BUSINESS AFFAIRS

"Celebrity Jeopardy": Defending Advertisers, Publishers and Ad Agencies In and From the Year of Orwell and Beyond

by Kenneth E. Kulzick

Some years ago there was a game show called "Celebrity Sweepstakes" and still another called "Jeopardy." The latter game show, I think, is in a current revival. But for 1984, and beyond, there could be a whole "new" advertising legal game called "Celebrity Jeopardy" - an exciting new high budget, high stakes legal program being actively pursued in our courts and legislatures by many very wealthy entertainers and other public figures. More and more celebrities and public figures are carefully

policing their so-called "personas" - with some of the ablest of the U.S.'s more than 620,000 lawyers eagerly attacking anything that resembles, ever so slightly, any alleged unauthorized commercial celebrity use. These celebrity actions could jeopardize the pocket books of advertisers, publishers, ad agencies and their underwriters - and speaking of celebrities, these actions could have an economic downhill potential faster than Bill Johnson's Olympic time. Because while it may well be negative publicity and goodwill loss for an advertiser, agency or publisher to be sued on a commercial - it is clearly worse to lose such an action for real dollars and bad publicity to boot.

Cottage legal industry

Traditional defamation, privacy, unfair competition and trademark causes of action have been recently

supplemented by the burgeoning "right of publicity" claims and suits. A new Hollywood cottage industry is developing. Clint Eastwood, Johnny Carson, Tom Selleck, Elizabeth Taylor, Cher, and many other public figures like "Jackie O" are all eagerly filing suits, combining new and old theories. Even more intriguing, from a lawyer's standpoint, grasping heirs, successors and relatives of deceased celebrities like Valentino and Presley are reaching out to claim alleged descendible rights under the "new" right of publicity form of action. This is marvelous for media defense lawyers but could prove expensive and embarrassing for the motion picture, television, publishing and advertising industries and their respective underwriters.

So, the basic subject of this article is what, if anything, can be done to lessen the media industry impact of "Celebrity Jeopardy" in 1984 and beyond.

It is no answer, of course, to say: do not have advertising clients utilize, directly or otherwise, stars and celebrities of the present and past. Stars and celebrities have-been very important to advertising for a long time. The use of a star or celebrity, we know, is an attention getting device which enables a client's product to "stand out in a crowd." According to Harry Wayne McMahan, a few years ago, more than 20 per cent of money making commercials used stars and celebrities - and probably the number of star users is still growing.

Use living spokesmen

Of course, one simple answer to avoid claims and litigations is - in every instance - have a well paid living product-spokesman celebrity, a Robert Young, Joe Di-Maggio or John Houseman. The advantages are obvious. Surely Dr. Marcus Welby wouldn't mislead us

about a medical claim or product safety. And coffee can't be all bad if "Jolting Joe" is Mr. Coffee. Nor could John Houseman of Paper Chase fame fail to give anything other than legally sound, conservative and safe business direction - after all he's worked hard to earn it: credibility.

But when advertising goes beyond the ordinary product, living spokesman / endorsement type of commercial the legal waters do get very murky. Can we find any legal guidelines that might help us?

For example, advertisers want their ad campaigns to be "with it" - to capture the sound, feel, style and look of today's world. In doing just that, or trying to do it, ad campaigns may well try to "remind" their audiences of certain prominent people, stars, celebrities and other public figures currently in the forefront of the public consciousness (because of their well known connection

with some recent public office or event such as a film, song, or recent political happening).

Or a commercial may harken back, nostalgically, to some by-gone era in an effort to evoke a happy sense of the past. The attention-getting device may then seek to embrace the familiar, suggest speech sounds like Bogart or Jack Webb, see again the look of Valentino, reflect some of the wit of Mae West, Groucho Marx or Charlie Chaplin. Should advertisers have to pay for the privilege of honoring the past? Does it make a difference that their homage is in the context of a product's commercial and not a more dignified work of art?

Name and likeness

First let's consider the present. Until quite recently "name or likeness" meant that and not much more. The courts spoke in terms of a commercial use, without

consent, of a celebrity's "name and likeness" so as to give an impression of product association or endorsement. The courts declined, generally, to protect voice and style imitations, such things as a performer's timing, inflection, tone and artistry. Thus in Booth v. Colgate-Palmolive, 362 F.Supp. 343 (S.D.N.Y. 1973), involving radio and television commercials with voice-over sounds "suggestive" of the plaintiff's voice in the role of her television character, Hazel, the court held there was no violation of the plaintiff's rights. The commercials were anonymous and did not use plaintiff Shirley Booth's "name or likeness" in any way to identify her as the voice of the character. The court indicated that the granting of a performance right monopoly preventing others from imitating a performer's posture, gestures, voices, sounds or mannerisms may impede, rather than "promote the progress of the useful arts."

Similarly, in Nancy Sinatra v. Goodyear Tire & Rubber Co., 435 F.2d 711 (9th Cir. 1970), the court held that Nancy Sinatra had no property rights in her particular style of singing and that Sue Raney could sing the then popular "These Boots Are Made for Walkin" in a Goodyear commercial without restraint by Frank's daughter. As Tony Liebig observed at the time: "The right to perform in the popular genre or style is essential. Freedom of a performer to earn a living by adopting - either consciously or because he is 'influenced' or simply 'with it' - current modes and styles which may be widely or even uniformly demanded is, indeed, imperative.... Consider any artist, musician or performer of any era and ponder what his oeuvre would have amounted to had he been precluded from utilizing the brush techniques, color principles, scales, metres, cadences, sounds, moods and methods - in short, the styles of those who have gone before.... Would Presley have

been foreclosed as an imitator or would he have had the right to foreclose those who came after him?" Liebig, Style and Performance, 17 Bulletin of the Copyright Society 40 (1969).

Since Sinatra failed to give the boot to Sue Raney there have been many other celebrity performers who have sought to expand their so-called "publicity rights" to include various attributes of their performance other than "name or likeness." This trend was probably blasted into popularity by the U.S. Supreme Court's decision that a local TV station could not legally include the plaintiff's entire fifteensecond "Human Cannonball" act in its local TV newscast. Zacchini v. Scripps-Howard Broadcasting Co., 433 US. 562 (1977).

"Here's Johnny" case

Since the Zacchini "right of publicity" case, celebrities have sought to expand the "right of publicity" theory to protect even a "suggestion" of their act or personality. Some have, like Johnny Carson, combined unfair competition, privacy and right of publicity claims in seeking to get judicial help against what Johnny regards as free-loaders or unloaders of his fame. His "Here's Johnny" portable potty suit is illustrative of the way the law is going, at least in the Sixth Circuit. Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831 (6th Cir. 1983) (ELR 5:2:7).

In 1980 Johnny Carson had unsuccessfully brought an action seeking to enjoin Here's Johnny Portable Toilets, Inc., from using the phrase "Here's Johnny" in connection with its business or advertising, basing his claims on various theories including unfair competition, invasion of privacy and right of publicity. The District Court held that the Lanham Act test of "likelihood of

confusion" had not been met and that privacy and publicity theories would only apply where "name or likeness" was exploited and that the phrase "Here's Johnny" (a part of Carson's act) did not qualify as name or likeness. (ELR 2:12:1).

The Court of Appeals agreed with the dismissal of the unfair competition claim, holding that although the company had intended to capitalize on the phrase popularized by Carson it had not intended to deceive the public into believing Carson was connected with its product. But with regard to the right of privacy and right of publicity claims, the Sixth Circuit held: "Carson's identity may be exploited even if his name, John W. Carson, or his picture is not used." Concentrating on "identity" rather than "name or likeness," the court stated that "If the celebrity's identity is commercially exploited, there has been an invasion of his right whether or not his 'name or likeness' is used." The court noted that the use

of the phrase "Here's Johnny" along with the second phrase "the World's Foremost Commodian" sufficiently identified Carson to establish a claim of appropriation of Carson's "right of publicity."

The moral of the Carson tale: don't suggest, even humorously, the identity of Johnny Carson in a commercial context or you may well get flushed down the tube. Note well that no confusion, no endorsement, no use of name or likeness was involved. To the Sixth Circuit, the suggestion of the identity of the famed comedian was sufficient: no "free ride" - even injest while Carson lives. So advertisers had better not use a significant current show slogan, or significant part of a living celebrity's act, without consent, unless they want to risk suit in the Sixth Circuit.

Look-alikes

What about look-alikes? A lot of current macho male models look a lot like Tom Selleck. A lot of lithe young girls look a lot like Brooke Shields. After all, our society usually apes the appearance and style of its current public heroes and heroines. Beauty shops and barber shops are besieged by requests to give a patron that "certain look." It's the American way.

At least in New York, in Judge Greenfield's court, the word is out on commercial look-alikes: look out! At least if the look-alike resembles Jackie O.

Does the commercial use of a look-alike violate a celebrity's rights? Can one person enjoin the use of someone else's face?

Judge Greenfield, for his New York State Supreme Court, the basic New York trial court, answers: Yes. Appeal is possible although the involved Christian Dior ad campaign is over. The Jacqueline Kennedy Onassis suit against the use of a Jackie O look-alike, Barbara Reynolds, in the Christian Dior mock wedding ad is very instructive. First off, it must be noted that the case dealt with alleged violations of Sections 50 and 51 of the New York Civil Rights Law which created a statutory right in New York. In recent years New York courts have tended to construe the statute quite broadly "to grant recognition to the newly expounded right of an individual to be free from commercial exploitation."

The special facts of Onassis v. Dior were reported in these pages last month. (ELR 5:10:10) What is the lesson to be learned from the case? Certainly do not mix real people and look-alikes without clearly disclosing which is which. But would a disclaimer have helped or mattered? Suppose there had been a humorous additional ad line, "Like all legendary events things were not

all they seemed. No former President's wife attended but Barbara Reynolds did attend."

That would not have mattered, it seems, to Judge Greenfield. He says: "Is the illusionist to be free to step aside, having reaped the benefits of his creation and permitted to disclaim the very impression he sought to create?"

Of course conservative legal advice would say: don't try to do anything involving Jacqueline Kennedy Onassis.

Commerce vs. drama

A few years ago, ABC produced a docudrama dealing with the early life of Jacqueline Bouvier Kennedy. The affectionate dramatic portrait did not have her consent and did not result in a lawsuit. Could the "commercial" nature of the look-alike Dior ad use have caused the

difference in her attitude and approach? Of course. It is always difficult to be viewed as a hawker of wares - a commercial exploiter rather than a dramatic creator. But maybe advertisers can be both. If they are creative, that will help, as in the Sinatra case, where Sue Raney, an accomplished vocalist, could sing better than Nancy Sinatra!

We should also note what Onassis v. Dior does not decide. Since the court found "ample basis for the granting of injunctive relief under the right of privacy laws, it is unnecessary at this time to reach the question proffered as to violation of her rights of publicity." If the case does proceed to trial on the merits there may well be a reconsideration of the status of "right of publicity" as a cause of action in New York. In any event, at this time Judge Greenfield notes that "Imitators are free to simulate voice or hair-do, or characteristic clothing or accessories, and writers to comment on and actors to re-enact

events." In short, Judge Greenfield would probably not have ruled differently, it appears, in the Booth, Sinatra or docudrama situations.

We can take some solace from that. But we should remember that the living celebrities are always looking for ways to enlarge their gains. We can predict safely that more "look alike" or "suggestion" cases are being readied for early filing.

Now let's briefly look at the other compelling "right of publicity" questions concerning deceased public figures and celebrities.

Deceased celebrities

Does any right of publicity survive the death of a celebrity to be asserted by heirs or assigns? The courts, legislatures and legal commentators are in serious disagreement. Gene Girden of New York gave a splendid

talk last December to the American Advertising Federation in Washington on the "Right of Publicity: Is There Life After Death? - It Depends On Where You Die."

If I may synopsize Gene's main points: the state of the law is in great confusion with even different courts in the same state reaching different results. Gene Girden would argue, as do 1, that "the memory, name and pictures of famous individuals should be regarded as a common asset to be shared, an economic opportunity available in the free market system." See, Memphis Development Foundation v. Factors, Etc. Inc. 616 F.2d 956 (6th Cir.) cert.den., 449 U.S. 953 (1980) (ELR 1:22:1). However, Gene recognizes that there appears to be an irreversible trend toward recognition of the descendibility of the "right of publicity" in most states.

In California various interpretations have been given to the two leading decisions of the California Supreme Court, Lugosi v. Universal Pictures, 25 Cal.3d 813 (1979) (ELR 1:18:1) and Guglielmi v. Spelling-Goldberg Productions, 25 Cal.3d 860 (1979) (ELR 1:18:1) (the Valentino case). In Lugosi, the heirs of Bela Lugosi sued Universal for profits it claimed Universal had made in licensing the use of the Count Dracula character, with Lugosi's visage, on T-shirts and merchandise (other than the film in which Lugosi had starred). The California Supreme Court held that "the right to exploit name and likeness is personal to the artist and must be exercised, if at all, by him during his lifetime."

The Valentino case was argued to the same California Supreme Court and the defendants urged that there was no right of publicity descendible to heirs in California. Two days after the Lugosi decision, the California Supreme Court stated "In Lugosi v. Universal Pictures we (held) that the right of publicity protects against the unauthorized use of one's name, likeness or personality,

but that the right is not descendible and expires upon the death of the person so protected." That seemed certainly clear enough, but the Second Circuit in Groucho Marx Productions v. Day and Night Company, 689 F.d 317 (2d Cir. 1982) (ELR 4:12:1), rather than applying the language in Valentino of non-descendibility considered again various possible interpretations of Lugosi. The Second Circuit concluded that California might recognize a limited descendible "right of publicity" if Lugosi had, during his lifetime, established a company to market "Lugosi as Dracula" T-shirts but would not recognize a descendible right of publicity that protects against an original play using a celebrity's likeness and comedic style. That leaves a lot of questions unanswered.

Pending legislation

All of this may well become moot if some form of California Senate Bill 613 or a new "right of publicity" statute is passed in California. As originally proposed in 1983, Senate Bill 613 would have amended California Civil Code Section 3344, and it would not only have created a statutory descendible "right of celebrity publicity" but also would have permitted life for 100 years after death for everyone. Fortunately that proposed bill has gone back to the drawing board for more legislative study and work. If there is to be descendibility it should clearly be of a short duration and careful definition.

Advertisers should become involved in the legislative process. If they leave it all to living actors, and those who deal in the merchandise of deceased celebrities, they will regret the consequences. Advertisers and their agencies should closely cooperate with their lawyers and all should responsibly follow both the current cases and legislative actions. In California that includes the

pending cases involving Clint Eastwood and Tom Selleck (ELR 5:9:13) and Shirley Jones.

Finally some of the public's disenchantment with the media in general reaches advertisers, agencies and their products in a special and potentially devastating way. Advertisers want to win friends for their products. That is the very purpose of advertising. There is a strong public resentment about any over-reaching invasions and infringements by the "irresponsible media." I use those words not as an indication that any large segment of the media or advertising industry is irresponsible but rather to show what certainly seems to be the continuing problem: in the public perception all are identified with the irresponsible few. Creativity and responsibility can go hand in hand. Even clever satire may require effective disclaimers. Advertisers must distinguish themselves from the irresponsible few.

So I do suggest more careful legal monitoring more sensitivity to privacy and publicity problems by all concerned, and then hopefully, "celebrity jeopardy" can be a winning game for all creative advertisers, ad agencies and their counsel.

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RECENT CASES

CBS Records wins copyright suit against American record distributor that purchased foreign-made albums from another American distributor that had imported them from the Philippines without authorization

The unlawful importation provisions of section 602 of the Copyright Act have been given definition of great breadth, much to the chagrin of a domestic record purchaser who had dealt directly with a domestic record seller.

A Federal District Court in Pennsylvania has decided that the purchase within the United States of copyrighted American records manufactured abroad and imported by a third party without the consent of the copyright owner constituted unlawful importation of phonorecords under section 602 of the Copyright Act, even though the imported records were manufactured abroad with the American copyright owner's consent.

Columbia Broadcasting System, Inc. ("CBS") is a New York corporation which owned United States copyrights to six sound recordings, copies of which were the subject of this infringement action. On January 1, 1981, CBS-Sony, Inc., a Japanese corporation, entered into written agreements with Vicor Music Corporation, a Philippines Corporation, by which Vicor was authorized to manufacture and sell certain records exclusively in the Philippines. CBS, which retained the American copyrights to those recordings, consented to the agreement between CBS-Sony and Vicor.

On November 2, 1981, CBS-Sony terminated its manufacturing and licensing agreements with Vicor.

Pursuant to the CBS-Sony/Vicor agreement, Vicor had a 60-day "sell-off" period to liquidate its inventory. Vicor sold the records to Rainbow Music, Inc., another Philippines corporation, which in turn sold them to International Traders, Inc., a Nevada corporation. Thereafter, International Traders sold the records to the eventual defendant, Scorpio Music Distributors, Inc., a Pennsylvania corporation. Of the recordings Scorpio purchased from International Traders, approximately 6,000 were records to which CBS owned the copyrights.

On February 1, 1982, CBS sued Scorpio, alleging that without the consent of CBS, Scorpio had imported records of works to which CBS owned the copyrights, thereby running afoul of section 602 of the Act. Section 602 provides, "Importation into the United States, without the authority of the owner of the copyright under this title, of copies of phonorecords of a work that have been acquired outside of the United States is an infringement

of the exclusive right to distribute copies or phonorecords under section 106, actionable under section 501."

The court recognized that although the records had not been "pirated," because CBS, the copyright owner, had authorized their manufacture, CBS had not authorized the importation of those records into the United States. The court thus found infringement of CBS' distribution right.

Scorpio attempted to resist CBS's claim of unlawful importation by raising the first sale doctrine as a defense. A copyright owner's exclusive distribution right is subject to section 109 which provides that ". . . the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell, or otherwise dispose of the possession of that copy or phonorecord."

Accordingly, where the copyright owner authorizes the outright sale of a particular copy, the copyright owner may not invoke the distribution right so as to prevent or restrict the resale of that copy. Once a first sale of a copy has taken place, any and all subsequent resales of that copy are generally immune to copyright infringement claims.

Citing section 109, Scorpio argued that Vicor was authorized by CBS to sell the copyrighted records to Rainbow Music in the Philippines, and that by virtue of that valid first sale from Vicor to Rainbow Music, Scorpio was not liable for unlawful importation. Scorpio argued that because of Section 109, any dis tribution rights CBS may have retained were extinguished when the records were lawfully sold by Vicor to Rainbow and then to International Traders before they were sold to Scorpio. The court disagreed.

The court stated that the Copyright Act was not intended to have extraterritorial effect and that it "does not extend beyond the borders of this country" unless it expressly states otherwise. CBS defeated Scorpio's asserted first sale defense on another ground as well. CBS argued that to construe section 109 as superseding section 602's prohibition on importation would render the more recently enacted section 602 virtually meaningless. "Third party purchasers who import phonorecords could thereby circumvent the statute," the court warned, "in every instance, by simply buying the recordings indirectly" from purchasers abroad who acquire the records through a valid first sale. The court refused to sanction what it feared would be unfair competitive advantages enjoyed by unauthorized importers of phonorecords.

It was a matter of uncontroverted fact that the records at issue were acquired outside of the United States by International Traders and imported without CBS's authorization. Scorpio nevertheless insisted that it did not import the records from the Philippines, because it transacted its business with International Traders within the United States. Scorpio argued that section 602 did not prohibit its actions, because importation alone is the infringing act under that section. The court rejected this argument too. The court easity concluded that Scorpio was an importer by virtue of the "law regarding vicarious and contributory infringement." "It is well established that a suit for infringement is analagous to other tort actions and infringers are jointly and severally liable; hence, plaintiff need sue only such participants as it sees fit," the court observed.

It was also noted that intent is not a necessary element of infringement, and the copyright holder may proceed against any member of the chain of distribution. CBS's claim was not weakened by virtue of its not having proceeded against International Traders, the actual importer.

An appeal to the Court of Appeals is pending.

Columbia Broadcasting System, Inc. v. Scorpio Music Distributors, Inc., 569 F.Supp. 47 (E.D.Pa. 1983) [ELR 5:11:7]

Universal Studios is unsuccessful in trademark infringement action against distributor of "Donkey Kong" video game; Federal District Court rules that Universal did not possess valid title to its alleged trademark in "King Kong" and that "King Kong" has not acquired a secondary meaning

A Federal District Court in New York City has granted summary judgment to Nintendo Co., Ltd., the creator and distributor of the "Donkey Kong" video arcade game, in an action brought by Universal City Studios. Universal claimed that Nintendo infringed the studio's trademark in "a particular gorilla, one who happens to be extraordinarily large and who holds a female captive on top of a large building." The court based its ruling on Universal's failure to establish a trademark in the name "King Kong," on the fact that "King Kong" lacks (if nothing else) secondary meaning, and on the lost viability of a trademark licensed without supervision.

A chronology of the case, while it may make the natives restless, is as essential as a machete for cutting through the dense, almost impenetrable thicket of Kong litigation. So, for future reference:

1932: King Kong first appears in public as a book and magazine serial based on a story by Merian C. Cooper.

1933: RKO releases first King Kong motion picture, based on the Cooper story which was also the basis of the 1932 book. RKO holds copyright on movie.

1933-1979: RKO and about 15 licensees use the King Kong name, character and story for products such as toys, clothing and books.

Early 1970s: RKO licenses Dino DeLaurentiis Corporation to remake the film King Kong.

1975: Universal sues RKO in state court in California for breach of contract and tortious interference with contractual relations, alleging that RKO had agreed to license Universal to remake King Kong. Action is settled.

1975: Universal commences suit in federal court in California against RKO, DeLaurentiis and Richard Cooper (Merian Cooper's son and the holder of exclusive book publishing rights with respect to King Kong) seeking a declaration judgement that the copyright to the King Kong story had lapsed, that the story was in the

public domain, and that Universal could produdce a new Kiiing Kong movie without infringing on the rights of RKO or DeLaurentiis. RKO's counterclaim charges that a Universal remake would infringe its copyright and would constitute unfair competition. Cooper denies that the King Kong story fell into public domain and cross-claims against RKO asserting that RKO, under its contract with Merian Cooper, was allowed to make only the 1933 King Kong movie, and that all other commercial exploitation of the King Kong name, character and story by RKO were for Cooper's account.

November 24, 1976: Federal District Court holds, inter alia, that King Kong is in the public domain and that Universal could make a movie based on King Kong so long as it did not infringe on the copyrighted 1933 movie.

December 6, 1976: Federal District Court signs interlocutory judgment holding that as between RKO and Cooper, all rights in the name, character and story of King Kong, other than the rights in the 1933 movie and the sequel "Son of Kong," were vested in Cooper, that RKO was a constructive trustee for Cooper to the extent that the company exercised nonmovie rights, that Cooper recover from RKO all profits earned by RKO in its trustee capacity, and that the interlocutory judgment would not affect the court's finding that the King Kong story is in the public domain.

December 15, 1976: Cooper and Universal enter into an agreement whereby Cooper, in return for \$200,000, assigns all his rights in King Kong to Universal.

1977: RKO appeals District Court judgment to Federal Court of Appeals.

1977: RKO enters into an agreement with Universal whereby RKO agrees to pay Universal about 62.5% of the revenues RKO will realize from the DeLaurentiis remake and not to sue Universal for any King Kong movie

that Universal might make. Universal agrees to pay RKO a small percentage of the net profits from any such remake.

Late 1970s: Federal Court of Appeals dismisses RKO's appeal, vacates District Court judgment and Cooper judgment.

December 1976: Paramount Pictures releases DeLaurentiis remake of King Kong, licensed by RKO. DeLaurentiis holds exclusive copyright to 1976 remake.

November 1980: Federal District Court dismisses Universal's complaint against RKO and RKO's counterclaim.

December 1980: Universal begins licensing King Kong name and character in connection with the sale of costumes and video games.

January 1981: Federal District Court reinstates 1979 judgment for Cooper (the judgment which Cooper assigned to Universal).

March 1981: Nintendo begins development of Donkey Kong. In this game, players must maneuver a figure known as Mario the Carpenter along ramps, elevators, etc., in a building under construction in order to rescue a girl from a gorilla at the top of the building. The game has been a major commercial success in the United States. Nintendo has earned more than \$180 million from the sale in the United States and Canada of about 60,000 Donkey Kong video arcade games, and the licensing of the trademark in the "Donkey Kong" name has earned \$8.5 million in royalties.

April 1982: Universal sues Nintendo, claiming that Donkey Kong's similarity to King Kong was a false designation of origin in violation of section 43(a) of the Lanham Act as well as New York's anti-dilution statute.

In turning to the substantive issues in the case, Federal District Court Judge Robert W. Sweet first agreed with Nintendo that the documents upon which Universal

based its claim of trademark ownership did not serve to convey that trademark. Judge Sweet noted the principle that "Trademark rights do not exist in the abstract, to be bought and sold as a distinct asset. They exist only in connection with a business or a product and can be transferred only along with that product or business or its goodwill." This rule applies even when the trademark is in a character name. Because trademark is not a right in gross, it can be transferred only by a supervised license or in connection with an ongoing business, neither of which was present in the Cooper-Universal transfer.

The court refused to find that the trademark was transferred by operation of law as sometimes occurs in bankruptcy proceedings. The December 6, 1976 judgment did make RKO a constructive trustee for Cooper as to the profits earned from the use and licensing of King Kong, but it did not successfully transfer RKO's trademark rights to Cooper. Cooper therefore could not have

assigned the King Kong trademark to Universal in any event because he never owned it. Therefore, summary judgment was found appropriate.

An independent ground supporting the award of summary judgment was that Universal's purported trademark in King Kong lacks secondary meaning. The court observed that because of the competing property interests in King Kong and various third parties' unauthorized uses of the name, "King Kong" no longer signifies a single source of origin to consumers.

At present, it appears that the holders of rights in King Kong are: RKO which owns the 1933 movie and its sequel, including the right to use or license stills and footage from these movies; Cooper who owns the worldwide book and periodical publishing rights; De-Laurentiis who owns the 1976 remake, including the right to use or license its stills and footage. Given this state of affairs, the court observed, "Exactly what shred

of the King Kong character and name Universal owns is far from clear ... Essentially Universal claims to own a trademark in an extraordinarily large gorilla standing on top of a tall building holding a woman captive." But the gorilla may not resemble either the 1933 or the 1976 King Kong. The vagueness of the image in which Universal claims its trademark "violates the fundamental purpose of a trademark ... to identify the source of a product and thereby prevent consumer confusion as to that source."

Universal argued that RKO and DeLaurentiis own copyrights in their King Kong images, rather than trademarks. But these companies have extensively used and licensed their King Kong images with the result, noted Judge Sweet, that the public would be unlikely to perceive that there exists a third image of King Kong which designates a third product source, i.e., Universal. Regardless of the legal identity of the parties' interests, the

evidence demonstrated that individuals who have attempted to secure licenses for a King Kong product have been unable to determine where to seek the license. Since, in the court's view, no reasonable trier of fact could find the presence of secondary meaning, summary judgment was again found appropriate.

The court declared that the many instances of third party trademark registration and commercial use of the King Kong name, often in conjunction with a picture of a gorilla, served to further strengthen the holding that Universal is unable as a matter of law to demonstrate secondary meaning. Such uses, while not justifying an alleged infringement by Nintendo, add to consumer confusion as to the source of King Kong products.

Finally, the court found, as a matter of law, that there was no likelihood of confusion as to the source of Donkey Kong, relying in part, upon the recent case of Warner Brothers, Inc. v. American Broadcasting Companies,

Inc., No. 82-7152 (2d Cir., Oct. 6, 1983). In Warner Brothers, a Federal District Court granted a motion for summary judgment in a suit for copyright and trademark infringement brought by the owners of the copyrights in Superman works against the creators of "The Greatest American Hero" television series. Despite a host of similarities between Superman and the series, the court stated that "The total perception of the Hinkley character is not substantially similar to that of Superman."

Donkey Kong and King Kong possess "equally great differences." Donkey Kong is a comical and entertaining game with a "farcical, childlike, nonsexual Donkey Kong . . ." King Kong, of course, is a ferocious gorilla who, in quest of a beautiful woman, goes on rampages and fights with natural and mechanical beasts. The court stated that "At best Donkey Kong is a parody of King Kong, but a parody of this sort is not an infringement." Even if Universal possessed a valid trademark in King

Kong, there was no likelihood of confusion between the two marks, because Universal's mark is not distinctive, the marks are different in "total concept and feel," and no evidence was submitted of actual confusion among consumers.

The court concluded by discussing the agreements Universal has reached with Nintendo licensees such as Coleco and Atari. In return for Universal's covenant not to sue, Coleco, the distributor of Donkey Kong cartridges for home video games, agreed to pay Universal royalties on its cartridge sales. Coleco has sold six million Donkey Kong cartridges bearing the Nintendo name, with no mention of Universal. Universal entered into a similar agreement with Atari in connection with Atari's development of a Donkey Kong game for home computers, and with a company developing a television cartoon series based on Donkey Kong. In the latter

xagreement, Universal received the right to distribute the series throughout the world.

Universal characterized these agreements as covenants not to sue rather than licenses, but "whatever Universal chooses to call these agreements," stated the court, they purport to authorize the use of a Universal mark. However, such use largely was uncontrolled, which indicates either Universal's abandonment of the mark or evidence of Universal's belief that Donkey Kong would not be confused with King Kong. Either possibility would reinforce the court's holding that there is no consumer confusion in this case as a matter of law.

The court also granted Nintendo's motion to dismiss Universal's claim under New York's antidilution statute. The statute generally protects extremely strong marks - a standard King Kong would hardly meet in view of the discussion above. Universal's pendent state law claims

for common law trademark and trade name infringement and for unfair competition also were dismissed.

Universal City Studios, Inc. v. Nintendo Co., Ltd., Case No. 82 Civ 4259 (S.D.N.Y., Dec. 22, 1983) [ELR 5:11:8]

Federal Court of Appeals reverses award of damages to author Gerard Zilg in his breach of contract action against Prentice-Hall; District Court's dismissal of Zilg's action against E.I. DuPont de Nemours & Co. for tortious interference with contractual relations is affirmed

The almost universal conflict between authors and their publishers has been perfectly illustrated by writer Dan Greenburg in his 1982 novel What Do Women Want?

"Lance," said Mike, "Judy, Charlene, Brad and I have been kicking around some ideas for the promotion of your book, and, well, frankly, I think we've come up with a helluva campaign."

"Great," said Lance. "What's our budget, by the way?"

"What's our what, Lance?" said Mike, frowning as though the word might be new to him.

"Our budget. How much is Firestone allocating for the promotion and advertising campaigns of my book?"

Mike looked quickly at Howard and then back to Lance and cleared his throat....

"The budget," said Mike, "has not as yet been finalized."

"I see," said Lance, waiting for the rest of it.

"We do not, quite frankly, have a whole carload of money to play around with," said Mike . . . "I think I'd better say that right off the bat."

Lance's discomfort began edging smoothly into anxiety. From experiences with his previous six novels he knew that the act of publishing a book was largely a self-fulfilling prophecy. Three of his previous books had been dubbed bestsellers by their respective publishers before they had even been set in type. They were advertised and promoted like bestsellers, and bestsellers is what they became. His other three novels had been dubbed dogs by their publishers at about the same point. They were scarcely advertised or promoted, and dogs they surely became. This of course caused Lance to take a loss on the years invested in the books, but it also made it hard to find a publisher for his next novel after each failure, since it is authors who get blamed for lack of sales and not their negligent publishers.

When Lance had made his deal with Firestone on Gallivanting, his latest, they seemed to feel it would be a blockbuster. They promised him a promotion and

advertising budget in excess of a hundred thousand dollars, just for starters, and a twenty-four city promotional tour.

"Is the budget less than a hundred thousand dollars?" said Lance. "Oh yes," said Mike. "Quite a bit less than that."

"I see," said Lance. "Is it less than fifty thousand?"

"Oh yes," said Mike. "Quite a bit less than that."

"Is it less than twenty-five?" said Lance ...

"I'm going to be honest with you, Lance," said Mike.

"The budget is five thousand dollars......

"I want my book back," said Lance ...

(Copyright 1982 by Dan Greenburg)

In 1972 author Gerard Colby Zilg entered into a contract with Prentice-Hall, Inc., for the publication of his book DuPont: Behind the Nylon Curtain, a critical account of the role of the DuPont family in American

social, political and economic history. Prentice-Hall accepted Zilg's manuscript and plans were made in June 1974 for a first printing of 15,000 copies of the book at a retail price of \$12.95 per copy. Soon after, a series of events occurred that resulted in Zilg's action against Prentice-Hall for breach of contract, and against E.I. DuPont de Nemours & Co., Inc., for interference with contractual relations.

The events: A DuPont family member obtained an advance copy of the manuscript and was "predictably outraged." A DuPont official contacted The Fortune Book Club and stated that the book was "scurrilous" and "actionable." The Fortune Book Club (a subsidiary of the Book of the Month Club) reversed its decision to distribute Zilg's book. The editor-in-chief of the Book of the Month Club declared that the book was "malicious" and had an "objectionable tone." Prentice-Hall removed several inaccurate passages from the page proofs of the

book, and cut the first printing from 15,000 to 10,000 copies, stating that 5,000 copies no longer were needed for the book club distribution. The proposed advertising budget was cut from \$15,000 to \$5,000.

Federal District Court Judge Brieant ruled that the DuPont Company had a constitutionally protected interest in discussing its good faith opinion of the merits of Zilg's work with the book clubs and the publisher, and found that the company had not engaged in threats of economic coercion or baseless litigation. However, the court also ruled that PrenticeHall had breached its obligation to Zilg to exert its best efforts in promoting the book because the publisher had no valid business reason for reducing the first printing or the advertising budget. Judge Brieant therefore awarded Zilg \$24,250 in damages on the ground that Prentice-Hall "privished" his book, that is, the company conducted an inadequate merchandising effort after concluding that the book did

not meet its expectations as to quality or marketability. Prentice-Hall's conduct may have led to a critical loss of sales momentum when the book was briefly out of stock.

A Federal Court of Appeals has reversed the District Court's holding that Prentice-Hall breached its contract with Zilg, while affirming the ruling as to DuPont, although on the narrower ground that DuPont's activities were not tortious under New York law. The court, stating that New York courts would likely follow the Restatement (Second) of Torts, reviewed the factors set forth in Section 767 of the Restatement for evaluating a claim of interference with contractual relations. Several of the factors had been considered by the District Court and those findings were adopted by Court of Appeals Judge Winter. Judge Winter then stated that the communication of good faith views about the merits of a literary work is socially beneficial in promoting "the free flow of ideas." Such statements need not be made to the public at large, as argued by Zilg. Book clubs and publishers "surely have, or ought to have," opined the court, "an interest in avoiding unjustified attacks as well as factual error."

In this case, the book clubs certainly had an interest in receiving DuPont's comments since Zilg's book may have been an "utterly inappropriate" selection and may have incurred the "wrath" of the clubs' members. Furthermore, the reading public has an interest in the accuracy and literary merit of available books, observed the court. Thus, while DuPont's actions "surely" resulted in the book clubs' decision not to distribute Zilg's work and also resulted in a change in Prentice-Hall's previously supportive attitude toward the book, DuPont's conduct was not tortious.

As to the breach of contract claim, Judge Winter noted that Zilg's contract with Prentice-Hall did not contain an explicit "best efforts" or "promote fully" promise, much less an agreement to make certain specific promotional efforts. Printing and advertising decisions were within Prentice-Hall's discretion. Nevertheless, Judge Winter stated his belief that the contract implied that the publisher would make certain efforts-in- connection with acquiring the book an obligation deriving "both from the common expectations of parties to such agreements and from the relationship of those parties as structured by the contract."

The relationship between authors and publishers involves an allocation of risks, by which, according to the court, publishers print, advertise and distribute books at their own expense. In return for performing these tasks and for bearing the risk of a book's failure to sell, the author gives a publisher exclusive rights to the book. Publishing contracts usually provide for royalties to the author, often on an escalating basis.

The prime conflict in this creative collaboration arises in connection with promotional expenses, since an author "usually has a bigger stake in the success or failure of a book than a publisher who may regard it as one among many publications, some of which may lose money." When determining promotional budgets, the publisher is likely to view the author's "willingness to take large risks as a function of the fact that it is the publisher's money at peril." Publishers would be unlikely to accede to a procedure of negotiating with each author and for each book as to the number of volumes to be printed and the level of advertising efforts. Publishers also would prefer to maintain flexibility in reacting to market conditions according to their experience in the field. However, Prentice-Hall's discretion in determining promotional expenses would not allow the publisher to refuse to print or distribute any copies of the DuPont book, leaving Zilg with his \$6,500 prepublication payment as the only remuneration for his work. The promise to publish must be given some content, stated Judge Winter, and that content is an "implied good faith effort to promote the book including a first printing and advertising budget adequate to give the book a reasonable chance of achieving market success in light of the subject matter and likely audience."

Once this obligation to engage in reasonable initial promotional activities is fulfilled, a good faith business decision by the publisher regarding the size of a printing or advertising budget may not then be subjected to review by a trier of fact. The court suggested that its decision would be to the advantage of authors, since any more rigorous court-imposed requirement as to promotional obligations might lead publishers to take fewer risks in releasing new books.

Under the appellate court's standard, Zilg might have demonstrated Prentice-Hall's breach of contract either

on the basis that the initial printing and promotional efforts were inadequate to attract a readership or that the publisher was not motivated by good faith business judgment in its marketing decisions. However, the evidence showed that Prentice-Hall printed 13,000 copies of Zilg's book, authorized an advertising budget of \$5,500, distributed 600 review copies, purchased newspaper advertising and made reasonable efforts to sell the paperback rights. The court concluded that a scaling down of the publisher's initial promotional plans did not mean that the actual marketing efforts were inadequate to send off the book. The District Court had found that Prentice-Hall did not adequately exploit "sales momentum." But the appellate court noted that the publisher had ordered a timely reprinting, a delay in the delivery of which had resulted in the temporary unavailability of the book, except through wholesalers.

Judge Winter emphasized his disagreement with allowing a trier of fact to "second guess" a publisher's good faith judgments on printing and advertising decisions. Prentice-Hall reacted reasonably to the news of the book club's reversal of its selection of Zilg's work, concluded Judge Winter, in reversing the District Court ruling on Zilg's breach of contract claim.

In a concurring opinion, Judge Pierce, joined by Judge Waterman, relied on narrower grounds for reaching the result reached by Judge Winter with respect to the tortious interference claim, focusing on the finding that DuPont's communications to the book clubs constituted a good faith noncoercive pursuit of the company's interest in protecting its name.

Zilg v. Prentice-Hall, Inc., 717 F.2d 671 (2d Cir. 1983) [ELR 5:11:10]

West Virginia Supreme Court rules that union is entitled to respond to "political" advertisements sponsored by trade association during university football broadcasts

Mountaineer Sports Network, a part of the athletic department of West Virginia University, produces a sports program "package," including the university's football games, which is distributed to about 60 individual radio stations. In order to carry the network's programming, local stations also are required to carry 15 minutes of advertising provided by the network. The West Virginia Coal Association has been one of the advertisers on the network for more than ten years, and during this time the Association's advertisements generally were devoted to promoting the use of coal. However, in the fall of 1982, the advertisements provided by the Association to the network commented on the state's "business climate"

and were both political and controversial. Nevertheless, the network determined that it would be "inappropriate to refuse to run the advertisements based upon their political content."

In early 1983, the United Mine Workers of America requested free advertising time on the network to present a rebuttal of the Association's views. This request was denied, as was the union's attempt to purchase advertising time (because the time was not available).

As a result, the union brought an action seeking to compel the university to provide it with the opportunity, during the next ensuing round of radio broadcasts of the university's football games, to express the union's view on the issues raised in the Association's advertisement. The Supreme Court of Appeals of West Virginia has granted this request, though only prospectively, finding that the university has a constitutional obligation to present the union's response to the controversial

advertisements if such advertisements are broadcast again on the network.

The court first pointed out that university facilities, which generally are open to the public, constitute public forums. Previous "public forum" decisions, however, have involved access to public places, while this case involves intangible property, i.e., the sale of advertising time for broadcast during university football games. Access to broadcast media, in turn, is governed in part by the Federal Communications Commission's fairness doctrine. But the network is not a licensee subject to federal jurisdiction: Thus, the court suggested that although the concepts underlying the fairness doctrine might guide its analysis of the network's obligation to the union, federal communications regulations did not preempt the subject matter of the case, as the Association had argued.

The union obtained relief on the basis of two provisions of the West Virginia constitution. One of the

provisions is a form of "equal protection" clause that led the court to conclude that "when a state agency or instrumentality sells advertising for broadcast which presents one side of a politically controversial issue of public concern, it is obligated under the (West Virginia Constitution) to preserve its neutrality by providing a reasonable opportunity for the presentation of contrasting points of view in order that the 'common benefit, protection and security' be served and fundamental fairness preserved."

The university argued that under the First Amendment it was not entitled to exercise content review over the advertisements submitted for broadcast, and that granting the relief sought by the union would impose an unconstitutional burden on its own First Amendment rights. Without basing its decision on the content review issue, the court noted that the sale of advertisements by a state entity may allow for content review in limited

contexts. The network, due to its long-term relationship with many advertisers, may have encouraged the monopolization of the "special forum" it created. And listeners might conclude that the advertisements broadcast over the network reflect the views of the university. Furthermore, the imposition of a right to reply requirement in this case would not violate the network's independent editorial judgment since the network is "merely a conduit for the views of its advertisers ... It is not a private entity seeking to advocate its own political views, and, therefore, it has no free speech interests similar to those held by the newspaper in Miami Herald [Publishing Co. v. Tornillo, 418 U.S. 241 (1979).]"

The court declared that the network is obligated to present contrasting views on controversial issues, using reasonableness and good faith to determine an appropriate spokesperson, an appropriate fee (a reduced rate or no fee might be called for in some cases), and an

appropriate amount of time to ensure a reasonably balanced presentation. In this case, it would be an "abuse of discretion" for the network to deny the union access for the presentation of its views.

The majority determined that the relief sought by the union will be prospective in the event that political advertising by the Association is broadcast again. Justice McGraw stated in the concluding footnote that "prospective relief is no relief for these parties" that the union should have been entitled to respond to the Association on the next ensuing football broadcast, and that the limitation imposed by the majority rendered the opinion logically and constitutionally inconsistent.

United Mine Workers of America International Union v. Parsons, 305 S.E.2d 343 (W.Va. 1983) [ELR 5:11:12]

Hell's Angels' libel action against Playboy Magazine is dismissed for failing to show that article was "of and concerning" particular members who filed the suit

Hell's Angels have no fury like a "bride" or "momma" scorned. Nevertheless, a libel claim filed by the group against Playboy Magazine has been dismissed by a Federal District Court, since it was not shown that the allegedly libelous statements in a May 1982 article in the magazine were "of and concerning" the complaining parties.

The article, entitled "Undercover Angel," purported to describe the experiences of an undercover narcotics agent, Dan Black, who infiltrated the Hell's Angels. Among the experiences depicted by author Lawrence Linderman was an "Angel's wedding," a ceremony which allegedly includes assorted sexual activities

between the bride and various Hell's Angels members wishing to express their congratulations to the newly-married couple. The article also stated that Angels beat up their "mommas" unless they agree to perform unusual, and herein unspecified, sex acts. The Angels charged that the article defamed all wives and members of the Oakland and Richmond chapters of the Hell's Angels.

The court noted that the parties bringing a defamation action must show that the allegedly libelous statements refer to them personally. With a large group, generally over 25 members, courts presume that no reasonable reader would take the statements as literally applying to each individual member. Indeed, in dismissing the first complaint in this case, the court had ruled that no reasonable reading of the article would support the limiting geographical identification of the complaints suggested by the pleading. Black's observations were presented as

illustrating the conduct of Hell's Angels in general, and the allegedly defamatory statements plainly referred to "the women who associate with the Hell's Angels throughout the United States, if not the world."

In their second amended complaint, the Hell's Angels attempted to meet the "of and concerning" requirement by claiming that not all Hell's Angels wives have been Hell's Angel "brides." Thus, while there are about 100 to 125 wives nationwide, there are only about 15 to 20 "brides," according to an "imaginative and esoteric interpretation" of the term. But the court was required to interpret the word "bride" as it would be understood by an ordinary reader. If "bride" does possess a unique meaning to the Hell's Angels, that meaning was not accessible to the readers of the article. The court therefore declined the group's "belated invitation to torture the ordinary meaning of the article to arrive at a definition which no reasonable jury could accept." Since, in the court's view,

the failure to meet the "of and concerning" requirement was unlikely to be cured by additional time or amendments, the complaint was dismissed with prejudice for failure to state a claim.

The court also addressed the magazine's argument that the Hell's Angels did not adequately plead malice, finding that it was appropriate to rule on the issue despite its dismissal of the case on alternate grounds, because of the First Amendment interests involved. The Hell's Angels alleged that Linderman did not adequately investigate the statements in his article. However, failure to investigate does not by itself constitute recklessness. And nothing in the article was sufficient to put Playboy on notice of any probable falsity which might suggest a need for further investigation. The court concluded by stating, "The danger that suits based on such flimsy allegations of malice would pose to freedom of speech and of the press if allowed to proceed is only too clear."

Barger v. Playboy Enterprises, Inc., 564 F.Supp. 1151 (N.D.Ca. 1983) [ELR 5:11:13]

Federal Court of Appeals reverses award of summary judgment to television station in invasion of privacy action brought by dinner theater manager, because manager was not a public figure with respect to statement regarding his personal finances

The age of Aquarius has dawned, belatedly and somewhat unexpectedly, in a Federal Court of Appeals in Michigan in connection with an action brought by Richard Bichler, a dinner theater manager, against Grand Rapids television station WZZM-TV.

Bichler was the principal stockholder and president of Rebel Promotions, a company that owned and operated the Thunderbird Dinner Theatre, and also was the general manager of the theater. As such, he hired Playmore Productions, owned by Jerry Moore, to present plays at the theater. Moore was to pay gross costs, travel expenses and lodging for the cast.

In January 1976, Bichler gave Moore a check in the amount of \$9,000 for the services of the cast. At about that time, Bichler was served with a garnishment pursuant to a judgment rendered against Moore for debts incurred. Bichler also became aware that certain of Moore's invoices were not "true invoices." In rapid, if not grand, order, Bichler placed a stop order on the \$9,000 check; the Playmore production of "Hair" at the theater ceased; and Moore held a press conference during which he stated that the show would not continue because the actors had not been paid.

WZZM reported on the press conference during a newscast and stated, in part, that "The Thunderbird Theatre has been having financial problems in recent weeks as has its owner, Dick Bichler." However, at the time of the broadcast the theater had not yet closed. The news report also misstated the terms of the contract between the theater and Moore, and the reasons for the cancellation of the production of "Hair." Within a few days of the broadcast, a local bank called in a loan to the theater and repossessed essential items of personal property. As a result, the theater did indeed close.

Bichler brought an action against WZZM, alleging that by implying that his financial affairs were not in order and that he had abandoned the cast of "Hair," the station had violated his Michigan common law right of protection against the publication of private information and of freedom from being placed in a false light. A Federal District Court granted the station's motion for summary judgment, holding that Bichler was a public figure under Gertz v. Robert Welch, 418 U.S. 323, and therefore was required to establish actual malice to recover on his

false light claim. As an alternate ground of decision, the trial court held that Michigan law would require a showing of actual malice even if Bichler were a private figure under Gertz.

The Court of Appeals reversed the District Court judgment due to its overly-broad reading of the public figure doctrine. Bichler had appeared in several newspaper articles but only as a spokesman for the theater; he was not "an individual of fame and notoriety." WZZM argued that Bichler was a limited public figure since the closing of the theater was a matter of public controversy. The Court of Appeals expressed the view that the theater closing was not a public controversy within the Gertz standard but stated that it did not need to dispose of that issue. The court found that since the station's statement about Bichler's personal finances was not related to the purported public controversy, WZZM's report was not privileged in any event.

The District Court also erred in finding that Michigan law required Bichler to show actual malice, stated the court. Michigan recognizes a privilege for newspapers which publish stories about private individuals involved in public issues. But, again, Bichler's private financial affairs were not connected to the story about the theater's difficulties, because he was not the outright owner of the theater, he had not personally guaranteed the payment of the actor's salaries, and he was not so identified with the theater that his personal life was of interest in itself.

A dissenting judge would have held the broadcast privileged as a report on a matter of public interest concerning a private party. It was noted that Bichler was the "virtual personification" of the theater as far as the public was concerned, sought publicity for the theater and was reasonably connected with the controversy with Moore. In view of these factors, the dissent would have

affirmed the District Court's entry of summary judgment against Bichler.

Bichler v. Union Bank and Trust Co., 715 F.2d 1059 (6th Cir. 1983) [ELR 5:11:13]

Federal District Court refuses to dismiss indictment charging record album bootlegger with interstate transportation of stolen property, but counts alleging mail/wire fraud are dismissed

In May 1981, FBI agents searched an apparel business known as Gallant International and discovered that in addition to selling women's clothing, John Gallant, the son of the company's owner, was selling "bootleg" record albums. The search uncovered thousands of bootleg albums of popular contemporary recording artists -

albums with an aggregate value of hundreds of thousands of dollars. Gallant was charged, in a 49-count indictment, with mail fraud, interstate transportation of stolen property and copyright infringement. A Federal District Court has granted Gallant's motion to dismiss the counts of mail fraud and wire fraud, but with great definitional trepidation, has refused to dismiss the stolen property charges. (The sufficiency of the copyright infringement counts was not disputed.)

The first "distinction with a difference" in the case concerned the use of the terms "piracy," "counterfeiting" and "bootlegging" with respect to record album infringement. "Pirated" record albums are those which duplicate, without authorization, the sounds from an authorized recording. "Counterfeit" record albums duplicate an entire album - the sounds, the label, packaging and art work. A "bootleg" album, according to the court, is "an unauthorized recording of a live performance that

is recorded either at the performance or from a radio or television broadcast of the performance and is not available for purchase as an authorized recording. Bootleg albums usually carry blank labels that make no suggestion that the album is authorized by the performer or the performer's record company, and the sound quality is generally inferior to that of studio recordings."

The government argued that for purposes of this case, these distinctions were immaterial since bootlegged records defraud copyright proprietors to the same extent as counterfeited or pirated records. Gallant, however, contended that bootleg albums do not defraud the public because purchasers of such albums know what they are buying.

Federal District Court Judge Edelstein ruled that applying the mail and wire fraud statutes cited by the government to Gallant's activities would be an unwarranted

expansion of the scope of those statutes. The court noted Gallant's position that he made no false statements, misrepresentations or promises to the copyright holders, and that while he may have infringed certain copyrights, he defrauded no one. The government reasoned that Gallant, as a wholesaler of copyrighted material, had an obligation to obtain a license from the copyright holders to distribute their musical compositions, and that his violation of this duty to disclose his proposed activities to the copyright holders constituted a scheme to defraud. Judge Edelstein stated that while in certain circumstances a breach of duty to disclose may provide the basis for a mail or wire fraud prosecution, most of those cases involve the breach of a fiduciary duty, not a statutory duty as in this case. In the absence of an allegation that Gallant had violated any duty independent of his alleged violation of the copyright laws, the court declined to allow the government to "bootstrap a violation of the copyright laws into a violation of the mail fraud statute."

Furthermore, in 1982, Congress enacted the Piracy and Counterfeiting Amendments Act of 1982, by which record counterfeiting and piracy were designated felonies. There was no reference in the amendments or in the legislative history to bootlegging, and there was "no indication of any intent for the amendments to reach the unauthorized duplication of live performances that are not already embodied in an existing marketed product." The court viewed the statute's omission of a specific reference to bootlegging as further support for its reluctance to include this conduct within the proscriptions of the wire and mail fraud statutes.

Gallant also was charged with violating section 2314 of the National Stolen Property Act. As to this charge, Gallant argued that the interstate distribution of bootleg recordings did not violate the Act because a live

performance - not protected by the copyrights laws - is incapable of being stolen. The government characterized the alleged stolen property as the copyrighted musical compositions of the songs contained in the bootleg albums, not the live performances themselves. The court pointed out that Gallant had not argued that the Copyright Act was unclear as to the illegality of the alleged infringement. The court also noted decisions that have held that "intangible" property is capable of being stolen. The court therefore concluded that a "myopic" reading of section 2314, rather than reading it in conjunction with the Copyright Act, would not be appropriate.

Gallant also argued that in United States v. Smith, 686 F.2d 234 (5th Cir. 1982), a Federal Court of Appeals reversed a conviction for copyright infringement and interstate transportation of stolen property for videotaping and distributing copies of movies and other programs publicly broadcast on television on the ground that

copyrighted works could not be 'stolen" or "converted" within the meaning of section 2314. Judge Edelstein, however, examined the definitions of "stolen" set forth in Smith and declared that those definitions would cover the offenses allegedly committed by Gallant. The motion to dismiss the counts of the indictment based on the violation of section 2314 was therefore denied.

United States v. Gallant, 570 F.Supp. 303 (S.D.N.Y. 1983) [ELR 5:11:14]

Journalist Oriana Fallaci recovers \$10,000 judgment and attorneys' fees for willful infringement of copyrighted interview

Journalist Oriana Fallaci has been awarded \$10,000 in damages and \$3,500 in attorneys' fees for the willful

infringement by the New Gazette of a copyrighted interview conducted by Fallaci with a leading Polish political official. The interview, entitled "Even an Angel Can Become a Whore," was first published in the Washington Post on February 21, 1982. The New Gazette, in its March 2, 1982 issue, published a Russian translation of the piece, using Fallaci's name and photograph.

A Federal District Court in New York, adopting the findings of a United States Magistrate, agreed with Fallaci that the New Gazette was or should have been aware that its unauthorized republication of the Washington Post article constituted copyright infringement. Furthermore, the Gazette apparently chose not to defend the action. This resulted in a default judgment, a factor which may be taken into account by a court in determining whether an infringement was willful under section 504 of the Copyright Act.

The magistrate found that the fair market value of the Russian language translation and non-exclusive republication rights to the article was \$5,000. It was noted, however, that a willful infringer "should be liable for a substantial amount over and above the market value of a legitimate license for otherwise infringers would be encouraged to willfully violate the law knowing the full extent of their liability would not exceed what they would have to pay for a license on the open market." A reasonable deterrent in this case would be a judgment in the amount of \$ 10,000, recommended the magistrate. And the award of attorneys' fees was appropriate in view of the willful character of the infringement.

Fallaci v. New Gazette Literary Corp., 568 F.Supp. 1172 (S.D.N.Y 1983) [ELR 5:11:15]

Federal District Court refuses to grant summary judgment in trademark infringement action involving use of the mark "Showtime"

A Federal District Court in Nevada has refused to grant summary judgment to Showtime Entertainment, Inc., in a trademark action brought by Showtime International, Inc. Showtime International, a Nevada corporation, at one time published a periodical called Showtime Magazine, which was distributed in Nevada and northern California. Showtime Entertainment is a New York partnership which provides pay television services for home viewing throughout the United States.

In 1979, when Showtime-Nevada asserted that its rights to the Showtime trademark (as registered in the state of Nevada) were being violated by Showtime-New York, Showtime-New York made a settlement offer that was rejected. Subsequently, Showtime-New York filed

a complaint for declaratory judgment in a Federal District Court in New York, seeking to establish its rights to the trademark. This action was dismissed in December 1980 because the court in New York lacked jurisdiction over Showtime-Nevada.

In August 1981, Showtime-Nevada filed a complaint in Nevada alleging that Showtime-New York's lawsuit was a "bogus action" filed for improper purposes. The complaint also set forth causes of action for trademark infringement and for the cancellation of Showtime-New York's federally registered trademark.

The court ruled that a genuine and material issue of fact exists concerning the trademark infringement claim. The court noted that there was no question as to the likelihood of confusion between the marks since they are identical, with only minor distinguishing decorative embellishments. The issue of infringement therefore must be resolved by the trier of fact.

The court rejected Showtime-New York's argument that Showtime-Nevada was precluded from bringing its trademark infringement action because the company sold Showtime magazine in late 1980, prior to its filing of an amended complaint. But Showtime-Nevada was entitled to seek damages for the alleged trademark infringement which may have occurred while the company did own the periodical, said the court. The court noted that ShowtimeNevada's sale of the magazine may mean that the company has no standing to seek cancellation of Showtime-New York's federal trademark registration. This will depend upon findings as to whether Showtime-Nevada still is engaged in business under the name Showtime, as the company claims and whether Showtime-Nevada, by assignment or abandonment, forfeited the right to use the Showtime mark. Showtime-New York did not sufficiently rebut Showtime-Nevada's

allegation on these issues, ruled the court in denying summary judgment.

Ging v. Showtime Entertainment, Inc., 570 F.Supp. 1080 (D.Nev. 1983) [ELR 5:11:16]

Summary judgment granted against operators of videogames that were strikingly similar to Pac Man and other videogames in copyright suit brought by Midway Manufacturing

Operators of "copy" videogames continue to find themselves cornered by the legal maneuvers of Midway Manufacturing, the owner of the rights to the popular "Pac-Man" videogame. In its action against certain owners and operators of videogame machines called "Mighty Mouth," Midway previously obtained a

preliminary injunction in the case (ELR 4:20:2), and now has obtained a summary judgment on the issue of liability.

A Federal District Court in Nebraska has found as a matter of law that the game Mighty Mouth infringes Midway's Pac-M an. The court also found that two other games operated by the defendants, "Galactic Invaders" and "Rally X," infringe the copyrights of Midway in the games "Galaxian" and "Rally-X."

Copying is demonstrated by establishing access and substantial similarity. In this case, though having noted that one of the defendants admitted in his deposition to having seen Midway's games, the court simply stated, "In any event, the games are so strikingly similar that copying may be inferred without direct proof of access."

The court found the games to be identical in virtually every detail, and concluded that "a reasonable observer, comparing the overall appearance of the games, could only conclude that the Mighty Mouth, Galactic Invaders and Rally-X machines and printed circuit boards resold and displayed for public use by defendants, copied plaintiff's unique expression of ideas for coin-operated video games." (Though the court did not make the distinction, it appears its conclusion was based on a finding of infringement of the games' audiovisual presentations, rather than of the games themselves as computer software programs.)

The court further found that Midway's unregistered trademarks were infringed, under the federal trademark law and the Nebraska Trade Practices Act.

Midway Mfg. Co. v. Dirkschneider, 571 F.Supp. 282 (D.Neb. 1983) [ELR 5:11:16]

Atari obtains preliminary injunction against maker of "Prom Blaster" device which facilitates home copying of video game cartridges

Bemoaners of the "Betamax" decision (ELR 5:9:10) may be able to take heart in a case decided a few weeks before the Supreme Court's decision was announced which involved the home copying of video games. In that case Atari has obtained a preliminary injunction against the sale of device which enables the duplication of video games.

Atari manufactures and sells home computer video game systems and cartridges containing popular video games such as Centipede and Pac-Man. A game cartridge consists of a plastic housing containing an electronic circuit, or "chip," which in turn contains the game's computer program. Such chips have "Read Only Memory," or "ROM," which means they can neither be

reprogrammed nor erased, only "read." Atari has obtained copyright registrations for its video games as audiovisual works. Game cartridges sell for about \$40.

JS&A is a retailer of electronic products, which last fall began marketing a product known as "Prom Blaster." (A ROM which is re-programmable is often called a "PROM," and hence the name.) The Prom Blaster is a machine with two slots, one for an Atari compatible cartridge and one for a blank cartridge. In the words of JS&A's advertisements, "You simply plug in your Atari or Activision cartridge in one slot and a blank cartridge in another, press a button and three minutes later you've created an exact duplicate." JS&A sold the machine for \$119 and blank cartridges for \$10.

JS&A marketed Prom Blaster as a means of making "back-up" copies of game cartridges, urging consumers to protect their investment in game cartridges which "can easily be ruined." Another selling point for the

Prom Blaster was that the buyer "can make copies for friends who wish to own archival copies of their favorite video games and charge them for the service."

It was Atari's position that any copying of its video games infringes its copyrights, even if the consumer does it for "archival purposes," and the effect of JS&A's acts were to actively induce and contribute to the making of infringing copies of its copyrighted video games. (One who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a "contributory" infringer.)

JS&A argued that the copying of video games is legal, and even if it is not, the court may not enjoin JS&A sale of the Prom Blaster as a contributory infringement because the device has other legal uses.

The court ruled that it was not enough for JS&A to establish the Prom Blaster had a legal use. The machine

must have a substantial noninfringing use to preclude injunction against its sale (citing the Court of Appeals' opinion in the "Betamax" case, which of course was subsequently overruled by the Supreme Court).

The court found that the Prom Blaster can perform only two functions: copy other companies' video games or duplicate JS&A's own games. JS&A argued that the later use, which is non-infringing, is enough. "This argument fails because that use is not substantial. JS&A markets only nine games. Since they evidently went on the market with the Prom Blaster quite recently, no one knows if consumers want to play these games, much less copy them. Furthermore, Prom Blasters sell for \$119. It strains credulity to assert that consumers would spend that much for a machine that could only copy JS&A's games. This capability of the Prom Blaster is by itself insufficient to make its sale legal."

JS&A's liability as a contributory infringer thus depended on the legality of the primary use of the machine: duplication of other companies' video games. The court ruled that copying copyrighted video game cartridges of others using the Prom Blaster would probably constitute infringement.

Section 106 of the Copyright Act provides the owner of copyright with the exclusive right "to reproduce the copyrighted work in copies." JS&A sought to rely on an exception to this rule, set forth in Section 117, which permits the making of archival copies of computer programs.

This "archival exception" (which apparently no other court has interpreted) did not legalize the Prom Blaster and its use in making back-up copies, the court determined. According to the final report of the Commission on New Technological Works (CONTU), the purpose of the exception is to protect the use of a copy "against

destruction or damage by mechanical or electrical failure." Computer programs are stored in a wide variety of media, not all of which are subject to the same risks, and not all are subject to mechanical or electrical failure, said the court.

"The medium of storage must, therefore, determine whether the archival exception applies. Where, and only where, a medium may be destroyed by mechanical or electrical failure, the archival exception protects the owners of programs stored in that medium, by granting them the right to make back-up copies."

Atari argued that since ROM's cannot be reprogrammed or erased, the programs are not susceptible to destruction or damage through mechanical or electrical failure. Though JS&A contended that ROM's can be destroyed "as a result of a wire becoming disconnected, liquid spillage, crushing, etc.," the only evidence that JS&A presented as to the nature of the danger to ROMS

was one letter from a customer who wrote that four of his cartridges "died." The customer did not specify the cause of death, said the court, and it concluded that JS&A did not meet its burden of bringing itself within the Section 117 exception.

Atari, Inc. v. JS&A Group, Inc., No. 83C 8333 (E.D.Ill., December 6, 1983) [ELR 5:11:17]

Briefly Noted:

Copyright.

United Features Syndicate, the owner of exclusive rights to reproduce, distribute and sell the "Peanuts" comic strip and the characters featured therein, has obtained an award of statutory damages in the amount of \$275,000 against Sunrise Mold Co. A Federal District Court in Florida ruled that Sunrise willfully infringed United's copyrights in the Peanuts characters by engaging in the unauthorized manufacture and distribution of plaster molds in the likeness of Snoopy, Charlie Brown and friends. Sunrise's molds, each of which can be used to manufacture 100 to 200 figures, constituted eleven separate infringements of United's copyrights, ruled the court. Sunrise's activities also violated section 43(a) of the Lanham Act. And because Sunrise violated Florida's common law of unfair competition, United was awarded punitive damages of \$165,000. The court also enjoined Sunrise from the further unauthorized use of the "Peanuts" characters.

United Feature Syndicate v. Sunrise Mold Co., 569 F.Supp. 1475 (S.D.Fla. 1983) [ELR 5:11:18]

Defamation.

A member of the state senate is a public figure for defamation purposes, resulting in a privilege for a radio talk show host accused of libel, the Rhode Island Supreme Court has held. The plaintiff served on a senate committee responsible for leasing a building in which he had an interest. The incident prompted much media attention in the days preceding the radio talk show. The defendant, prior to taking calls on his talk show, made references to newspaper articles concerning the senator's involvement with the lease. In response to a caller who was sympathetic to the senator, the defendant characterized the plaintiff's conduct as "reaching into the public till with both hands" and "stealing public money." The senator, relying on these statements, brought a defamation action. The court held that the senate majority leader, was well known as a public official. His name was known to everyone who followed the news during the week preceding the radio talk show, and that in view of the public attention given the senator's involvement in specified activities, the defendant's opinion broadcast on the radio talk show was not actionable.

Hawkins v. Oden, 459 A.2d 481 (R.I. 1983) [ELR 5:11:18]

Obscenity.

A California Court of Appeal has held that an ordinance outlawing operation of movie projection equipment where the film shown depicts specific sex acts was specifically content based and thus in violation of the First Amendment. The defendant's drive-in theater featured soft-core pornography which did not rise to the

level of obscenity, and was therefore protected by the First Amendment. The San Joaquin County Board of Supervisors adopted an ordinance prohibiting operation of movie projection equipment where the film shown depicts specific minors and where the movie can be seen by minors beyond the property line. The court held that because the ordinance was not content neutral, but was expressly content based, it could not be sustained under the general power of government to regulate commercial businesses. The ordinance failed as a valid time, place and manner regulation, because it existed only to suppress nonobscene films based on the government's hostility to their subject matter, thus violating the First Amendment.

People v. Valley Cinemas, Inc., 194 Cal.Rptr. 859 (Cal.App. 1983) [ELR 5:11:18]

Art Galleries.

The Pennsylvania Superior Court has ruled that it was error to exclude evidence regarding the value of paintings where an artist brought an action against a gallery alleging the negligent sale of paintings below their value. The artist engaged the services of a gallery to exhibit and sell a number of paintings. The gallery proceeded to photograph and insure the paintings, billing the artist for those services. The artist and gallery agreed that two paintings should be auctioned off to test the market for the paintings, the proceeds from the sale to be applied against the bill owed to the gallery. The artist brought suit alleging that the gallery negligently allowed the paintings to be sold for a price the artist considered to be less than their true value. The gallery denied liability and countersued for the outstanding balance due for the gallery's services. The court, in granting a new trial based on the artist's motion, held that it was error to exclude evidence of the value of the paintings where that evidence could have affected the jury's verdict. Contrary to the trial court's assertion, the evidence in question was not only relevant to liability but, since it went to the heart of the artist's case, its admission might have resulted in a different verdict.

Kremer v. Janet Fleisher Gallery, Inc., 467 A.2d 377 (Pa.Super. 1983) [ELR 5:11:18]

Previously Reported:

The following cases, which were reported in previous issues of the Entertainment Law Reporter, have been published: Twentieth Century-Fox v. MCA, 715 F.2d 1327 (4:19:1); BMI v. Club 30, 567 F.Supp. 36

(4:21:6); Roth v. Pritikin, 710 F.2d 934 (5:4:11); Strick v. Superior Court, 192 Cal.Rptr. 314 (5:4:14); Selle v. Gibb, 567 F.Supp. 1173 (5:5:8); Cruz v. Ferre, 571 F.Supp. 125 (5:7:7); Greater Los Angeles Council on Deafness v. Community Television of Southern California, 719 F.2d 1017 (5:7:8); Keene v. Smith, 569 F.Supp. 1513 (5:8:14). [ELR 5:11:18]

IN THE NEWS

Metromedia appeals Federal District Court's refusal to set aside \$325,000 jury verdict awarded to newswoman Christine Craft

In the relatively short span of time since January 5, 1983, Christine Craft's action against Metromedia, Inc., has generated two jury decisions, a 14-page opinion by

a Federal District Court judge, the filing of various appeals, and repeated coverage by the Entertainment Law Reporter.

The most recent occurrence is Metromedia's filing of an appeal challenging the second jury verdict in the case - a verdict which awarded Craft \$325,000 on her claim of fraudulent conduct on the part of executives of Kansas City television station KMBC-TV (which was owned by Metromedia at the time of Craft's employment as a news anchor). Federal District Court Judge Joseph E. Stevens refused to set aside this verdict, which was reached by a 12-member jury in Joplin, Missouri in January 1984 (ELR 5:9:18), and also denied Metromedia's motion for a new trial.

Judge Stevens had ordered the new trial after the sixmember jury which first heard Craft's case awarded her actual damages of \$375,000 and punitive damages of \$125,000. Judge Stevens ruled that this earlier jury verdict was "excessive" and "the result of passion, prejudice, confusion, or mistake on the part of the jury." (ELR 5:7:12) Instructional errors may have been responsible for the excessive verdict; such errors concerned the failure to withdraw, clearly and expressly, the issues of punitive damages and wrongful discharge from the jury's consideration. The excessive verdict also was attributed by Judge Stevens to the pervasive publicity surrounding the case - publicity which the jury was likely to encounter since it was not sequestered and faced a courtroom gallery "crammed" with reporters.

Judge Stevens' opinion setting forth the grounds for granting Metromedia's request for a new trial after the first verdict has just been published. Craft v. Metromedia, 572 F.Supp. 868 (W.D.Mo. 1983). The opinion recounts the history of Craft's employment at KMBC and the events preceding the filing of her claim that the station committed fraud and misrepresentation in hiring

her, engaged in sex discrimination and violated the equal Pay Act, Judge Stevens rejected the latter claims and, in so doing, he stressed his conclusion that as a matter of fact, the news director at the station never uttered the much publicized "litany" that Craft was "too old, too unattractive, and not deferential enough to men."

Metromedia, in filing its appeal from the second verdict, has questioned whether there was sufficient evidence to support the Joplin jury's verdict and whether Judge Stevens erred in allowing the testimony of Craft's chiropractor and psychiatrist.

Watch this space for further developments. [Apr. 1984] [ELR 5:11:19]

Federal District Court bars "Gay Games" sponsors from using the word "Olympics"

A Federal District Court in San Francisco has ruled that the sponsors of an international athletic competition known as the "Gay Games" may not use the word "Olympic" to describe their 1986 event. The United States Olympic Committee argued that the Amateur Sports Act gives the Committee the exclusive right to use and license the word. A representative of the sponsors of the homosexual athletic competition, which was first held in 1982 in San Francisco, stated that the decision would be appealed on the basis that the group's use of the word "Olympics" would not suggest that the Gay Games are connected with the games supported by the Committee. [Apr. 1984] [ELR 5:11:19]

Motion Picture Association of America resolves dispute over "Preppy" film titles

The Motion Picture Association of America has resolved a conflict involving the use of the words "preppy" and "preppie" in certain film titles by voting in favor of Chuck Vincent Prods., whose distributor, Platinum Records, released the film "Preppies." The Vincent film's title was registered over a year before AmeriEuro Pictures registered the titles "The Last American Preppy" and "The Unofficial Preppy Movie." These titles were registered on behalf of a film scheduled for release by Cannon Corp. and MGM/UA Entertainment.

According to a news report, the MPAA, by unanimous decision of its arbitrators, found "that there is harmful similarity and conflict between the titles by virtue of, among other reasons, the use of the word preppie (preppy) in both titles and the overlapping time periods

in which each motion picture is planned for release." AmeriEuro Pictures therefore was not free to use its proposed titles. [Apr. 1984] [ELR 5:11:19]

Department of Labor approves results of "re-run" of 1982 Writers Guild election

The results of the rerun of the 1982 Writers Guild of America election have been approved by the United States Department of Labor. The Department of Labor had initiated an investigation of the election based upon charges that associate members, although paying dues, were not allowed to vote or run for office.

The Department of Labor presently is seeking a rerun of at least part of the Guild's September 1983 election, on the ground that writers John Astin and Irwin Rosten, candidates for the Board of Directors, were ineligible for Guild office because of their supervisory status. (For additional background, see ELR 5:7:10.) [Apr. 1984] [ELR 5:11:20]

WASHINGTON MONITOR

Federal Trade Commission files lawsuit challenging proposed merger between Warner Communications and Polygram Records Inc.

The Federal Trade Commission has filed a federal court action in California seeking to enjoin the proposed merger between the record divisions of Warner Communications Inc. and Polygram Records Inc. The FTC views the merger as anticompetitive since it might create "the largest prerecorded music distributor in the United

States and the world, controlling 26% of the United States market."

Recent consolidation in the recording industry has resulted in six major companies - Warner, Polygram, CBS, RCA, Capitol/EMI and MCA - distributing about 85% of all recorded music in the United States. This consolidation, states the FTC, has led to the "near demise" of the independent distribution system.

According to the FTC, a Warner-Polygram merger would make it unlikely that a new distributor could enter the competitive fray, and would eliminate competition between Warner and Polygram, remove Polygram as a competitor in the United States market, and enhance the ability of the four other major United States distributors "to collude with respect to price and terms of sale and the number of new records released."

In response to the FTC action, Warner and PolyGram agreed to postpone the effective date of the merger.

A Warner representative stated that the FTC's position fails to recognize the impact of home taping on the record industry and the economic problems facing Polygram's domestic operations. [Apr. 1984] [ELR 5:11:20]

Federal Communications Commission begins process of allocating new FM radio stations

The Federal Communications Commission has selected 684 areas where new FM radio stations may be licensed. The number of new stations around the country ultimately will increase by more than 1,000. Most of the new stations will be located in small cities, primarily in the South and Southwest. The communities are those where FM service is needed and where it is technically feasible.

The Commission also has requested comments on its proposal to remove the "diversity demerit" given in a comparative hearing to a daytime-only licensee that might apply for FM stations in the same community. The "demerit" in many would foreclose experienced broadcasters from expanding their service. [Apr. 1984] [ELR 5:11:20]

DEPARTMENTS

Book Notes:

1983 Entertainment, Publishing and the Arts Handbook

The 1983 Entertainment, Publishing and the Arts Handbook is the first of a planned series of annual

anthologies to be published by Clark Boardman Company, Ltd., covering recent developments in the entertainment field. The 18 articles in this issue touch almost all aspects of the industry: books, movies, television, music, and managers and agents. Some of the pieces are reprinted from other publications and some were authored originally for this volume.

Among the specific subjects covered are: libel by fiction; limited partnership financing of motion pictures; renegotiation of performers' contracts; cable television franchising; new technologies and the law; the right of publicity; California regulation of talent agents; and recent developments in federal taxation.

The Handbook is edited by two USC Law School graduates, Michael Meyer, an attorney-manager producer in Los Angeles, and John David Viera, an associate professor of film and media law at California State University in Long Beach.

The Handbook has been distributed to owners of Clark Boardman's three-volume set entitied Lindey on Entertainment, Publishing and the Arts, as part of the upkeep service for those books. The Handbook also is available independently at a cost of \$35 from Clark Boardman Company, Ltd., 435 Hudson St., New York, N.Y. 10014; phones (800) 221-9428 and (212) 929-7500.

The Lindey set also has been supplemented with additional material (in loose-leaf format for insertion in the set's binders). The revisions were compiled and edited by Martin E. Silfen of Silfen & Glasser in New York City. Included are new materials on performing rights in nondramatic music and on Broadway plays. [ELR 5:11:21]

In the Law Reviews:

Hastings College of Law, San Francisco, CA. has published Volume 5, Number 4 of Comm/Ent, a Journal of Communications and Entertainment Law. It contains the following articles:

Protecting and Regulating Commercial Speech: Consumers Confront the First Amendment by Barbara A. Burnett, 5 Comm/Ent 637 (1983)

A Reexamination of Cable Television's Compulsory Licensing Royalty Rates: The Copyright Royalty Tribunal and the Marketplace by Dale N. Hatfield and Robert Alan Garrett, 5 Comm/ Ent 681 (1983)

Workers' Compensation Insurance for Entertainment Loan Out Corporations by Edward Branigan and Bruce M. Stiglitz, 5 Comm/Ent, 725 (1983) FCC Regulation and Other Oxymorons: Seven Axioms to Grind by Erwin Krasnow, Harry F. Cole and William E. Kennard, 5 Comm/Ent 759 (1983)

Voir Dire: Is There a Constitutional Right of Access? by Kathleen A. Kelly, 5 Comm/Ent 779 (1983)

What's Entertainment? An Inquiry into the Educational and Amusing Aspects of Educational Play Parks by Jennifer J. Martin, 5 Comm/Ent 795 (1983)

Don't Make Waves: A M Stereophonic Broadcasting and the Marketplace Approach by Mark Peyton Schreiber, 5 Comm/Ent 821 (1983)

The National Bar Association, 1773 T Street N.W., Washington, D.C., 20009, has published the National Bar Association Law Journal focusing on

ENTERTAINMENT LAW REPORTER

Communications: A New Frontier for Minority Entrepreneurs with the following articles:

CBS, NBC and ABC Should Continue to be Barred from Owning Cable Systems: A Brief for the Status Quo by Carol A. LeBoo, Cynthia Mabry, James E. McCollum and Laura Murray Richards, 12 National Bar Association Law Journal 1 (1983)

Recent Trends in Minority Ownership of Broadcast Properties by the National Black Media Coalition, 12 National Bar Association Law Journal 33 (1983)

Radio Deregulation: Minority Broadcasters, the New System of Broadcast Control by Michael A. Jacobs, 12 National Bar Association Law Journal 41 (1983)

The Black Executive in the Broadcast Industry: Experience for the '80s by Gene A. Davis, 12 National Bar Association Law Journal 59 (1983)

The Federal Communications Commission and Minority Ownership of Broadcast Facilities: A Federal Administrative/ Regulatory Model for the Fostering of Greater Minority Entrepreneurship by Clarence V. McKee, 12 National Bar Association Law Journal 75 (1983)

Financing Ownership of Broadcast Properties from a Minority Venture Capitalist Perspective by John E. Oxendine and Kenneth 0. Harris, 12 National Bar Association Law Journal 85(1983)

Remedies for Group Defamation in Broadcasting by David Honig, 12 National Bar Association Law Journal 113 (1983) America Moves from an Industrial to a Telecommunications High Tech Society: Will Minorities be Left Behind? by Beverly Grymes, 12 National Bar Association Law Journal 137 (1983)

Book Review of Who Owns the Media by Benjamin M. Compaine, Christopher H. Sterling, Thomas Guback and J. Kendrick Noble, Jr., 12 National Bar Association Law Journal 149(1983)

Are Athletes Covered by Workers' Compensation? by Nicholas A. Buoniconti, 13 The Brief 4 (1983) (published by the Tort and Insurance Practice Section of the American Bar Association, 11 55 East 60th Street, Chicago, Illinois 60637)

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Off-the-Air Educational Videorecording and Fair Use: An Analysis by Ancil G. Ramey, 10 The Journal of College and University Law 341 (1983) (published by Fred B. Rothman & Co., 10368 West Centennial Road, Littleton, CO 80127)
[ELR 5:11:22]