RECENT CASES

Termination of copyright assignment by coauthor of "Who's Sorry Now" did not terminate music publisher's continued participation in royalties earned from pretermination recordings of the song

It was the 1920's - the heyday of Tin Pan Alley. Irving Berlin and George Gershwin were writing classically enchanting melodies and ever-captivating lyrics. Among the now-standard musical compositions created at the time was "Who's Sorry Now," written and composed by Ted Snyder, Burt Kalmar and Harry Ruby. The authors assigned their copyright in the song to a music publisher - Waterson, Berlin & Snyder Co. - and the copyright was registered in the name of that company in 1923. In 1932, the copyright was assigned to Mills Music, Inc.

Mills recorded the assignment as the exclusive copyright owner and publisher of the song for the balance of the original 28-year term of the copyright In 1940, the coauthors assigned to Mills all their renewal rights to the copyright of the song, and in 1951 the copyright renewal was registered by Mills.

Hum a few bars and it's 1978. Under the 1976 Copyright Act, which became effective January 1978, the owners of copyrights already in effect were granted a 19-year extension of the renewal term. In order to "recapture" this extension, Marie Snyder and Ted Snyder, Jr., the widow and son of the by-then deceased Ted Snyder, served Mills with a Notice of Termination of the copyright assignment pursuant to section 304 of the 1976 Act. The Snyders' Notice was effective as of January 3,1980 and it terminated Ted Snyder's grant to Mills of his one-third interest in the renewal copyright in the song. Mills, however, contended that the Snyders could not entirely revoke Mills' interest in royalties earned subsequent to the termination of the assignment by derivative versions of the song. This dispute over the allocation of a portion of the future earnings of the song has inspired an often-lyrical 60page exercise in statutory interpretation by Judge Edward Weinfeld of the Federal District Court in New York City.

It was undisputed by the parties that sound recordings of "Who's Sorry Now" prepared by record companies pursuant to licenses issued by Mills directly or through the Harry Fox Agency were "derivative works." From 1951 through 1980, 419 licenses were issued to record producers permitting the use of the song. Mills claimed that it was entitled to receive all the royalty income from the distribution of the recordings of these derivative works (subject to the company's obligation to pay 50% of the income to the co-authors). The Snyders, however, contended that after termination of the assignment, each licensee could continue to make and distribute derivative records, but that the Snyders alone were entitled to all future mechanical royalties-that is, Mills would be " out of the picture."

Section 304(c)(6) of the Copyright Act of 1976 provides that a reversion of rights is subject to the following limitation: "A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant." According to the Snyders, this exception did not apply to recordings of "Who's Sorry Now," because the recordings were not prepared "under authority of the grant" from Ted Snyder to Mills. The Snyders did not dispute that Ted Snydees assignment of the renewal copyright in the song was a "grant" within the meaning of section

304(c) of the Act, and that Mills had the right to exploit the underlying work directly or by licensing others to act on its behalf. But the Snyders argued that the various recordings of "Who's Sorry Now" had been prepared under authority of the compulsory license provisions of the Copyright Act, not the grant from Ted Snyder to Mills, and therefore were beyond the protection of the "derivative works" exception.

Under the compulsory license provisions of the Act, once a copyright owner distributes recordings of a song, any other person may obtain a nonexclusive license to record the song by complying with statutory notice and accounting requirements, including filing detailed annual statements and paying specified royalties.

Judge Weinfeld noted that those record companies that had issued recordings of "Who's Sorry Now" had not complied with the statutory requirements and hence had never obtained a compulsory license. Instead, each company had negotiated with Mills or the Fox agency for the issuance of a license. The licenses often contained favorable variations of the statutory terms such as reductions in either the statutory royalty rate or the frequency of royalty payments and accounting. In the absence of such licenses, the record companies' failure to comply with the statutory requirements would have constituted copyright infringement, emphasized the court. Since Mills had the authority to vary the statutory terms by virtue of the Snyder assignment, the sound recordings prepared pursuant to Mills' licenses were prepared "under authority of the grant"

Judge Weinfeld also ruled that nothing in the legislative history of the 1976 Act suggested that the phrase "under authority of the grant" was intended to exclude derivative works prepared under licenses obtained from a music publisher as the assignee of an author's copyright. Thus, the "derivative works" exception did apply to any reversion of rights to the Snyders.

The Snyders then argued that the termination provision was intended to give the entire benefit to the 19year extension of copyright protection to authors, composers and other creators. They asserted that Mills held a copyright only in the underlying work, i.e., the song, and never owned or had any copyright in the licensed sound recordings. The Snyders' position was that the record companies held all the rights in the recordings and that the section 304(c)(6) exception was for the benefit of the record companies, not for the benefit of music publishers.

Judge Weinfeld disagreed. He pointed out that utilization of a derivative work necessarily involves the copyright in the underlying work and, most significantly, that the use of old derivative works "limits the reversion of those rights in the underlying work that are incident to this utilization of old derivative works." The Snyders' attempt to disregard the source of the derivative work was found to be "without substance."

Again, nothing in the language of section 304(c)(6) states that the "old derivative works" exception applies only to record companies and not to music publishers. Continued utilization of old derivative works is made subject to the "terms of the grant." Thus, all parties to a grant may continue to participate in the benefits of such utilization, ruled the court.

The Snyders further argued that all royalties should revert to them, because the phrase "under the terms of the grant" refers to the relationship between an author and the owner or producer of a derivative work - in this case, the record company. But the court held that Mills should not be deprived of its rights under the Snyder grant simply because the company licensed others to make derivative works rather than doing so itself. In any event, there never was a relationship - via direct grant or license - between the record companies and the authors. All of the record companies' rights were derived from licenses issued by Mills or Fox.

The court then embarked on a search of the legislative history of the exception in order to see whether there was any support for the Snyders' claims. But it did not appear that the drafters of the "derivative works" exception or Congress specifically considered the provision with respect to music publishers. The court bluntly stated that it was an "unwarranted assumption that Congress itself ever gave any thought to the issue."

The termination provisions were designed to give authors an opportunity to renegotiate earlier, unremunerative grants of copyright, but the interests of an author's assignees also were recognized and accommodated. Allowing music publishers to participate in the benefits of the 19-year renewal extension would not defeat the purpose of the extension, said the court, because the author retains the same share of the royalties he or she received prior to termination. Furthermore, at termination the author may re-exploit the underlying work. As aptly noted by the court, if the 19-year extension had not been granted, the song would have entered the public domain and neither the author nor the music publisher would have received or shared further royalties.

The policies underlying the copyright laws also did not require Mills' exclusion from royalty participation. The public interest in maintaining copyright protection depends on enhancing "broad public availability" of creative works. And "Copyright protection, in addition to encouraging authors, also induces publishers ... to invest their resources in bringing creative works to the public ... Music publishers play an integral part in the dissemination of musical works. Songwriters and music publishers in effect form a partnership ... Permitting music publishers to share in the extended term offers opportunity for additional returns, thereby encouraging them to invest further in copyrighted musical works and thus contribute further to the dissemination of such works" - an activity which the copyright law seek to encourage.

In conclusion, the court ruled that Mills was entitled to receive royalties from the distribution of phonorecords made from old derivative works under its grant from Ted Snyder. Mills also will have the right to continue to license new releases of sound recordings prepared under pre-termination licenses. For example, if a record company wishes to release a sound recording as a single or as part of a new album - such as a greatest hits album - it must obtain a new license. Re-recording does not contain sufficient originality to comprise a new derivative work. The Snyders' resistance to this conclusion was rejected by the court The fact that Mills imposed a limitation on its licensee's use of a work did not impose a limitation on Mills' authority to license a re-recording and to share in the resulting royalties with the author.

However, Mills was not entitled to receive royalties held in a fund by Fox for two recordings which had been prepared prior to the termination but for which Mills had issued licenses after the termination. Mills argued that the recordings were prepared "in contemplation of obtaining a license" and that the company therefore was entitled to a share of the royalty income. However, the recordings were not prepared under the authority of the by-then terminated grant, stated the court. The record companies involved must obtain a compulsory license or negotiate with the Snyders, and all royalties earned by these recordings will revert to the Snyders.

Harry Fox Agency, Inc. v. Mills Music Inc., Case No. 80 Civ. 6993 (S.D.N.Y., July 15, 1982) [ELR 4:7:1]

Federal Court of Appeals upholds ruling that Barry Manilow's Copyright Act claims conferred jurisdiction on District Court despite disputed contract issues with Robbins Music; Manilow's invasion of privacy claim was barred by statute itself

Further rulings have been issued in the "arduous" litigation between Barry Manilow and his former music publisher, Robbins Music Corp. (See ELR 3:22:3 and 2:10:5 for earlier rulings.)

A Federal Court of Appeals has affirmed a District Court order confirming an arbitrator's award to Karnakazi Music Corp. (Manilow's wholly-owned corporation) of $250,000 in damages and approximately

$50,000 in attorney's fees. The Court of Appeals agreed that the District Court had jurisdiction to hear the matter. It held that Kamakazi's suit against Robbins under the Copyright Act was not transformed into a suit for breach of contract simply because Robbins asserted a defense based on its music publication contract with Kamakazi.

The Court of Appeals decision was issued after the District Court in January 1982 had refused to grant Robbins' motion for a stay of the proceedings pending appeal. Several other issues were decided by the District Court in its January opinion as well. The court determined that both Manilow and Warner Bros. Publications were entitled to assert claims for damcages against Robbins despite the fact that KaTnakazi, the holder of legal title to Manilow's copyrights, already had been awarded

Judge Sweet noted that Manilow was the beneficial owner of the transferred copyrights under section 501(b) of the Copyright Act as "an author who had parted with legal title to the copyright in exchange for percentage royalties based on sales or license fees." Section 101 of the Act defines a copyright owner as follows: "Copyright owner, with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right." Thus, Warner, which had obtained the exclusive right to print and distribute copies of Manilow's compositions, also was a "copyright owner" and was eligible to file an infringement suit.

Robbins' argument that section 504 of the Act served to limit the number of parties entitled to bring an action for infringement was an incorrect interpretation of the section, stated Judge Sweet. Section 504(a) of the Act provides that an infringer of copyright is liable for either "(1) The copyright owner's actual damages and any additional profits of the infringer ... or (2) statutory damages...." The House Report analyzing section 504 provides that an award of minimum statutory damages may be multiplied if separate works and separately liable infringers are involved but that a single award in the $250 to $10,000 range is to be made "for all infringements involved in the action." The report continues: "Where the suit involves infringement of more than one separate and independent work, minimum statutory damages for each work must be awarded ... Moreover, although the minimum and maximum amounts are to be multiplied where multiple 'works' are involved in the suit, the same is not true with respect to multiple copyrights (or) multiple owners...." This limitation prohibits the multiplication of minimum and maximum amounts in determining statutory damages, stated Judge Sweet, but it does not define or limit who may recover under the liability provision. In other words, although three parties were asserting infringement claims against Robbins, the minimum statutory award will remain $250 and the maximum award will remain $10,000, with adjustments under section 504(c)(2) for willful infringements.

The court then faced Manilow's cause of action under sections 50 and 51 of the New York Civil Rights Law for Robbins' allegedly unauthorized use of the composer's name and likeness for advertising and trade purposes. The statute specifically provides that use may be made of an author, composer or artists's name and/or likeness "in connection with his literary, musical or artistic productions which he has sold or disposed of with such name or picture 'used in connection therewith.'" While upholding the right of a public figure to protect a privacy interest under sections 50/51 (citing Brinkley v. Casablancas, 438 N.Y.S.2d 1004, ELR 3:15:1), Judge Sweet found that Manilow had disposed of his musical compositions through Kamakazi to Robbins. Robbins thereby gained the right to use Manilow's name and likeness pursuant to this provision of the New York statute. The court ruled that although Robbins did not have the right to publish Manilow's compositions (as was previously found by the arbitrator), the breach of contract did not of itself authorize a cause of action under section 51. Robbins' activities did not invade Manilow's right of privacy "in the sense of his right to be free from mental strain and distress as well as of his interest in the commercial exploitation of his valuable name and likeness." This result appears to differ from a New York appellate court decision which recently held that the airing of a commercial after the expiration of a performer's agreement with an advertising firm did violate sections 50/51, Welch v. Mr. Christmas,447 N.Y.S. 2d 252 (1982) (ELR 4:2:4).

The court also found that the doctrine of collateral estoppel barred Robbins from claiming again that it acted properly under the Kamakazi-Robbins agreement when the arbitrator had determined that Robbins was without authority to print the infringing publications. However, partial summary judgment on the issue of Robbins' liability to Manilow and Warner was ruled inappropriate since the validity of the transfer of rights to Warner and the recordation of such rights had not been established in the arbitration.

Robbins' motion to dismiss Manilow's claims for punitive damages was granted in view of the fact that statutory damages may be increased to $50,000 if willfulness is demonstrated.

Kamakazi Music Corp. v. Robbins Music Corporation, Case No. 81-7922 (2d Cir., July 20, 1982); 534 F.Supp. 69 (S.D.N.Y. 1982) [ELR 4:7:3]

Composers and music publishers win $54,000 judgment in copyright infringement suit against radio station that continued to broadcast ASCAP songs after license expired; officer and shareholder of station also found liable as "contributory infringer" for failing to supervise disc jockeys

Richard Rodgers as well as more than 35 other composers and music publishers must have been whistling a happy tune at the conclusion of their combined copyright infringement cases against the owners of radio station WAQI in Ashtabula, Ohio. The composers have obtained an injunction from a Federal District Court in Ohio against Quests, Inc., owner of WAQI, stopping further broadcasts of their songs on the station until permission to do so is granted by ASCAP. In addition to issuing the injunction, the court also has awarded over

$54,000 in damages and attorneys' fees against a shareholder and officer of Quests.

The composers sought damages from Phillip Cantagallo who is a vice president of Quests and is the owner of 44% of Quests stock, on the grounds that Cantagallo was a "contributory infringer." A person may be liable as a contributory infringer if he has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.

The court had no trouble finding that Cantagallo had a "direct" financial interest in WAQI and its broadcasting activities because of his stock ownership in the firm. Much of the court's discussion, however, concerned whether Cantagallo had the "right and ability" to supervise the activities in which the infringement had occurred.

Cantagallo testified that he made his living practicing law full-time, with trial work a substantial part of his business; that he rarely visited the station; that he did not even have a key to enter the station building, and, therefore, had no opportunity to supervise the infringing activity.

The evidence showed, however, that Cantagallo had continuous dealing with ASCAP dating back to 1967 which included three lawsuits Cantagallo had settled on behalf of WAQI. After receiving notices from ASCAP concerning copyright infringement by WAQI, the station continued to broadcast music from the ASCAP repertory without permission. The court found that with this knowledge, responsibility was thrust upon Cantagallo as vice president of the station's activities to take steps to prevent further copyright infringements over its air-waves. After the expiration date of WAQI's last ASCAP license, the very least supervision that Cantagallo should have undertaken was to instruct the station manager, to take some effective steps to prevent disc jockeys from broadcasting musical compositions from the ASCAP repertory. "He did nothing, yet he might have," said the court.

The copyright owners in this case elected to recover an award of statutory damages for the infringements of WAQI. Under the copyright law, such damages may be not less than $250 or more than $10,000 per infringement as the court considers just. In setting the damages, the court considered that, as of the month of the trial, the defendants would have owed $4,832.88; on the other hand, the minimum statutory damages of $250 for each of the 37 infringements that had occurred would come to a total of $9,250. Nevertheless, the copyright owners in this case asserted that simply awarding minimum statutory damages per infringement would hardly serve as a deterrent to the radio station. The copyright owners therefore requested an award of $5,000 per infringement which would total an award of $185,000.

Finding that the requested damages would be confiscatory and excessive, the court awarded $750 per infringement. The court also awarded $26,400 towards plaintiff s attorneys' fees, which was 50% of the attorneys' fees the plaintiffs had requested for 688 hours of time spent by their attorneys in prosecuting this action.

Rodgers v. Quests Inc., 213 USPQ 212, CCH Copyright Law Reports, para. 25,343 (N.D. Ohio 1981) [ELR 4:7:4]

Mickey Rooney's antitrust action seeking to recover certain rights in pre-1960 films from eight major producers is dismissed

Succeeding in an antitrust action against eight major film production companies requires more than hardiness, as Mickey Rooney has learned. Rooney's action was brought on behalf of himself and a purported class consisting of all performers in films produced by the companies prior to 1960. Essentially, Rooney contended that when the film producers obtained the rights to theatrically exhibit the pre-1960 films containing Rooney's performances, the producers did not acquire the rights to exhibit such films in alternative markets such as commercial or pay television or via audio-visual devices. Rooney alleged that the producers had conspired to refuse to deal with him regarding his "publicity rights" in the pre-1960 films and had proceeded to exploit such rights in the alternative markets without compensating Rooney or the other members of the class, a conspiracy in restraint of trade in violation of section 1 of the Sherman Act. Rooney further alleged that the producers violated section 1125(a) of the Lanham Act by falsely representing that the pre-1960 films could be commercially exploited in the alternative markets, and that use of the pre-1960 films in these markets was sponsored, endorsed or approved by Rooney.

Judge William E. Conner of the Federal District Court in New York City noted that Rooney's employment contracts with the producers provided that "all rights" in the resulting films would belong to the employer. This provision was facially valid, noted the court. Nonetheless, Rooney argued that the contracts were illegal because they were the product of an antitrust conspiracy among the producers. The objective of the conspiracy, which allegedly began in the 1930s, was to retain all rights to the proceeds from the exhibition of the films.

The court found that even if such a conspiracy were proved, it would not provide Rooney with a basis for avoiding the contracts since "Having accepted the considerable benefits of such contracts, Rooney cannot now avoid the corresponding obligations by his charge of a separate agreement among defendants in violation of the federal antitrust laws." Judge Conner concluded that Rooney did not have any publicity rights in the pre-1960 films, and that any express or implied representations by the producers concerning their rights to exploit the films were not false. The producers' motion for summary judgment therefore was granted.

Rooney v. Columbia Pictures Industries, Inc., 1982-1 CCH Trade Cases, Pam. 64,706 (S.D.N.Y. 1982) [ELR 4:7:5]

Film licensing agreement containing a percentage-of-ticket rental charge does not constitute vertical price fixing

Buena Vista Distribution Company (the exclusive distributor of films produced by Walt Disney Productions) uses a film license agreement which requires its exhibitors to pay either a stated percentage of each ticket sold (such as 70%) or the same percentage of a minimum per capita amount (minimum admission price) set in the license agreement, whichever is greater. A Federal Court of Appeals, which recently considered this licensing provision, noted that if the minimum per capita amount were defined as $3.00, the rental would be a flat rate of $2.10 (per ticket sold) for tickets sold at less than $3.00, and 70% of the ticket price (per ticket sold) for tickets sold at an amount greater than $3.00.

General Cinema, a film exhibitor, contended that Buena Vista's rental policy constituted vertical price fixing, a violation of section 1 of the Sherman Act. The Court of Appeals found that General Cinema had standing to bring its action based upon the company's claim that it suffered competitive injury due to the alleged price fixing scheme. Buena Vista had argued that General Cinema was free to set its own prices and did not incur any penalty for failing to set its prices at the minimum per capita amount. But according to General Cinema, its failure to charge the minimum per capita amount resulted in its paying a higher percentage of its ticket revenues in rental fees than other exhibitors. This allegation of a potential antitrust injury was sufficient to confer standing on General Cinema, ruled Judge Dorothy Nelson.

Judge Nelson found, however, that Buena Vista's rental policy did not constitute vertical price fixing, and she affirmed the District Court's award of judgment on the pleadings in favor of Buena Vista. A claim of vertical price fixing must "demonstrate affirmative price action that will induce customers to adhere to a uniform price rather than engage in price competition." Buena Vista's rental policy was found to contain no "elements of coercion" that might encourage exhibitors to set any price other than a competitive price. General Cinema did not explain to the satisfaction of the court why the percentage of its ticket price that must be paid in film rental would have any effect on where the company set its ticket price. Judge Nelson stated that "Buena Vista's system does no more to induce exhibitors to set prices at other than a competitive level than a system that charges a flat dollar rental. Such an inducement is insufficient to constitute vertical price fixing."

General Cinema Corporation v. Buena Vista Distribution Co., Inc., Case No. 80-5851 (9th Cir., July 12, 1982) [ELR 4:7:5]

Atlanta movie exhibitor Is entitled to opportunity to prove that distributors' alleged refusal to license first run films constituted an unlawful boycott

The recent spate of exhibitor antitrust claims against competing exhibitors and/or film distributors continues. In an action filed in 1975, Southway Theatres, the owner of the Jonesboro Twin Movie Theatre located in the metropolitan Atlanta area, alleged that several competing Atlanta theatre chains and seven major national film distributors "conspired to deprive Southway of the opportunity to license first run films and sought to eliminate it from competition in the licensing and distributing of these films." A Federal District Court entered a summary judgment for the theatre chains and film distributors. But this decision has been reversed by a Federal Court of Appeals on the basis that the District Court had placed an impermissibly greater burden of proof on

Southway than was necessary in order for the company's claim to survive a motion for summary judgement.

Southway contended that the "circuit" exhibitors - that is, chains of theatres under common ownership - had induced the distributors not to provide Southway, as an independent exhibitor, with desirable films. When the Jonesboro Twin first opened in September 1973, Southway was not able to obtain first run films from the major distributors; some of the distributors refused Southway even the opportunity to bid for first and second run films. It was not until late 1975 that Southway was included in the bidding process. In the interim, the defendant, Weis Theatres had opened a motion picture theatre which was located about 2-1/2 miles north of the Jonesboro Twin. Weis was successful in licensing such major first run films as "Godfather Part II," "Jaws," and "King Kong" at a time when the Jonesboro Twin was being licensed only two first run films, "Swashbuckler" and "Baby Blue Marine."

Southway alleged that a conspiracy to deprive it of first run films was demonstrated by the fact that the distributors "(1) refused to permit Southway to bid for films; (2) rejected bids from Southway in favor of inferior bids from circuit exhibitors; (3) permitted irregularities in the bidding process (favorable to exhibitors)...; and (4) provid(ed) secret information regarding unreleased films to circuit exhibitors."

The Court of Appeals agreed with the District Court that Southway had alleged a boycott by the film suppliers. But Southway also had offered certain evidence apart from the facts set forth in its refusal-to-deal allegations in an effort to demonstrate an unlawful cooperative response by the distributors to a split agreement among the exhibitors. The District Court then had required Southway to show that the evidence was more probative of this conspiracy than of typical business behavior. The District Court thereby had engaged in an impermissible, premature weighing of competing inferences, stated the Court of Appeals. The court concluded that on the motion for summary judgment it was necessary to determine only whether the additional facts introduced by Southway would support a reasonable inference of a conspiracy when joined with the evidence of a parallel refusal to deal. If the evidence supported such an inference, there would be a genuine issue of material fact and Southway would be entitled to proceed to trial. This determination must be made initially by the District Court and the matter therefore was reversed and remanded by the Court of Appeals.

Southway Theatres, Inc. v. Georgia Theatre Company, 672 F.2d 485, 1982-1 CCH Trade Cases, Para 64,658 (5th Cir. 1982) [ELR 4:7:6]

FCC's repeal of its Top-Fifty Policy is upheld by Court of Appeals

The Federal Communications Commission's decision to repeal its Top-Fifty Policy in connection with television station ownership has been upheld by a Federal Court of Appeals. The policy, first adopted in 1964, required an applicant for a station license in one of the top 50 television markets to undergo an evidentiary hearing if the applicant already owned or had interests in one or more VHF stations in those markets, or if the applicant sought to acquire interests in two or more VHF stations in the largest markets. In 1956, the Commission proposed to adopt a rule prohibiting the ownership of three or more television stations or of more that two VHF stations in the top 50 markets. The Commission decided not to adopt a rule at that time but did continue with its top 50 policy in order to counteract an apparent increase in ownership concentration in the larger television markets.

In 1979, the FCC determined that changes in the level of ownership concentration during the preceding decade were insubstantial and did not require the continuation of the existing policy let alone the enactment of a rule based either on the policy or on the 1965 proposal.

In affirming the FCC's decision, the Court of Appeals emphasized that the Commission was entitled to determine the most effective means to achieve diversity of ownership. The Commission will maintain its seven-station rule by which a single owner is limited to five VHF stations and a total of seven television stations. Due to the various multiple-ownership rules, the maximum prime time audience reached by any group owner's stations will remain less than five percent of American homes. If the level of ownership concentration does increase in the future, the FCC may conclude that granting a particular license will not add to the diversity of program sources and that the issuance of the license will not be in the public inrerest. The court also noted that the FCC consistently had waived the top 50 policy and that all applications for exceptions to the policy's limitations had been granted without a hearing on the basis of a compelling showing that the license would further the public interest.

The public interest requirement also may include consideration of whether a licensee's operations will increase minority programming and employment Although the top 50 policy was effective in promoting these objectives, the FCC was not required to retain the policy. The Commission enforces other programs and regulations that "more directly promote and have an impact on minority ownership, employment and programming," concluded the court.

National Association for the Advancement of colored People v. Federal Communications Commission, Case No. 80-2416 (D.C. Cir., June 29, 1982) [ELR 4:7:6]

Briefly Noted:

Trademark and Copyright.

The pronouncement of a cereal's vitamin statistics on the cereal box does not convert the cereal into a vitamin product, according to a Federal District Court in New York City. American Greetings Corporation granted an exclusive license for its "Strawberry Shortcake" characters and motif to Nation's Choice Vitamin Company, Inc., for use in connection with chewable vitamins. American Greetings subsequently sold an exclusive license to General Mills, Inc., for the use of its "Strawberry Shortcake" characters in connection with a cereal. Nation's Choice brought copyright, trademark, and related actions against General Mills and American Greetings, contending that the display of the words "PROVIDES 25% of daily nutritional needs for 7 essential vitamins and iron as established by U.S. Government" on the cereal box infringed its exclusive license to use the characters in connection with "vitamin and mineral supplement products for human consumption." The court disagreed, noting that "Nation's Choice knew at the time it obtained the StrawberrY Shortcake license that other products would be using the same name therefore increasing the likelihood of confusion between the products. In fact, the popularity of the Strawberry

Shortcake characters is precisely what the plaintiff plans to capitalize on to sell its own products."

Nation's Choice Vitamin Co. v. General Mills, Inc., 526 F.Supp. 1014 (S.D.N.Y. 1981) [ELR 4:7:7]

First Amendment.

A California Court of Appeal has determined that the exclusion of the Laguna Post, an unsolicited give-away newspaper, from Rossmoor Leisure World, at a time when the Leisure World News, a similar newspaper, was accorded exclusive delivery rights in the compound, violated the NewsPost's free press and free speech rights. After a jury trial, several court hearings and a lengthy opinion, the Court of Appeal found that Leisure World is a "townlike" entity and therefore is required to comply with constitutional free speech guarantees. Damages will be available to the News-Post for the violation of its First Amendment rights. The News-Post also may proceed to trial on its cause of action alleging that the publisher of the Leisure World News acted in concert with Leisure World's management company to unconstitutionally exclude the News-Post, thereby causing an unreasonable restraint of trade.

Laguna Publishing Company v. Golden Rain Foundation of Laguna Hills, Case 4 Civ. 20650 (Cal.Ct.App., May 18, 1982) [ELR 4:7:7]

DEPARTMENTS

In the Law Reviews:

Art & the Law is now being published jointly by Volunteer Lawyers for the Arts and Columbia University School of Law. It will be published quarterly in a traditional law review format. Subscriptions are $20 per year and may be ordered from Volunteer Lawyers for the Arts, 1560 Broadway, Suite 711, New York, New York 10036. The inaugural issue of the joint venture contains the following articles.

Trademarks and the Arts by William M. Borchard, 7 Art & the Law 1 (1982)

The Collapse of Consensus. Effects of the Deregulation of Cable Television by Jules F. Simon, 7 Art & the Law 19 (1982)

The Columbia-VLA Art Law Clinic. A New Kind of Law School Clinic by Leonard D. Easter and John M. Kernochan, 7 Art & the Law 53 (1982)

VLA Perspectives by Arlene Shuler, 7 Art & the Law 83 (1982)

The most recent issue of Comm/Ent contains a symposium on cable television. Comm/Ent is published by Hastings College of Law, 200 McAllister Street, San Francisco, California 94102. Subscriptions are $20 per year, individual back issues are $6.50 each. The articles in the current issue am the following.

Cable Television, Government Regulation, and the First Amendment by Henry Goldberg, Robert W. Ross and Phillip Spector, 3 Comm/Ent 577 (1982)

Regulating Cable Television by Nicholas P. Miller and Alan Beals, 3 Comm/Ent 607 (1982)

State Action Immunity and Antitrust Issues in Cable Television Franchising by Stephen D. Susman and Mark L.D. Wawro, 3 Comm/Ent 645 (1982)

Municipal Ownership of cable Television: Some Issues and Problems by Michael J. Henderson, 3 Comm/Ent 667 (1982)

New Communications Technology. The Emerging Anti-trust Agenda by Michael Botein, 3 Comm/Ent 685 (1982)

Mandatory Programming Rules for Children's Television by Donna Roberson, 3 Comm/Ent 701 (1982)

Unauthorized Pay Television Reception Under Section 605 of the Communications Act by Allen N. Dixon III, 3 Comm/ Ent 719 (1982)
[ELR 4:7:7]