RECENT CASES

Federal Court of Appeals upholds jury award of $725,000 against CBS because of its unauthorized use of excerpts from Charlie Chaplin films

A jury award of approximately $725,000 in compensatory and punitive damages in favor of Roy Export Co. against CBS for statutory and common law copyright infringement and unfair competition has been affirmed by a Federal Court of Appeals in New York. (The unique factual background of the action was recounted in the report of the District Court's decision in ELR 3:3:1.) Roy Export, the holder of the copyrights in the films of Charlie Chaplin, and of a common law copyright in a compilation of excerpts from the films, contended that CBS, without authorization, had used substantial portions of its compilation in a film biography of Chaplin which was broadcast on December 26, 1977.

CBS argued a "generalized First Amendment privilege" as a bar to Roy's claims, asserting that it had a right to use the films that were the basis of Chaplin's fame in reporting on the newsworthy event of his death. The "Roy" compilation itself had been shown only once - on the occasion of the 1972 Academy Awards ceremony (broadcast on NBC) marking Chaplin's return to Hollywood after a 20-year exile. CBS stated that since the compilation was a part of the "news event" of the Awards ceremony, its newsreporting privilege entitled the network to use excerpts from the compilation in its 1977 obituary. The court found this argument "unpersuasive," observing that "No Circuit has ever held that the First Amendment provides a privilege in the copyright field distinct from the accommodation embodied in the 'fair use' doctrine." And in this case, the showing of the film clips was not essential to CBS' report, because public domain films were available to illustrate Chaplin's career.

The court also found that Roy's common law copyright in the compilation was not terminated either by the one-time license granted to the Academy of Motion Picture Arts and Sciences to broadcast the compilation during the 1972 Academy Awards ceremony, or by the fact that the Academy had affixed a copyright notice in its name to the entire telecast. The court made a lengthy analysis of the distinction between "investive" and "divestive" publication under the 1909 Copyright Act, particularly with respect to unpublished works included as component parts of a collective work. The Academy did not acquire a statutory copyright in the compilation, said the court, because "without an assignment from the proprietor of a component, the compiler of a collective work cannot secure copyright protection for preexisting components that be did not create; protection is available only for that part of his product that is original with him. . . ." The 1972 telecast was "performance" which did not constitute a "divesting" publication. Therefore, the compilation did not lose its common law copyright, and was not in the public domain. Furthermore, the fact that a copyright was affixed to the telecast did not require Roy to exchange its common law copyright for statutory rights solely because the compilation was included in the Academy Awards telecast.

The Court of Appeals also upheld the finding that CBS was liable under New York unfair competition law for misappropriating the compilation and using it to compete with Roy's own film biography of Chaplin. CBS had argued that any misappropriation claim derived from its use of the copyrighted films from which the compilation was excerpted, and that Roy's claim therefore was preempted. The court disagreed, saying that CBS unquestionably had appropriated the "skill, expenditures and labor" of Roy and the producers of the compilation. CBS' actions arguably were a form of "commercial immorality." The taking of the compilation, an entity apart from Chaplin's copyrighted films, and the use of the excerpts in the film obituary were in bad faith. Roy and its licensees would have had a viable claim for unfair competition even if they did not hold copyrights in the films, concluded the court. Thus, the misappropriation claim was found not vulnerable to a preemption defense.

Roy Export Company v. Columbia Broadcasting System, Docket No. 81-7027 (2d Cir., Mar. 4, 1982) [ELR 4:1:1]

Parody of John Lennon and Paul McCartney song "Revolution," which altered lyrics but not the music, infringed their joint copyright under Canadian law

The Supreme Court of Ontario has enjoined Rogers Radio Broadcasting from using the music to the John Lennon-Paul McCartney song "Revolution" with revised lyrics. Rogers had planned to make tapes and records of a song known as "Constitution," but was refused permission to use the music to "Revolution" by ATV, the copyright holder in Canada of the musical work.

Rogers argued that the copyright to "Revolution" was not in one single work composed of words and music, but that there were separate copyrights in the music and in the words of the piece. Based on its "separate copyrights" premise, Rogers claimed that it was entitled to a compulsory license in order to use the music, so long as it paid ATV the fixed statutory royalty rate required by Canadian law.

The court noted that in Chappell & Co., Ltd. v. Redwood Music Lid., 2 All E.R. 817 (1980), Viscount Dilhoune had stated that "the author of the words of a song will be the first owner of the copyright in the words and the author of the music of the copyright in the music. . . . Though one might regard a song so produced as the product of joint authorship, it is not treated by the 1911 Act as such . . . "

Judge Van Camp, however, noted that it was admitted that the song "Revolution" was "authored by" Lennon and McCartney. There was no evidence of any separate copyrights in the words or in the music, or that one musician was the author of the words and the other the author of the music. He therefore concluded that "Revolution" was a work of joint ownership for which there would be one copyright. And irreparable harm, incompensable monetarily to the copyright holder, undoubtedly would ensue, in the court's view, since "It would be difficult ever again to listen to the original song without the words of the new song intruding."

ATV Music Publishing of Canada Lid. v. Rogers Radio Broadcasting Limited, In the Supreme Court of Ontario, Canada (Mar. 2, 1982) [ELR 4:1:2]

T-shirt bootlegger is enjoined; Federal District Court denies First Amendment protection to vendor whose shirts bore "news" items about musical performers.

In addition to selling records, musical performers and groups, including the Rolling Stones, Jefferson Starship, Pat Benatar, the Electric Light Orchestra and Tom Petty and the Heartbreakers, among others, have a common interest in the exclusive merchandising licenses they have granted to Winterland Concessions Co. Winterland's licenses cover the right to manufacture, distribute and sell "upper body garments," such as T-shirts and jerseys, bearing the names, likenesses and logos of the performers and groups. It is a lucrative enterprise - in one 12-month period, Winterland's total sales of licensed shirts amounted to some $15 million. Winterland paid about $3 million of this total as royalties to its licensors and an additional $3 million was paid to the concert halls where the performers entertained while their T-shirts were being sold. But it is not an enterprise without complications. As in cases previously reported in these pages (ELR 3:10:2, 3:6:2), Winterland and its licensors found it necessary to bring an action to prevent the distribution of "bootleg" shirts - those being sold without permission or license from the performers.

Several companies involved in the unauthorized sales agreed to the entry of preliminary injunctions. It remained for the court to determine whether it had personal jurisdiction over John Sileo, the alleged operator of a bootleg shirt business, who had not been personally served. The court noted, among other factors, that both Sileo and his father had each ordered goods and made payments for them on behalf of the business, and that both were signatories in at least one business bank account. The business was found to be a partnership. And service on John Sileo was properly made in accordance with Illinois law by service on his father-business partner.

Another defendant in the action had argued that he produced a shirt which bore "news" items about the performers. Notwithstanding his contention that he was distributing "newspapers" protected by the First

Amendment, the court stated that his products were indeed bootleg shirts.

The court concluded that the unauthorized use of the names, trademarks and/or likenesses of the entertainers violated their right of publicity which had been validly transferred to Winterland, and violated Section 43(a) of the Lanham Act. An injunction was issued accordingly.

Winterland Concessions Co. v. Sileo, 528 F.Supp. 1201 (N.D. Ill. 1981) [ELR 4:1:2]

Athletic shoe manufacturer wins injunction prohibiting pro baseball and football players from "doctoring" its shoes by affixing Nike's "swoosh-stripe" trademark

During the 1980 baseball and football seasons, Nike, Inc. entered into endorsement contracts with 72 major league baseball players and 115 football players. The contracts required the athletes to wear Nike shoes exclusively. However, three players for the Philadelphia Phillies, including Mike Schmidt, and Washington Redskin place kicker Mark Moseley, for a time wore shoes manufactured by Brooks Shoe Manufacturing Co., which had been "doctored" to bear the distinctive Nike "swoosh-stripe" trademark. A Federal District Court in New York has enjoined Nike from continuing to authorize, permit or cause such doctoring.

Doctoring the goods of another manufacturer is the type of "implied passing off" which the Lanham Act prohibits, stated the court. Nike contended that the doctoring was done without its participation, knowledge or approval. But the court found that Nike had been "less than vigilant" in enforcing a contractual provision against doctoring. And the athletes were not independent contractors but played a "significant part" in Nike's advertising program, and thus were subject to the company's supervision.

The endorsement of shoes by an outstanding professional athlete was found to be causally related to the sales of the shoes endorsed. The application of the Nike trademark to a competitor's shoe might mislead potential customers of athletic shoes concerning the brand of shoe worn by the athlete. And Brooks and other shoe manufacturers would suffer irreparable injury due to this unfair diversion of sales to Nike, concluded the court in ordering the issuance of a preliminary injunction.

Nike, Inc. v. Rubber Manufacturers Association, Inc., 212 U.S.P.Q. 225 (S.D.N.Y. 1981) [ELR 4:1:3]

Distribution of "imitation" Rubik's Cubes is enjoined; Rubik Cube's appearance and packaging are distinctive and protectible under the Lanham Act and unfair competition law

A puzzling dilemma has been unscrambled by a New York court which has enjoined the distribution of five cubes resembling the dreaded "Rubik's Cube." Ideal Toy Corporation has an exclusive arrangement with Erno Rubik of Hungary to sell his cube in the United States. Ideal charged that the defendants used the same colors, the same start position and the same cylindrical packaging on their cubes.

The "imitators" argued that simplicity, attractiveness or ease of shipping were the basis for the design and packaging used by Ideal and that such functional features are in the public domain. But Judge Motley noted that Ideal's solid color combination was so distinctive as to be considered non-functional and that the cube's packaging also was more "arbitrary and capricious" than functional.

It also was found that the great similarity in the packaging of the cubes was an intentional attempt to capitalize on the appearance of Ideal's product, which would result in the "inevitable" confusion of an average consumer. Ideal therefore had demonstrated a likelihood of success on the merits of its claim that the defendants' products were confusingly similar to its own. An injunction was warranted even in the absence of a showing of secondary meaning.

The court, however, went on to find that secondary meaning in the trade dress of the Rubik's cube had indeed been established. The court considered such factors as Ideal's $1 million advertising budget in 1980, a consumer survey indicating a high recognition factor for the cube, and the number of imitations on the market.

Hence, Ideal's claims under the Lanham Act and under New York unfair competition law were well founded, stated the court.

Ideal Toy Corp. v. Chinese Arts & Crafts Inc., 530 F.Supp. 375 (S.D.N.Y. 1981) [ELR 4:1:3]

Alleged participant in Chicago arson-for-profit scheme held entitled to pursue his invasion of privacy and right of publicity claims against ABC, Geraldo Rivera and producer of "Newsmagazine 20/20"

A segment of ABC's program "Newsmagazine 20/20" which was broadcast on February 7, 1980, has become the target of a heated libel and invasion of privacy claim. The segment, entitled "Arson and Profit," was narrated by Geraldo Rivera and produced by Peter Lance. It reported on the operation of an alleged arson-for-profit conspiracy involving a group of real estate owners and their associates in the Uptown neighborhood of Chicago. Rivera began his report by stating that 20/20 had uncovered "extraordinary circumstantial evidence" that a small group of Chicago businessmen "are making money as their buildings bum and as their tenants die."

James Cantrell was the manager of one of the buildings which was allegedly burned in order to collect insurance proceeds. Using a hidden camera, 20/20 filmed a conversation between Cantrell and Lance, who was posing as a real estate developer. Cantrell purportedly explained to Lance how to get the most insurance money from a building fire. When later confronted by Rivera and Lance, Cantrell acknowledged that the conversation had occurred but stated that he had just "explained the system." As is his wont, Rivera asked: "Did you burn your buildings?" Cantrell's reply was "No siree."

A Federal District Court in Illinois has refused to grant ABC's motion to dismiss Cantrell's action. The court noted that under Illinois law, it is libel per se to impute to an individual the commission of a criminal offense. The seven allegedly libelous statements concerning Cantrell in 20/20's report, when viewed in the context of the entire segment, charged Cantrell with sufficient acts to constitute the criminal offenses of conspiracy to commit arson and insurance fraud and therefore were libelous per se. The narrative and accompanying visuals finked Cantrell directly to the "unethical and criminal activities" of the businessmen's group and were "so obviously and inevitably hurtful to [Cantrell] that damages to his reputation may be presumed," stated the court.

Cantrell's claim therefore was actionable and the question of whether the segment actually imputed the crime of arson and murder to Cantrell will be left for a jury to decide.

ABC's contention that the statements in the segment were protected opinion was rejected since accusations of criminal activity, even in the form of opinion, are not constitutionally protected.

Also rejected was ABC's argument that certain statements in the interview between Cantrell, Lance and Rivera were true, as per Cantrell's own admissions. But Cantrell's reply of "no siree" was not such an admission, observed the court, and he had specifically denied that he had committed a crime to defraud any insurance companies. Cantrell also is entitled to pursue his false light invasion of privacy claim, ruled the court. He was a private figure who had not thrust himself to the forefront of any particular public controversy. He was not "public" merely because of the 20/20 report. And while the arson-for-profit scheme may have been a matter of interest to the public, it was not necessarily the type of "public controversy" which would bestow public figure status on Cantrell who was a far from prominent participant in the purported conspiracy.

Cantrell v. American Broadcasting Companies, Inc., 529 F. Supp. 746 (N.D.Ill. 1981) [ELR 4:1:4]

Mental patient's consent to filming is found invalid; damages to be against CBS in action under New York Civil Rights Law

Sections 50 and 51 of New York's Civil Rights Law have been rigorously applied in an action against CBS which was brought on behalf of David Delan, a mentally incompetent patient at Creedmor State Hospital. Delan was portrayed in a CBS documentary entitled "Any Place but Here."

Delan purportedly had signed a form entitled "Consent for Patient Interview." But he was not mentally capable and competent to grant such consent. Further, any consent form must be witnessed by a physician who has interviewed and examined the patient. The court stated that CBS was aware of the specific requirements of the consent form and should not have relied on the opinion of a psychologist who apparently examined Delan prior to the filming.

CBS argued that any invasion of Delan's right of privacy or right of publicity was "de minimis" and that its program involved the presentation of a newsworthy topic. However, the court observed that CBS was not merely gathering information for a news report, but planned to distribute its film for profit. Thus, even if Delan's consent had been valid, the fact that he had agreed to appear on film on one occasion did not mean that he had authorized the "eternal" and widespread use of his likeness. Poignantly, the court affirmed its responsibility to safeguard the civil rights of the mentally incompetent "whose very vulnerability to exploitation makes it absolutely necessary to obtain a valid 'written' consent in order to protect him from the violation of his rights, and most importantly, his right to be free from invasion of privacy."

The court cited Brinkley v. Casablancas, 80 A.2d 428, 438 N.Y.S.2d 1004 (1981) (ELR 3:15:1), for the position that Delan's right of publicity claim is "subsumed" in sections 50 and 51, and that CBS' broadcast of the film also constituted an unprivileged invasion of Delan's right of publicity. An assessment of damages was ordered.

Delan had also brought an action for false imprisonment, alleging that he had been confined to one ward of the hospital during the filming. CBS was granted partial summary judgment on this claim since patients were free to leave the ward subject only to hospitalimposed restraints.

Delan v. CBS, Inc., 445 N.Y.S.2d 898 (N.Y.Sup.Ct., Queens Cnty. 1981) [ELR 4:1:4]

Obscenity is not a defense to an action for copyright infringement, rules Federal Court of Appeals

In 1976, the Santa Ana City Council adopted an ordinance declaring that "certain cinematic depictions of sexual activities constituted a nuisance," and could be subject to an abatement proceeding. The Council then declared that the Mitchell Brothers' Santa Ana Theater was a nuisance since it exhibited films, such as "Teen-Age Fantasies," and "French Classmates," which were billed as "bard-core" pornographic. All of the Mitchells' licenses and permits were revoked.

The Mitchells responded by filing an action against the Council for infringing five copyrighted films, the action alleged that an agent of the Council had photographed the screen in the theater during the exhibition of certain films and had reproduced the photographs, in miniature, in a booklet which also included dialogue from the films. This material was used by the Council in determining that the theater was a nuisance.

In accordance with instructions from the court, a jury found that the films were obscene and hence pot protected by copyright. The jury also determined that the Council's use of the booklets was a fair use of the films. A Federal Court of Appeals has reversed the jury's decision on the obscenity issue.

The court pointed out that the Fifth Circuit, in what has been called "the most thoughtful and comprehensive analysis of the issue" (Nimmer on Copyright, section 2.17), recently rejected obscenity as a defense to a copyright infringement claim in a case which also involved the Mitchells - Mitchell Brothers Film Group v. Cinema Adult Theatre, 604 F.2d 852 (5th Cir. 1979), cert. denied, 445 U.S. 917 (1980) (ELR 1:15:1). The Fifth Circuit decision, which appeared after the District Court's ruling in this case, was based on the Copyright Act of 1909. But the current copyright law requires the same interpretation of "content neutrality" in ruling on an infringement claim, stated the Court of Appeals. Content neutrality is particularly demanded when infringement is alleged, because characterizing a work as "obscene" involves community standards under Miller v. California 413 U.S. 15 (1973). Thus, allowing an "obscenity" defense in copyright might result in an impermissible variation in the protection given to copyrighted works in different geographical areas.

In turning to the fair use issue, the court questioned whether it was appropriate to apply the fair use criteria of section 107 of the Copyright Act to this case because the Council's use of the films in an abatement proceeding did not commercially exploit the copyrights or impair the copyright holder's market. But the Mitchells had not objected to the court's instruction on fair use. And the jury's determination was based upon substantial evidence and "was not clearly erroneous," held the court.

A ruling ordering the Mitchells to pay approximately $23,000 in attorneys fees was reversed, however, The Mitchells' claim was not frivolous and was not brought to harass the Council. Further, the position taken by the Mitchells now has been accepted in two Courts of Appeals.

The trial court's refusal to declare the films obscene as a matter of law, as requested by the Council, was upheld since this "unquestionably" was a factual determination for the jury. Also upheld was the court's refusal to order forfeiture and destruction of the films.

Jartech, Inc. v. Clancy, Case No. 79-3087 (9th Cir., Jan.25, 1982) [ELR 4:1:5]

California does not require proof of obscenity "beyond a reasonable doubt" in a public nuisance abatement proceeding

In 1981, a state court nuisance abatement action was brought against the Mitchell Brothers' Santa Ana Theater. Later that year, in response to a petition for certiorari brought by the City of Santa Ana, the United States Supreme Court ruled that the California Court of Appeal had erred in upholding a jury instruction issued by the trial court judge in the abatement proceeding. The judge had instructed the jury that it had to be persuaded of the obscenity of the films at issue "beyond a reasonable doubt."

The Supreme Court concluded that while a state may require proof beyond a reasonable doubt in an obscenity case, that choice is solely a matter of state law - the First and Fourteenth Amendments do not require such a standard. The case therefore was remanded to the state court for further proceedings.

Justice Stevens, in dissent, questioned whether the court, without full briefs and arguments, should have addressed the issue of the standard of proof required to establish obscenity in a public nuisance abatement action. It was unclear whether the California appellate court had upheld the "beyond a reasonable doubt" standard in the belief that such a standard was required by federal law or merely had established a procedural rule to be followed in the state courts subject to its jurisdiction.

Given this ambiguity, Justice Stevens characterized the jurisdiction of the Supreme Court as "doubtful."

On remand, the California Court of Appeal concluded that the proper standard of proof in the civil regulation of obscenity, including a public nuisance abatement action, under both the state and federal Constitutions, is the "clear and convincing evidence" standard. The matter now has been remanded to the trial court for further proceedings.

Cooper v. Mitchell Brothers' Santa Ana Theater, Case No. 81-271 (U.S. Supreme Court, Nov. 30, 1981); Cooper v. Mitchell Brothers' Santa Ana Theater, Case 4 Civ. No. 19940 (Cal. Ct. App. Feb. 18, 1982) [ELR 4:1:5]

Agreement between horseracing sponsors to allocate racing dates did not violate antitrust laws

An agreement between two sponsors of horse races to allocate racing dates at a Phoenix racetrack was not a per se violation of the antitrust laws and, in any event, was immune from antitrust law as a regulated state activity, a Federal Court of Appeals has ruled.

In 1956, Turf Paradise, Inc. and Arizona Downs entered into a lease agreement by which Downs was entitled to use the Turf Paradise racetrack for one-half of the racing season. Turf and Downs equally divided the total number of racing dates legally available. Many furlongs later, the Arizona Horsemen's Foundation applied to the Arizona Racing Commission for a permit to conduct races at the Turf Paradise track on the same days as Downs was scheduled to conduct its races. A proposed lease between Turf and AHF indicated that Turf would receive greater revenue from AHF than from its lease with Downs.

When its application for a permit was denied, AHF filed a state court action claiming that the Turf-Downs lem agreement violated state antitrust laws. The Arizona Supreme Court upheld the Turf-Downs lease because a valid Arizona statute had authorized such allocation agreements among applications for racing dates.

On its part, Turf had filed an action in federal court seeking to have the date allocation provisions of its lease agreement with Downs declared void as a per se violation of the Sherman Act. The Federal District Court, whose opinion was issued prior to the decision of the Arizona Supreme Court, determined that Turf, as one of the two presumably equally liable participants in the allegedly illegal agreement, would be barred from receiving any damages, and therefore granted Downs' motion for partial summary judgment. The District

Court, noting the then-pending state court action, as well as the fact that there is extensive state regulation of horse racing in Arizona and that Arizona has a greater interest in the controversy than the federal government, also apparently relied upon the abstention doctrine in dismissing Turf's claim.

The Federal Court of Appeals first outdistanced several challenges to its subject matter jurisdiction. Horseracing at Turf Paradise was not merely a "local" activity, but rather has a substantial "nexus" with interstate commerce, stated the court, in that many of the owners and trainers at the track are non-residents, more than 40% of the horses stabled at the track are from out-of-state, more than 40% of the patrons are non-residents, more than two-thirds of the jockeys are out-of-state residents, and refreshment concessionaires have sales of more than $1.5 million per year.

The District Court's dismissal of the action on abstention grounds therefore was found to be an abuse of discretion. The exercise of federal jurisdiction over the federal antitrust claims might lead to a result in conflict with the state court decision on the state antitrust claims, but this "potential" for conflict did not require abstention. A federal court ruling "would neither affect the availability of the Turf Paradise race track for horseracing, nor impermissibly obstruct the regulation of gambling by the Arizona Racing Commission." And there is no concurrent state and federal jurisdiction over the federal antitrust claims.

However, coming down to the wire, the appellate court held that the date allocation provisions in the Turf-Downs lease were not a per se violation of the Sherman Act. The District Court did not decide this question, but Circuit Judge Sneed pointed out that the issue had been fully presented before both federal courts. The date allocation was not a horizontal restraint between competitors to allocate market territories. Instead, it was an allocation of time to use a facility essential to conducting the business of horseracing. Striking down the date allocation provision would not serve to promote competition between Turf and Downs or to increase the extent to which all competitors would share in the use of the track. Such a decision only would give Turf increased control over access to its track.

As an alternate ground for its decision, the appellate court held that the date allocation provision of the lease is immune from the reach of the antitrust laws under Parker v. Brown, 317 U.S. 341 (1943). An Arizona state statute provided that private agreements allocating racing dates would be recognized by the state racing commission in order to encourage the private resolution of conflicts in dates. But the commission still supervises and reviews the "reasonableness" of such agreements, in order to guarantee that only qualified applicants receive racing permits. This statutory scheme, together with the state's strong interest in the conduct of horse racing activity and legalized parimutual wagering, demonstrates that "unfettered competition" in the application for racing dates has been replaced by state regulation. The Turf-Downs agreement therefore was "shielded" from a Sherman Act claim.

Calling the majority's discussion of the date allocation issue an "interesting analysis" rather than "overtly decisional," Circuit Judge Poole concurred with the court's alternate ground for its decision. He questioned the majority's ruling on the horizontal restraint issue since the question was not decided by the District Court, and the issue presented was not "as easy or as clear" as the majority assumed.

Arizona Downs v. Arizona Horsemen's Foundation, 637 P.2d 1053 (Ariz. 1981); Turf Paradise, Inc. v. Arizona Downs, Case No. 80-5185 (9th Cir., Jan. 7, 1982, as amended Feb. 26, 1982) [ELR 4:1:6]

Briefly Noted:

Copyright.

The owners of Demetri's, a restaurant and bar in San Jose, California, have been slapped with a judgment of $6,000 in statutory damages and $1,500 in attorneys fees for allowing performances of copyrighted songs on the premises without having obtained a license from ASCAP. Since Demetri's opened in 1978, ASCAP had been seeking to license the restaurant for the public performance of copyrighted songs in its catalog. Demetri's entered into such a licensing arrangement in 1978, but stopped paying the premiums and has since "blatantly refused to enter into any licensing arrangements with ASCAP or BMI or any other licensing organization." The court rejected Demetri's contention that its musicians were independent contractors and that it had no control over the compositions they played. In fact, the court noted that owners have been held liable for copyright infringement, even when musicians played certain compositions in direct violation of the owner's instructions. The court also gave no significance to ASCAP's alleged failure to provide Demetri's with a list of ASCAP songs. No estoppel would arise from such a failure, said the court. The court also rejected Demetri's claim that if it paid ASCAP it might have to pay other such organizations as well. "Those who profit from copyrighted music are obliged to pay not only the piper but the author," the court ruled. Ironically, the ASCAP licensing fees for one year for a restaurant the size of Demetri's would have been well under $100.

Leigh v. Sakkaris, Case No. C-81-1273 RPA (U.S.D.C., N.D.Ca., January 20, 1982) [ELR 4:1:7]

Music Publishing.

ASCAP, which is accustomed to commencing lawsuits on behalf of its members, has found itself responding to a lawsuit filed by one of its own, who has charged that the methods used by ASCAP to determine how royalties are to be distributed to its members are unfair to composers and publishers of Hawaiian music. Specifically, the member contends that the ASCAP survey system eliminated those local radio stations which specialized in Hawaiian music, thus, in effect, discriminating against

Hawaiian composers and unfairly reducing their compensation. A Hawaiian trial court had dismissed the case on the ground that the member had not exhausted his remedies within the ASCAP organization. The Intermediate Court of Appeals of Hawaii has reversed, however, pointing to a letter written in 1973 by the Hawaiian Professional Songwriters Society to the ASCAP Board of Review concerning the problem. The appellate court therefore sent the case back to the trial court with instructions to consider other issues of procedure and jurisdiction, including the question of "whether the Hawaiian courts have any power to deal with such a situation."

Bright v. American Society of Composers, Authors & Publishers, 634 P.2d 427 (Hawaii App. 1981) [ELR 4:1:7]

Sports Injury.

The State of California is not liable for injuries sustained by a young water-skier when he fell onto a granite embankment at the shoreline of Millerton Lake, a California appellate court has ruled. California's Government Code provides absolute immunity to the state from liability for injuries "resulting from a natural condition of any unimproved public property." In this case there had been no physical change in the condition of the property at the location of the injury. State workers do place hazard buoys at various locations in the lake, but did not buoy submerged rocks immediately adjacent to the shoreline because "boaters are expected to use common sense when traveling close to shore." Moreover, the shoreline area had not been "improved" so as to require the state to assume responsibility for "reasonable risk management" in the area. A trial court order granting a new trial (due to juror misconduct) was reversed, and the court was directed to enter judgment for the State of California.

Eben v. State of California, Case 5 Civ. No. 5649 (Cal.Ct.App., April 1, 1982) [ELR 4:1:7]

Pornography.

A Federal Court in the state of Washington has temporarily enjoined the commencement of criminal prosecutions under that state's recently enacted Pornography Act. The Attorney General for the State of Washington admitted that the legislation is among the most stringent of its kind in the country and certainly on "the cutting edge of the law." The court stated that it was not passing upon the substantive merits of the Act, but rather wished to conduct a detailed review of its provisions prior to enforcement efforts.

Azure Entertainment Corp. v. Eikenberry, Case No. C-82-231; J-R Distributors, Inc. v. Eikenberry, Case No. C-82-230 (E.D.Wash., Apr. 13, 1982) [ELR 4:1:7]

DEPARTMENTS

Book Note: "Fictional Characters and Real People"

The Beverly Hills Bar Association and the University of Southern California Law Center, in conjunction with the 28th Annual Program on Legal Aspects of the Entertainment Industry, have issued a program syllabus entitled "Fictional Characters and Real People." The 344-page work provides comprehensive discussions by leading attorneys of such "identity" issues as the protectability of the name and logo of a musical group, rights of privacy and publicity, and defamation questions in relation to the depiction of real people and actual events in fiction and nonfiction. Also covered are the various claims, including copyright infringement, which may result from the portrayal of fictional characters in an entertainment production.

Practical approaches to dealing with creators, insurers and merchandisers are suggested. The syllabus includes sample indemnity, release and licensing agreements.

Copies are available from the USC Entertainment Law Institute, Law Center, Room 105, University Park, Los Angeles, Ca. 90007. cost: $40.00. [ELR 4:1:7]

In the Law Reviews:

What's Mine Is Not Yours: Commercial Appropriation of Personality Under the Privacy Acts of British Columbia, Manitoba and Saskatchewan by David Vaver, 15 University of British Columbia Law Review 241 (1981)

Ideas, Their Time Has Come: An Argument and a Proposal for Copyright Ideas by David D. Hopkins, 46 Albany Law Review 443 (1982)

The National Collegiate Athletic Association: Fundamental Fairness and the Enforcement Program by David F. Gaona, 23 Arizona Law Review 1065 (1981)

Decoding Section 605 of the Federal Communications Act: A Cause of Action for Unauthorized Reception of subscription Television, 50 University of Cincinnati Law Review 362 (1981)

Redefining Copyright Misuse, 81 Columbia Law Review 1291(1981)

The California Resale Royalties Act as a Test Case for Preemption Under the 1976 Copyright Law, 81 Columbia Law Review 1315 (1981)

The William O. Douglas Lecture: Press versus Privacy by Arthur R. Miller, 16 Gonzaga Law Review 843 (1981)

Section 482 and the Personal Service Corporation by Vincent T. Volpe, 26 Saint Louis University Law Journal 155 (1981)

An Essay on the International Trade in Art, by Paul M. Bator, Stanford Law Review 275 (January 1982)

Spectator Violence: What they See is What they Do? by Gail Appleson, 68 American Bar Association Journal 404 (April 1982)
[ELR 4:1:8]