RECENT CASES

Arista Records fails to set aside bankruptcy court's rejection of company's contract with songwriter Willie Nile

It isn't likely that songwriter Willie Nile will soon choose to record the theme from "A Fistful of Dollars," at least not for Arista Records, his former recording company.

Nile (whose real name is Robert A. Noonan) was signed to an exclusive recording contract with Arista in 1978. The initial period of the contract was 18 months during which time Nile was obligated to record a minimum of two albums. Arista was given an option to extend the 18-month term for three consecutive periods of like duration. Nile was given an advance recoupable from royalties of $300,000. He recorded two albums which had "modest" sales. The royalties from sales of the albums therefore fell below the amount Arista was entitled to recoup. Arista chose to exercise its option for a second 18-month term during which Nile would be obligated to record two additional albums. Nile foresaw that after Arista advanced the production costs for a third album, sales of this album would have to exceed one million units in order to reach recoupment amounting to about $500,000.

In June 1981, Nile, "with his eyes and mind focused on a more favorable artistic and monetary environment," filed a petition for relief under Chapter 11 of the 1978 Bankruptcy Reform Act. Nile moved for an order, under section 365(d) of the Bankruptcy Code, which would reject the Arista contract as executory. When Arista opposed this motion, Nile responded by converting the Chapter 11 case to a Chapter 7 case in order to take advantage of the automatic rejection of executory contracts in Chapter 7 proceedings. A bankruptcy trustee could not assume the Arista contract because it is not the trustee's services which are required by the company; therefore, the trustee would have to reject the contract since there would be no means to compel Nile to sing or play on another album.

Arista moved to put Nile back into Chapter 11 where Arista would be entitled to propose its own plan for Nile's repayment of creditors, conditioned upon his affirmance of the Arista contract.

Judge Roy Babbit of the Bankruptcy Court has denied Arista's motion. Judge Babbit noted that the usual Chapter 11 case is a business reorganization whereby creditors may realize on the value of the assets of a business in use. But Nile had no tangible assets available for distribution. "The Arista contract is merely the instrumentality for the exploitation of the debtor's talents ... (and) is simply not the kind of an asset to which the creditors can look by insisting that the debtor assume it." The court suggested that Arista was aware that it was dealing in an area where the longstanding rule has been that courts will not order specific performance of personal service contracts (citing ABC v. Wolf, 52 N.Y.S.2d 394 (1981) (ELR 3:16:1). Both to avoid "the specter of involuntary peonage" and to carry out a primary purpose of the Bankruptcy Code which is "to allow a debtor to obtain a fresh start, free from creditor harassment . . .," Judge Babbit declined to accede to Arista's "attempts to manipulate the bankruptcy process for its own ends ..."

The court also discounted Arista's claim that the denial of its motion would have an adverse impact on the record industry and on new performing artists, noting that any business, not just the record industry, might be adversely affected by an individual's bankruptcy.

Two attorneys who represented Arista have commented that the use of the Bankruptcy Code by recording artists leaves the forsaken record company with nothing more than a general, unsecured claim for damages which is discharged when the debtor-artist emerges from bankruptcy. This situation may occur after a record company has invested heavily in developing and promoting a previously unknown talent and after the company has realized little or no profit from the artist's first few albums in the expectation of major sales of future albums. If the now successful entertainer becomes dissatisfied with his or her contract or is attracted by a competing label, the entertainer may force a renegotiation of the original long-term contract by suggesting that taking recourse in the Bankruptcy Court would terminate any remaining obligations under the existing contract, leaving the artist free to sign with the highest bidder. This "potent weapon" may well be used by performers other than recording artists, and by professional athletes. Courts consistently have held that contractual provisions which purport to waive the benefit of a bankruptcy discharge are "wholly void, as against public policy," noted Thomas J. Schwarz and Herbert F. Kozlov. The possible defense which might be raised by a record company would be a motion to dismiss the artist's petition on the ground that it was not filed in good faith, that is, that the artist was not in real financial distress. Schwarz and Kozlov also cautioned that competing record companies may be subject to common law remedies for tortious inducing of breach of contract or tortious interference with advantageous business relations if they urge a financially secure artist to utilize section 365(d).

In the Matter of Noonan, 17 B.R. 793 (Bankruptcy Court, S.D.N.Y. 1982) [ELR 4:20:1]

Film exhibitor's failure to list antitrust claim against distributors as asset in Chapter XI reorganization results in dismissal of claim

An antitrust action filed by a film exhibitor against several distributors has been dismissed by a Federal Court of Appeals because the antitrust action was not listed by the exhibitor as an asset in a proceeding for the reorganization of its affairs under Chapter XI of the Bankruptcy Act.

Fred Stein was the principal shareholder of Century Cinema Circuit, Inc., which operated theaters in Southern California from 1973 to 1976. In 1976, Century petitioned for a Chapter XI reorganization and subsequently closed or disposed of all of its theaters. In 1979, Stein filed his antitrust claim, alleging a conspiracy to drive

Century out of business because of its refusal to participate in a purported scheme to allocate first-run film licenses among major exhibitors and distributors. Stein claimed that the purpose of the conspiracy was to force him to sell Century stock to some of the alleged conspirators at a reduced price. The participants in the conspiracy were charged by Stein with refusing to license first-run films to Century's theaters, denying its theaters the opportunity to bid, negotiate for or obtain first-run films and giving Century's competitors preferential treatment.

A Federal District Court concluded that the failure to list the antitrust claim in the Chapter XI proceeding meant that the claim did not belong to Century at the conclusion of the reorganization. Century therefore could not assign the claim to Stein, and he lacked standing to pursue an antitrust action individually. Thus, the antitrust action could not proceed unless Stein first sought to reopen the bankruptcy proceeding. This conclusion has been upheld by a Federal Court of Appeals which reaffirmed the District Court's holding that in a Chapter XI proceeding, the .,property dealt with" refers to property that is administered or listed.

Stein's individual antitrust claims were dismissed because of the remoteness of any antitrust injury. Stein's losses as a creditor or guarantor of Century reflected only the alleged injury to the corporation which forced it to default on its loans.

Stein v. United Artists Corporation, 691 F.2d 885 (9th Cir. 1982) [ELR 4:20:2]

Pac-Man and friends win copyright suits against infringing video games

The era of video games, as permanent and pervasive as it now may seem, actually began chomping its way into our lives and livelihood only recently. In 1980, Midway Mfg. Co. registered copyrights for its PacMan and Galaxian games as audiovisual works. The era of video game lawsuits soon followed. A series of recently published cases display various configurations of players, courts and issues, but in general all agree that the underlying computer programs and the display modes of video games are original works of expression entitled to copyright protection. These conclusions also agree with the frequently cited opinions in Atari v. North American Philips Electronics Corp., 672 F.2d 607 (7th Cir. 1982) (ELR 4:5:3) and in Stern Electronics v. Kaufman, 669 F.2d 852 (2d Cir. 1982) (ELR 3:22:5).

The earliest of this second wave of video game decisions actually dates back to 1981, though the court's opinion has been published only recently. The main characters in Midway Mfg. Co. v. Dirkschneider were Midway's Pac-Man, Galaxian, and Rally-X games. The defendants in this Federal District of Nebraska case distributed competing video games known as Galactic Invaders and Kamikaze 111, which the court found to be identical or very similar to Midway's Galaxian; Mighty Mouth, which the court found to be identical to Midway's Pac-Man; and Rally-X, which the court found to be similar to Midway's own Rally-X.

The defendants' primary argument was that Midway's games were not copyrightable because their "visual displays are merely ephemeral projections on a cathode ray tube" and therefore do not satisfy the Copyright Act's requirement that works be "fixed in a tangible medium." The court made short shrift of this contention however by finding that the games are audiovisual works that are fixed in prument that Midway was attempting to monopolize an idea. The court ruled that Midway's copyrights protect the expression of its games, including the distinctive color and design of the games' characters and the sounds of the games.

The court also held that the similarities between Midway's games and those of the defendants created a likelihood of confusion which violated the Lanham Act. Accordingly, the court issued a preliminary injunction barring further infringements.

The longest analysis of the copyrightability and substantial similarity questions was undertaken in Midway Mfg. Co. v. Bandai-America, Inc., in which a Federal District Court in New Jersey acknowledged that it is likely there is substantial similarity between Midway's Pac-Man and Galaxian games and Bandai's handheld versions of those games, but nevertheless refused to grant summary judgment to Midway on its copyright infringement claim. The court did issue a preliminary injunction restraining Bandai's sales of its games pending a trial of the substantial similarity case.

Bandai contended, but failed to prove, that Galaxian was an unoriginal version of the allegedly similar and pre-existing Space Invaders game. The court noted that video games are not protectable as games, but their audio components and the concrete details of the visual presentation of the games do constitute copyrightable expression. The court also noted that there was "overwhelming" similarity between Midway and Bandai's games so that "no reasonable jury could find that Bandai's work was not copied from (Midway's) . . ." The music themes of the two Galaxian games are fundamentally identical, both games portray insectile aliens, and the play of the games and sequence of images also are similar.

Bandai responded by claiming that any similarities between its game and Midway's game resulted from an "inevitable" connection between the games' expression and similarities in their unprotectable ideas. This argument was unavailing however, since, in the court's view, granting recognition to Midway's copyright would not preclude the creation of other space video games. The issue to be decided at trial will be whether an ordinary lay observer would detect substantial similarity between Galaxian and Bandai's game.

When it entered the Pac-Man maze, the court again rejected Bandai's argument that three allegedly similar preexisting games negated the originality of Midway's game. Pac-Man may trace the origin of certain of its elements to Pac-ancestors, but its gobbler and ghost figures, the sequences and arrangements of the game action and the characters' "gobbling action" all were copyrightable, as were the musical themes and cartoon sequences of the game.

Bandai admitted that it intended to capitalize on the popularity of Pac-Man. This was reflected in the design of Bandai's Packri Monster mark which highlighted the words "Pack" and "Mon." Copying also was present in the opening musical theme and the cartoon sequence of the Pac- Man game.

Nonetheless, the court again did not find as a matter of law that Bandai's copying went so far as to constitute improper appropriation of Midway's game. Despite a "strong" showing made by Midway, the court concluded that the issue of substantial similarity must be determined at trial.

The court did, however, grant a preliminary injunction prohibiting Bandai from distributing its Galaxian and Packri Monster games, because of its conclusion that Midway was likely to succeed on the merits of its claims. Bandai was proposing to market 90,000 or more units of Packri Monster, and this volume of sales indicated that Midway's injury would not be trivial.

Midway was granted summary judgment on its claim of trademark infringement of its Galaxian mark. Galaxian was found to be a distinctive mark entitled to broad protection. Likelihood of consumer confusion was shown as a matter of law based on the following factors, among others: the identical names of the games, the strength of the mark Galaxian, Bandais intention to benefit from the goodwill and popularity of Midway's game; and the likelihood that users of Midway's arcade games would be confused as to the source of Bandai's handheld games.

Unlike the Galaxian trademark, the Packri Monster mark is not identical to the Pac-Man mark, diminishing the likelihood of confusion. Further, a factual issue was raised as to the abandonment of the mark on the part of Midway. These issues precluded summary judgment for

Midway on its claim that Bandai infringed its Pac-Man trademark.

Midway's Galaxian and Pac-Man also have managed to defeat competitive attacks by another persistent invader, Artic International, Inc. Artic was selling a "speed-up" kit which when attached to the Galaxian game resulted in a faster-paced, more difficult game - and in the contribution of more quarters to the economy. Also at issue was Artic's distribution of a printed circuit board that could be used to create a "Puckman" video game. In a thoughtful opinion, a Federal District Court in Illinois noted that the only differences between Midway's Pac-Man game and Artic's Puckman game were the names of the ghost characters, the lack of a copyright notice on Artic's game and the name of the games.

As had Bandai, Artic staged a massive attack on Midway's copyright in its games. But the court affirmed the availability of copyright protection for such original features of Midway's games as the fanciful design of the characters used to play the games, the distinctive manner in which the characters move, and the sounds associated with that movement. Protection was not limited to the videotapes of the audiovisual display of the games which were deposited with the Copyright Office in connection with Midway's registration of the copyrights in the games. The videotapes were not "copies," but identifying material submitted in lieu of actual copies of the works. And the court pointed out that under section 101 of the Copyright Act a registrable copy may be made in any medium so long as the work can be perceived from it.

The fact that the Japanese developer of the games published them in Japan without attaching a copyright notice also did not void Midway's copyrights. Midway is the copyright owner in the United States, and all copies of the games published or sold by Midway contained sufficient notice.

Midway was not attempting to copyright an essentially utilitarian feature of its games, that is, the ROMs in the computer element of the games. In all, there was "ample" evidence that Artic copied Midway's game and that the games essentially were the same, thereby infringing Midway's copyright.

The speed-up kit for the Galaxian game was found to violate Midway's right to make derivative works, namely, modifications of the copyrighted display, based on the game.

Midway no longer sells the Galaxian game but this did not bar a finding of irreparable harm, because Midway's reputation for high quality and distinctive video games is entitled to protection from copyright infringers, just as its potential sales are. The speed-up kit may discourage less skilled individuals from playing Midway's games, which is an effect which is impossible to quantify monetarily and which necessitated the issuance of the injunction requested by Midway.

Midway Mfg. Co. v. Dirkschneider, 543 F.Supp. 466 (D.Neb. 1981); Midway Mfg. Co. v. Bandai-America Inc., 546 F.Supp. 125 (D.N.J. 1982); Midway Mfg. Co. v. Artic International, Inc., 547 F.Supp. 999 (N.D.Ill. 1982) [ELR 4:20:2]

Playboy Enterprises succeeds in preventing use of the word "Playmen" as title or subtitle of a competing magazine

Retail displays of popular magazines are designed to attract impulse buyers. The cover of a magazine, in particular, becomes precious "real estate" devoted to celebrity or other eye-catching images and alluring descriptions of feature articles. Playboy Enterprises has been involved in lengthy litigation to protect the integrity of its distinctive magazine title and to prevent the use by Tattilo Editrice, an Italian corporation, of the name "Playmen" in connection with a magazine title in the United States.

Tattilo Editrice publishes, in Italy, a sex-oriented magazine with the English title "Playmen." Tattilo licensed Chuckleberry Publishing to distribute an English language version of Playmen in the United States, but a Federal District Court permanently enjoined the issuance of a publication' under that name. (ELR 3:10:6). A Federal Court of Appeals has upheld the District Court's finding that a likelihood of confusion exists between the marks "Playboy" and "Playmen," and the appellate court has affirmed the lower court's ruling that the use of the subtitle "America's Edition of Italy's Playmen" on Tattilo's magazine "Adelina" infringes the Playboy mark.

The Court of Appeals recognized that the haste attendant to magazine purchases increases the likelihood of product and source confusion between the already similarly-named magazines. Further, both magazines appeal to the same audience, utilize the same cover design and contain a table of contents page, editorial material, and a three-page centerfold photograph of a female model which all are virtually identical features. Thus, the court concluded, consumers are likely to believe that "Playmen" is sponsored by Playboy Enterprises.

The District Court also had found that "subliminal association" - an exploitation by Tattilo of consumer recognition of the Playboy name and of Playmen's likeness to it - supported a finding of confusion. Because a consumer is more likely to notice "Playmen" on the newsstand, the promotion of the magazine becomes less expensive than the usual promotion costs for a new magazine. And while other magazines do use the prefix "Play" in their titles, these magazines are aimed at entirely different markets than Playboy or Playmen, stated the court, and their existence does not undermine Playboy's claim of likelihood of confusion. In all, it appeared to the District Court and to the Court of Appeals that Tattilo's purpose in using the name "Playmen" was to trade on Playboy's mark, resulting in deception and confusion.

The Court of Appeals reached a similar conclusion as to the likelihood of confusion as to source, if not product, resulting from use of the word "Playmen" in the subtitle of Tattilo's magazine "Adelina." Expert testimony indicated that Adelina's subtitle would be important in selling the magazine because of the central cover position and highlighted lettering of the word "Playmen." the subliminal association factor again would serve to draw public attention more to the word "Playmen" than to the word "Adelina," making confusion of source more likely. And there was no evidence that the subtitle was adopted for any reason other than to trade on Playboy's mark.

The District Court order granting permanent injunctive relief and an award of $5,000 for attorney's fees therefore was affirmed.

Judge Mansfield, although concurring in the issuance of the injunction against the use of the title "Playmen," questioned the court's reliance upon the "amorphous" concept of "subliminal association" as a separate type of confusion, apart from product or source confusion that might independently warrant a finding of trademark infringement.

Judge Mansfield also dissented from the court's affirmance of the injunction barring the use of the "Playmen" subtitle, noting that the subtitle was not likely to confuse an "appreciable" number of consumers. The "Adelina" and "Playboy" titles do not look alike, and the subtitle is less than one-eighth the size of the title "Adelina." Expert testimony suggested that subtitles play a minimal role in a consumer's purchasing decision. Playboy and Playmen, which clearly differ in explicitness and tone of their contents, have competed in Italy since 1972, but Playboy introduced only a few reader's letters as evidence of actual confusion. A market survey, in Judge Mansfield's view, would have provided probative evidence of any confusion between the magazines. Playboy's failure to prove actual confusion justified an inference in this case that there was no likelihood of confusion, stated Judge Mansfield. He also noted that any of the proliferation of "Play" prefix magazines would be just as likely as Playmen to cause confusion as to source. These magazines also reduce the distinctiveness of Playboy's mark and the degree of protection to which it is entitled, in Judge Mansfield's view.

Playboy Enterprises, Inc. v. Chuckleberry Publishing, Inc., 687 F.2d 563 (2d Cir. 1982) [ELR 4:20:4]

Television news weatherman's covenant not to compete with former station is valid under Georgia law

Employers have struck a blow in their continuing battle with ex-employees to enforce covenants not to compete. The "covenant not to compete" is a tool widely used by employers to prevent their proprietary information and trade secrets from being unfairly used in competition with them when employees who had access to such information leave. Such a covenant was used by Cox Broadcasting to prevent the benefit of expensive goodwill developed in a newscaster from being appropriated by a competitor's station.

From 1962 to 1982, John Beckman was employed as a "meteorologist and television personality" on Cox Broadcasting's Atlanta affiliate, WSB-TV. When Beckman neared the end of his contract with WSBTV, he signed a contract with WXIA-TV, a local competitor, to commence similar employment upon the expiration of his contract with WSB-TV.

Upon learning of Beckman's plans, Cox began a transitional media program to replace Beckman. Cox also filed a petition seeking a judicial declaration that Beckman's covenant not to compete with Cox was valid. Beckman's restrictive covenant provided: "Employee shall not, for a period of one hundred eighty (180) days after the end of the Term of Employment, allow his/her voice or image to be broadcast 'on air' by any commercial television station whose broadcast transmission tower is located within a radius of thirty-five (35) miles from Company's offices ... unless such broadcast is part of a national program." The trial court dismissed Cox's action because it found no evidence that Beckman would violate the covenant while employed at WXIA-TV.

When Cox subsequently refused to release Beckman from the restrictive covenant, Beckman filed a declaratory judgment action of his own to ascertain the validity of the covenant under Georgia law. The trial court ruled that "The restrictive covenant is valid under Georgia law as it is reasonable and definite with regard to time and territory and is otherwise reasonable considering the interest of Cox to be protected and the impact on Beckman." The court's ruling was based on findings that: WSB-TV had spent over one million dollars promoting "Beckman's name, voice and image as an individual television personality"; that Beckman was therefore "one of the most recognized 'television personalities' in the Atlanta area"; that television viewers select a local newscast based largely on their familiarity with the newscasters; and that 44 WSB-TV would be injured by allowing a competitor to take advantage of the popularity of a television personality which WSB-TV had expended great sums to promote before WSB-TV had time to compensate for the loss of that personality" with their transitional media program. The court contrasted such injury to WSB-TV with the minimal harm Beckman would suffer if the covenant were enforced against him, keeping Beckman employed but "off the air" for the first six months of his five-year contract with WXIA-TV.

Beckman appealed to the Supreme Court of Georgia, contending that the covenant is "unreasonable in that it is broader than is necessary for Cox's protection." Beckman argued that be had "already realized a drop in his popularity among the members of his viewing audience and that a prolonged absence from the airways will have a disastrous effect on his career." He also argued that the "television personality of Johnny Beckman belongs solely to him and he is entitled to take this image, which he maintains he has developed by his own skills and resources, to any competing station without interference from WSB-TV." The Supreme Court agreed with Beckman that he "is entitled to take the 'image and personality of Johnny Beckman' to WXIA-TV." However, since "throughout Beckman's career the resources of WSB-TV have been used to bolster and promote the image of Beckman as a part of the image of WSB- TV," the court concluded that "For a limited time and in a narrowly restricted area, WSB-TV is entitled to prevent Beckman from using the popularity and recognition he gained as a result of WSB-TV's investment in the creation of his image, so that WSB-TV may protect its interest in its own image by implementing its transition plan." The court found that "the restrictive covenant in this case is reasonably tailored to that end."

Beckman v. Cox Broadcasting, 296 S.E.2d 566 (Ga. 1982) [ELR 4:20:5]

New York Yankees are enjoined from playing their opening home games of the 1983 season in Denver rather than in Yankee Stadium

The New York Yankees have struck out with a New York judge who enjoined the team from playing its 1983 three-game home opening series with the Detroit Tigers in Denver. The Yankees scheduled the games in Denver due to the possibility that major structural repairs to Yankee Stadium will not be completed prior to the home opener of the 1983 season. However, New York City was prepared to guarantee timely completion of the repairs and to indemnify the team against any loss of revenue if the Stadium were not available for opening day. It was suggested that only 1,000 to 2,000 seats might be unavailable and that the Yankees might be compensated for this loss by an abatement of rent. But by November of 1982, the Yankees no longer responded to the City's efforts to accommodate the club.

State Supreme Court Judge Richard A. Lane pointed out that if the Yankees were to play in Denver, this would violate the club's lease with the City which requires all home games to be played in the Stadium. In defending its proposed change of venue, the Yankees claimed anticipatory breach by the City. However, it appeared to the court that George Steinbrenner, the principal owner of the team, "was grabbing a pretext to take his team to greener pastures . . ." The following factors suggested to Judge Lane that Steinbrenner was not motivated solely by his concern about the condition of the Stadium: Steinbrenner's failure to consider an alternate site at a time in the summer of 1982 when the risk of nonavailability of the Stadium was highest; the escalation of the Yankee's demands when the City was about to accept the team's guarantee and indemnification requirements; and the failure to negotiate with more obvious alternate sites - Shea Stadium or Tiger Stadium in Detroit.

In a lyrical coda, the court declared, "The Yankee pinstripes belong to New York like Central Park, like the Statue of Liberty, like the Metropolitan Museum of Art ... Any loss represents a diminution of the quality of life here, a blow to the City's standing at the top, however narcissistic that perception may be." As is their wont, the Yankees reacted to this concern by noting that the team actually opens the season in Seattle April 5th and that only three games at the Stadium would be involved.

The court was quick to remark that "it is the symbolism of the act not the quantity which counts. Any reduction in the number of home games ... erodes the ties of loyalty between the people of the City and their team ... No money damages can measure or assuage this kind of harm."

City of New York v. New York Yankees, New York Law Journal, p.7, col. 2 (Jan. 11, 1983) [ELR 4:20:6]

Briefly Noted:

Civil Rights.

Refusing to admit a woman to a movie theater "solely because she was of the Negro race" is a violation of the Federal Civil Rights Act (42 U.S.C. Sec. 1981), a City of New York Civil Court has held. Furthermore, the woman was entitled to seek recovery of $10,000 for embarrassment and humiliation, as authorized by Federal law, even though the limit under New York's state Civil Rights Law would have been $500. The court noted that the purposes of the 1886 Civil Rights Act would best be furthered by applying Federal law on damages in this case and that the degradation experienced by the woman was what the Act was intended to prevent.

Madison v. Cinema I, 454 N.Y.S.2d 226 (N.Y.Civ.Ct. 1982) [ELR 4:20:6]

Children's Television.

A Federal District Court has dismissed an action brought by Action for Children's Television seeking to compel the Federal Communications Commission to conclude its proceeding concerning the adoption of rules to govern television programming for children. ACT began its relationship with the FCC in 1970. In 1974, the Commission decided not to adopt any specific rules on children's programming and to await the results of self-regulatory efforts by the broadcast industry. This decision was appealed by ACT; but a Federal Court of Appeals affirmed the Commission's action in Action for Children's Television v. FCC, 564 F.2d 458 (D.C.Cir. 1977). In 1978, ACT petitioned the FCC to evaluate the effectiveness of industry self-regulation. The Commission established a task force and subsequently reopened proceedings in the area. But there has been no final FCC order promulgating or declining to promulgate rules. The District Court concluded that it lacked subject matter jurisdiction since it did not have the authority to issue a writ of mandamus to compel the FCC to perform a discretionary action. It also was noted that any review of FCC conduct is properly conducted by the Court of Appeals in the District of Columbia pursuant to the Administrative Orders Review Act.

Action for Children's Television v. Federal Communications Commission, 546 F.Supp. 872 (D.D.C. 1982) [ELR 4:20:6]

DEPARTMENTS

Book Review:

Lindey on Entertainment, Publishing and the Arts: Agreements and the Law by Alexander Lindey

As the number of lawyers licensed to practice has grown over the last decade, the number of books available on every subject, including entertainment, has grown as well. Most are treatises which analyze what the law is or ought to be. But even the best of these say little if anything about the business side of the entertainment industry, nor do they describe even the outlines of agreements that are made every day by those who work in the industry. This is because treatises are intended for litigators and, to a lesser extent, for experienced draftsmen working out a new clause or two to cover a sophisticated point. Many entertainment lawyers, however, do not do trial work. Rather, many spend their days negotiating and drafting contracts. For lawyers such as these, intimate knowledge of the contents of a copyright or libel treatise may be less essential than familiarity with basic "deal points" and some sense of how to describe in writing the agreements they have made in phone conversations.

Twenty years ago, Alexander Lindey authored a book entitled "Publishing, Entertainment and the Arts" designed to service this segment of the entertainment bar. It consisted for the most part of contract forms, and it was well received. Periodic supplements were issued until the book grew unwieldy. Three years ago, Lindey and his publisher undertook to prepare a second edition in three volumes, and that project has now been completed.

The new set is a veritable treasure-trove of guidance for the entertainment draftsman. In it, one will find contract forms used by every business in the industry: plays, motion pictures, television, radio, music, sound recordings, art work, advertising, publicity, books, magazines, newspapers, agencies and computers. In addition, Lindey leads each section of the book with an eclectic collection of brief comments designed to introduce the reader to the business in which the forms are used. Here for example, laywers new to the book publishing field will learn that "Ayn Rand's The Fountainhead, which has had 32 printings and has sold 2.5 million copies, was rejected by a dozen publishers before it was launched on its astonishing long-term career." Average advances against royalties range from $5,000 to $10,000. All Peter Benchley could get on his first book - Jaws - was $7,500," though prominent authors may receive advances in the six and even seven-figure range. And an Authors Guild survey indicates that royalties are generally 10% of retail price on the first 5,000 copies, 12 1/2% on the next 2,500, and 15% above 7,500. Lindey closes each section of the book with an assortment of short annotations to pertinent cases and law review articles.

The forms themselves are good. Indeed, experienced practitioners may well recognize the language of some - either because they have become industry standards since the earlier edition of the book was published, or because Lindey took care to use industry standards in the first place.

"New technologies" are expanding the means by which entertainment is delivered to its fans. New technologies also are blurring the boundaries between different kinds of entertainment. Music lawyers may now be called on to negotiate and draft pay-TV agreements; and television lawyers may now be doing videodisk deals for musicians. When working in a new area, a comprehensive set of forms is worth its weight in gold. "Lindey on Entertainment, Publishing and the Arts" is such.

Published by Clark Boardman Company, Ltd., 435 Hudson Street, New York, N.Y. 10014; phone (800) 221-9428, in N.Y.S., (212) 929-7500 collect. $210 for the three volume set; a 10% discount is offered to those who enclose payment with their orders. [ELR 4:20:7]

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[ELR 4:20:7]