases which were reported in previous issues of the Entertainment Law Reporter have been published: Recording Industry Association of America v. Copyright Royalty Tribunal, 212 USPQ 69 (3:4:3); United States v. Reader's Digest Association, 662 F.2d 955 (3:12:5); Jason v. Fonda, 526 F.Supp. 774 (3:14:2); Broadcast Music, Inc. v. Moor-Law, Inc., 527 F.Supp. 758 (3:18:1); Flamingo Resort v. United States, 664 F.2d 1387 (3:18:5); United States v. Columbia Broadcasting System, 666 F.2d 364 (3:19:4); Maxwell v. Superior Court, 30 Cal.3d 606 (3:19:3); Olivia N. v. NBC, 126 Cal.App.3d 488 (3:16:2); and City of Los Angeles v. Amber, 123 Cal.App.3d 715 (3:12:6). [ELR 3:22:8]

DEPARTMENTS

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[ELR 3:22:8]