BUSINESS AFFAIRS

Concert Tour Financing through Record Company Support and Corporate Sponsorship

by Michael J. Pollack

Traditionally, it has been the role of record companies to contribute financially to make up for deficits incurred by its recording artists in relation to live concert tours which the artists undertake in connection with new albums. Recently, however, record companies have been supporting fewer live concert tours than they were five to ten years ago.

Various factors contribute to this diminishing support. First, concert tours are less profitable; touring costs have increased, while receipts have declined due to reduced attendance by teenagers at concerts resulting from high ticket prices and the increased popularity of dance and video clubs. In addition, increased competition for the entertainment dollar from new technologies (e.g., videocassettes, videodiscs and videogames) and the prevalence of home taping have resulted in decreased records sales and less monies available for financing live concert tours. Finally more cost effective marketing techniques have been introduced for selling records and creating recognition for recording artists (e.g., promotional videos which are frequently financed by record companies, 12-inch singles, promotional samplers, etc.).

Conversely, the recent trend has been for major corporations to become more active financial backers of concert tours by major acts. Some recent examples include: Pepsi Cola (The Jacksons, Lionel Richie); Coca Cola (Duran Duran, Julio Iglesias); Canada Dry (Rod

Stewart); Nabisco (Culture Club); and Salem Cigarettes (Alabama).

Promotional Benefits

These corporations derive substantial promotional benefits from exposing their name and products to the public via a concert tour. This mode of exposure has become more comfortable for corporate sponsors because of the increasing acceptance by the general public of the "Music of the '80's," and certain corporations actively pursue such arrangements since, in addition to the name recognition, recording artists and their music tend to convey a sound, feel, look, lifestyle and/or image with which corporate sponsors often wish to be identified. Corporate sponsorship of tours also has been encouraged because of the increasing acceptance by recording artists of controlled commercialization of their names and likenesses, ranging from limited identification with, to express endorsement of, the corporation's product. The precursors of this trend were the sponsorship by Jovan of The Rolling Stones and by Canada Dry of Hall & Oates. Moreover, the desire of corporate executives to "meet the stars" and be involved in show business cannot be discounted as an important factor in the increase of corporate sponsorship of tours.

Despite these trends, record companies still contribute to tour financing, although now such financial burden is often shared by corporate sponsors. This article will summarize factors which affect determinations by record companies on whether to aid in financing live concert tours by their recording artists and, if a record company agrees to contribute to tour financing, the contractual protections it generally will demand. The article also will describe examples of contractual provisions which might be found in an agreement between a recording artist, a sponsor and a record company in such an endeavor and certain crossmerchandising provisions between a corporate sponsor and a record company.

Tour Deficit Financing By Record Companies

Record companies view live concert tours as a marketing tool to increase current and future record sales by their recording artists. Since there are budgetary limitations for marketing for each album by each recording artist, the record company must compare the potential costs and benefits of a live concert tour against other marketing alternatives. Record company tour deficit financing decisions are generally influenced by a number of factors, not the least of which are subjective and intuitive factors, for example, the personality, charisma, and star potential of the particular recording artist. Other more pragmatic factors often include: the other financial commitments made by the record company to the recording artist; the type of music the recording artist performs; the record sales feedback received by the record company from regions in which the recording artist previously performed at live concert engagements; and the current regional and national level of sales and radio airplay of records embodying the recording artist's performances.

Sometimes, the nature of the act itself makes touring an important promotional tool as opposed to other means of promotion. For example, the fans of heavy metal rock groups want to identify with the "look" of the band. Since this is most effectively accomplished through live concert performances, record companies are generally more disposed to help finance tours by heavy metal rock groups.

An "event" may substantially influence the decision-making process. Jerry Brandt, the owner of "The Ritz," a rock club in New York City, keeps abreast of the English music scene. He learned of a group called "Thompson Twins" which had achieved a certain degree of success in England but was still relatively unknown in the United States. Jerry Brandt invited and paid for the Thompson Twins to come from England to play The Ritz on a weekend. The Thompson Twins so impressed the record company staff and local media people at these performances that shortly thereafter the record company agreed to contribute to the financing of a live concert tour of the United States.

A live concert tour may substantially increase the audience and potential purchasers for the recording artist's record product by creating a broader image than is conveyed by the recording artist's records. For example, through touring, the Thompson Twins' image has evolved from one primarily appealing to the dance music market to one that appeals to listeners and fans of pop, AOR (i.e., album oriented radio) and adult contemporary music.

For non-American recording artists such as the Thompson Twins (English) and Air Supply (Australian), two months or more of travelling across the United States gives the recording artist a feeling and pulse for the American marketplace that they probably could not otherwise get. This exposure generally influences them to create and perform material which has greater appeal for the American market and ultimately translates into increased record sales.

As a general rule, rhythm and blues ("R&B") enthusiasts are more selective than other concertgoers in choosing concerts to attend. Thus R&B recording artists generally must have one or more commercial hits before a record company will aid in tour financing. However, once R&B recording artists have the hit, they can generally break even or make money by touring although usually they still need financial help for startup costs to create a stage show equal to their record performances.

An additional factor that may influence a record company to contribute towards the financing of a live concert is if the new recording artist has an opportunity to perform as the opening act for a superstar that has a compatible music style. Such a tour exposes the new recording artist to the superstar's audience and hopefully such exposure will lead to increased record sales.

Protections Sought When Record Companies Finance Tours

If a record company decides to contribute to the financing of a recording artist's tour, it will generally seek certain protections for its investment. For example, the record company will usually require the recording artist to plan the timing of the tour so that it coincides with the initial release by the record company of an album by such recording artist. The recording company will seek a firm assurance that it will participate either in the planning, or in the approval of, the dates, cities and specific places of performance of each concert on the tour. The record company might want a commitment by the recording artist to cooperate with instore appearances, radio interviews, etc. Usually, the artist will be required to submit to the record company for its approval a detailed statement of anticipated gross receipts and projected expenses of the tour. Finally, the record company will demand an acknowledgement of its right to recoup a sum equal to all monies advanced by it for a live concert tour from royalties earned by the recording artist from sales of its records by or under the control of the record company. The amount, the timing and the mechanics of the tour financing are negotiable but a record company usually will insure that a sufficient portion of its financing is retained until the tour is completed in accordance with the approved schedule. This concern is less of a factor if the recording artist's record royalty account is in an earned position and the record company deems its investment protected.

If the record company's financing for one or more tours is substantial, a record company may insist on sharing in merchandising revenues received by the recording artist from sales at live concerts.

Monetary Arrangements with Corporate Sponsors

Once a corporate sponsor and a recording artist have determined that they are compatible, and the parties have decided on the degree of association the recording artist will have with the sponsor's product (e.g., will the recording artist appear in commercials for the product?), then the essence of the arrangement from the recording artist's standpoint will be the amount of money paid to the recording artist by the sponsor. Numerous variables that affect how much a sponsor will pay a recording artist (e.g., the length and territory of the tour, the amount of competition for the recording artist's services, the importance of the recording artist to the overall marketing and advertising plans of the sponsor, etc.) and different types of financial arrangements can be constructed (e.g., income splitting of net receipts derived from the live concert tour, payment by the sponsor of particular obligations, an overall specified payment by the sponsor, etc.). For purposes of the discussion of contractual provisions, I am assuming that the sponsor will not share in income from the tour and will be making a predetermined specified payment. I am also assuming that the recording artist has agreed to endorse or otherwise be closely identified with the sponsor's product.

A crucial factor to the sponsor and the artist is the timing of payments to the recording artist. In general, an initial payment will be made by the sponsor upon the execution of the agreement, but it may be given to an escrow agent rather than to the recording artist or the artist's representatives. Additional disbursements will be made by either the sponsor or by an escrow agent to the recording artist after the completion of certain specified events (e.g., the completion of particular concerts).

Other Contractual Provisions

Aside from the details of payment, the following contractual provisions are typically sought by sponsors of live concert tours:

- The sponsor will want to be the sole and exclusive sponsor of every concert performance given by the recording artist during a particular time frame. During that time, the sponsor will demand a guarantee of a minimum number of live "headline" concert performances listing specified dates and locations, if booked, and/or the setting forth of criteria which must be met (e.g., a minimum number of performances in a minimum number of major market areas in venues with a minimum potential aggregate seating capacity).

- Generally, the sponsor will require the recording artist and his or her representatives to handle all contractual arrangements with the concert promoters and venues.

- The recording artist will likely be undertaking an extensive advertising and publicity campaign in connection with the tour, and the sponsor win seek the right to be identified prominently as the sole and exclusive sponsor of the tour.

- The sponsor and the recording artist will have the right to mutually approve all advertising and publicity, and the artist will be required to submit to the sponsor proof of all advertising undertaken. Sponsors will frequently require uniform pre-printed ad mats for print advertising; a uniform prerecorded radio spot; and specific credits in connection with the opening and closing portions of television and cable advertisements, e.g., "Sponsor Presents Recording Artist In Concert." A sponsor may also require a recording artist to take out a "Thank You" advertisement if a particular concert on the tour has been sold out and to give thanks from both the recording artist and the sponsor.

- The sponsor will seek to have the artist cause a credit for the sponsor and the sponsor's logo to appear on an concert tickets with the type and size of the print for such credit often specifically included in the contract. Proof of compliance is usually actual copies of the tickets.

- The sponsor might require the prominent display of signs and banners bearing the sponsor's name and logo at key locations throughout the concert halls and the making of announcements during the concerts identifying the sponsor of the tour.

- The sponsor will require a specific number of gratis "house seats" in specific locations for each concert and the ability to purchase a reasonable number of additional tickets at the best available seat locations.

- The sponsor may want the recording artist to arrange for the sale of t-shirts and jerseys bearing the sponsor's name and/or logo and the legend such as "Sponsor Presents Recording Artist in Concert" in a prominent manner. The sponsor will want to have prior approval of the use of its name and logo.

- The sponsor may require the recording artist to arrange for the production and sale at each concert on the tour of a program which includes a full color advertisement for the sponsor on one or more pages or on the inside back cover or in another prominent place in the program.

- The sponsor may negotiate for the distribution at each concert of a poster of the recording artist using the sponsor's product.
- The sponsor will secure the right to use the recording artist's name, likeness, photographs, logo, graphical materials, etc. for advertising, publicity and purposes of trade in connection with promotions conducted by the sponsor or its designees in connection with the tour.
- The sponsor may conduct a contest in connection with the tour and if so, the sponsor may require the recording artist to meet with the winners of the contest either backstage or at a dinner, etc.
- The sponsor will want the recording artist to agree to pose at a reasonable number of photograph sessions with the sponsor's product.

- The sponsor will likely require the recording artist to make a minimum number of in-store personal appearances at retailers designated by the sponsor and to pose for publicity photographs, to autograph photographs, concert programs, record albums, etc., to appear at press interviews and other promotions arranged by the sponsor in connection with the tour.

- The sponsor may insist that the recording artist agree to actually use the sponsor's product during the tour and if appropriate, at concert performances. In addition, the sponsor will secure the agreement by the recording artist not to use a competitor's product during the tour or concert performances. Further, the sponsor will require a negative covenant by the recording artist for a reasonable period after the tour not to use any competitive products or in any way to reflect a negative image of the sponsor or its product.

- The sponsor may also want an agreement by the recording artist to conduct themselves with due regard to public conventions and morals.
- The agreement will also contain provisions requiring the recording artist to take reasonable steps to protect the sponsor's trademark.

Cross-Merchandising Provisions

Agreements involving record companies and corporate sponsors participating in the financing of a tour may contain cross-merchandising provisions between the record company and the corporate sponsor.

The record company may agree to furnish to the sponsor a limited number of free promotional copies of the album being released in connection with the tour. The record company may further agree to allow the sponsor to purchase limited quantities of such album at a negotiated price for promotional distribution. The limitations will be based upon the nature and extent of the sponsor's promotion in which the albums are being used in a particular market and upon the size and nature of the demand for phonograph records in that market. For major artists there might be an agreement for the record company to sell the sponsor between 25,000 and 50,000 albums in the aggregate with specific limitations for specific markets. For example, a 1,000-album limitation for Atlanta but a 5,000-album limitation for New York City. Such limitations are imposed so as to avoid complaints from the record company's customers in the affected market areas about loss of sales.

As to the records purchased by the sponsor, the record company will cause each album so sold to bear a stamped or embossed legend identifying the sponsor as the source of the product and stating that the record is for promotional purposes and not for resale. This action is taken as a precaution against such records being returned for full credit to the record company as part of the returns privilege that record companies extend to their customers.

The record company will require that when the sponsor orders records, it identifies the ultimate designation of the records. It will further require the sponsor to agree that all such records which are not distributed pursuant to the promotional programs be promptly destroyed and that no such record shall under any circumstance be sold by the sponsor or by a retailer.

The sponsor will negotiate for the right to use the recording artist's recordings in conjunction with portions of the advertisements run during the tour which refer to the tour or to the sponsor's sponsorship thereof. The sponsor generally will be responsible for obtaining all necessary consents for any such advertising usages.

The record company will demand that all print, radio and television advertising placed by the sponsor, its advertising agencies or other representatives state that the recording artist's album is available on the particular record company's label. The record company win further demand that excerpts from one or more of the recording artist's recordings contained on the album concerned be included in all radio advertising and that a reproduction of the front cover of such album be shown in all print and television advertising. The record company will supply mini album covers on a mat format.

The sponsor will request that during the period of the tour the record company agree to include in all consumer advertising it places in connection with the album (print, radio or television and in-store posters promoting the album) a statement that the sponsor is the sponsor of the particular tour in a prominent form and size and to show a reproduction of the sponsor's logo and trademark.

The sponsor may request that the record company agree to cause the album to contain the sponsor's name and logo in prominent form and size. If the record company agrees to such a request, it would probably do so only on the inner sleeve of the album.

Conclusion

Corporate sponsorship of tours by major recording artists is increasing and benefits can be derived by the recording artist, the sponsor and the record company if the arrangement is properly structured. Each of the parties has certain sensitivities and needs and it is important for an attorney representing any of the parties to understand and respect the sensitivities and needs of the other parties to the arrangement.

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[ELR 6:2:6]

RECENT CASES

Plagiarism and other state law claims against "The Deer Hunter" are rejected by California appellate court because of federal preemption and lack of substantial similarity

A California appellate court has dismissed an action brought by Harry John Klekas, the author of an unpublished novel written in the early 1970s, entitled "The Fields of Discontent" in which Klekas contended that his book was the basis for the EMI Films' movie "The Deer Hunter."

The trial court had ruled that the date when an alleged infringement occurs determines whether the provisions of the Copyright Act of 1976 will apply to preempt a common law copyright infringement claim. Since the distribution of the film and the publication of the novelization of the screenplay of the film occurred after January 1, 1978, the effective date of the 1976 act, Klekas' claims relating to the film and the novelization were preempted by the federal statute, concluded the court.

The appellate court agreed, stating that "the date when (Klekas) created or began creation of the work which was allegedly subsequently plagiarized by (EMI) is of no legal significance. What is dispositive, however, is the date the alleged plagiarism occurred."

The court then considered Klekas' claims with respect to the screenplay for the film. The screenplay was written by Deric Washburn and Michael Cimino between November 1976 and January 1977. The screenplay was based, in part, on a screenplay entitled "The Man Who Came to Play," written by Louis Garfinkle and Quinn Redeker in 1975. The trial court had found as a matter of law that there was no substantial similarity between the screenplay and Klekas' nove.

On the issue of substantial similarity, the appellate court noted that "The Fields of Discontent" was the story of a soldier who returns to his home town after 20 years of military service and the events that ensue in the six day period following his return. "The Deer Hunter" depicted the lives of three young men who volunteer for service in the army, are reunited in Vietnam, and confront the tragic effects of the war on their lives. According to the court, the common subjects of both works - friendship, courage, honor and the effects of war on the human spirit - are not protectable material in and of themselves. They also suggested certain sequences of events, known as "scenes a faire," that did not constitute protectable material either.

Furthermore, substantial differences were found in the works at issue in the use of "contexts, characters and language" through which the themes were expressed. The 23 similarities set forth by Klekas were "either strained or devoid of any legal significance," stated the court, and summary judgment was properly granted EMI. The court found no need to reach the question of EMI's access to Klekas' work.

The trial court also correctly determined that there was no triable issue of fact on Klekas' cause of action for an implied-in-fact contract, because the evidence did not establish the use of the novel in the writing or making of "The Deer Hunter"

Klekas v. EMI Films, Inc., 198 Cal.Rptr. 296 (Cal.App. 1984) [ELR 6:2:10]

Clyde Beatty's widow allowed to proceed with action alleging infringement of Beatty's right of publicity; California law does not preclude action, rules Federal Court of Appeals in diversity lawsuit

Faced with legal issues as delicate as the most challenging high wire act, a Federal Court of Appeals for several Southern states has adroitly maneuvered its way to a ruling on the descendibility of the right of publicity in a proceeding involving the use of Clyde Beatty's name by Acme Circus Operating Company.

Clyde Beatty was an animal trainer who, until 1956, operated a circus bearing his name. In 1956, he sold his circus equipment and property to Gerald Collins, the predecessor of Acme Circus, and entered into an employment agreement with Collins. As part of the agreement, Beatty licensed the buyers the right to use the name "Clyde Beatty." In 1958, Acme and Beatty entered into another agreement reaffirming the license of Beatty's name; the agreement was for a term of 10 years. In 1965, Beatty assigned all of his right, title and interest in the Clyde Beatty Circus title and equipment to his wife, now Jane Beatty Kuperstock. Beatty died in 1965. In 1969, Acme and Kuperstock entered into another 10-year agreement in which Acme was granted a license to use the Beatty name.

In 1979, Kuperstock and Acme entered into an alleged oral agreement requiring Acme to pay Kuperstock $30,000 for the 1979 season. Acme made 27 weekly payments of $1,000 but then ceased making payments to Kuperstock. Instead, Acme brought an action in California state court for a declaratory judgment that it had the right to use the name of Clyde Beatty in conjunction with its circus. Kuperstock filed a counterclaim alleging the violation of a Florida statute which provides for the recovery of damages for the infringement of the right of publicity. The Florida statute specifically provides for the survival of the right of publicity in a person's name.

After the action trapezed its way to a Federal District Court in Florida, Acme was granted summary judgment against Kuperstock. This ruling was based on the District Court's conclusion that, in this diversity case, California law controlled the survivability of the right of publicity and under California law, the right of publicity in Clyde Beatty's name did not survive his death. Therefore the District Court concluded that Kuperstock did not possess a right that could have been infringed by Acme in violation of Florida law. Since Kuperstock gave no consideration for the 1979 agreement, that agreement was unenforceable, as were any other claims involving the use of Beatty's name.

The Court of Appeals upheld the District Court's determination that California law governed the matter. But the Appeals Court has reversed the District Court's conclusion as to the survivability of Beatty's right of publicity and has remanded this issue for further proceedings. The Court of Appeals first pointed out that under California choice of law rules, the question of the existence of a survivable right of publicity is a question of personal property law to which the law of domicile applies (a very legal sentence indeed). California was the domicile of Clyde Beatty at the time of his death;

accordingly, California's law governed the survivability issue.

The court then daringly navigated the flaming hoops set up by the California Supreme Court in Lugosi v. Universal Pictures, 25 Cal.3d 813 (1979) and in Guglielmi v. Spelling-Goldberg Productions, 25 Cal.3d 860 (1979), and by the Second Circuit in Groucho Marx Productions v. Day and Night Co., Inc., 689 F.2d 317 (2d Cir. 1982), and concluded that "where the right (of publicity) was exercised during lifetime and turned into a commercial venture or other contract right, it becomes property that, under California law, survives and certainly may be assigned, giving the assignee the benefit of that assignment after the death of the assignor." In Lugosi (ELR 1:18:1) the California Supreme Court had held that the right of publicity did not survive the death of actor Bela Lugosi. However, the court did not clarify whether the right of publicity never survives and descends or whether the right may survive if exercised by the decedent prior to his or her death so that a secondary meaning is created in the name. In Guglielmi, (decided soon after Lugosi) (ELR 1:18:1) the court cited Lugosi in ruling that the right of publicity is not descendible and expires upon the death of the person who held the right. But, as in Lugosi, the principal in this case, Rudolph Valentino, had not exercised the right during his lifetime.

In Groucho Marx Productions (ELR 4:12:1), the Second Circuit Court of Appeals noted there are two possible interpretations of Lugosi. It may mean that California does not recognize any descendible right of publicity and that the heirs of a celebrity must rely on trademark law to protect the goodwill that the celebrity brought to a product during this lifetime. Alternatively, Lugosi might mean that, wholly apart from trademark law, California recognizes a descendible right of publicity that enables the heirs to prevent the use of a celebrity's name and likeness on any product or service the celebrity promoted by exploiting his or her right of publicity during his or her lifetime. The Groucho Marx court did not then choose between these interpretations since it found that the Day and Night Company was not using the names or likenesses of the Marx Brothers in connection with any product or service that the Marx Brothers had promoted during their lives.

In the Clyde Beatty case, the Eleventh Circuit rejected the view that publicity interests never survive, because this strict interpretation would render meaningless the Lugosi court's description of the factual circumstances existing in that case as opposed to instances where the right of publicity was exercised during an individual's lifetime in relation to a product or service. At issue in Lugosi were the rights Lugosi had not assigned to Universal and had left unexploited - the publicity rights

Lugosi explicitly assigned during his lifetime to Universal remained the property of Universal after Lugosi's death, noted the Eleventh Circuit. And Clyde Beatty, unlike Bela Lugosi, did exercise his right of publicity to an extent sufficient to create a secondary meaning in his name as associated with his circus, and validly transferred that right to another. Furthermore, Acme was using Beatty's name in connection with the very same product associated with Beatty. The matter therefore was remanded for a determination of the factual question of whether a secondary meaning was created in the name Clyde Beatty.

The District Court also must determine whether a tortious infringement of the right of publicity occurred. The Court of Appeals cautioned that the infringement question will present another choice of law problem if differences exist between the relevant Florida and California statutes. It was noted that California applies a "governmental interest" choice of law rule as to tort issues. In this case, California would have little interest in limiting recovery on behalf of its domiciliary Kuperstock. Acme, however, operates out of Florida and any unauthorized use of Beatty's name most likely occurred in Florida. Thus, Florida would have a strong governmental interest in the purported infringement of a right of publicity by one of its citizens, and it appeared to the court that Florida would have a strong governmental interest in the purported infringement of a right of publicity by one of its citizens, and it appeared to the court that Florida law would likely apply in determining whether there was a tortious infringement of Beatty's right of publicity.

Acme Circus v. Kuperstock, 9 Med.L.Rep. 2138 (11th Cir. 1983) [ELR 6:2:11]

Florida appellate court upholds jury award of $100,000 in invasion of privacy action against Genesis Magazine, but punitive damage award of $400,000 is reversed

A Florida appellate court has upheld a jury award of $100,000 in compensatory damages to Anne C. Goss whose nude photograph was published without her consent in a commercial advertisement which appeared in Genesis Magazine. The magazine conceded that it did not have Goss's permission to publish the photograph even though such permission is specifically required by the statutes of New York, where Genesis is published, and of Florida, where the complaint was filed.

However, the appellate court reversed the jury verdict of $400,000 in punitive damages. Punitive damages would have been available to Goss although her complaint alleged common law invasion of privacy and not a violation of statute, if there had been evidence tending to show "intentional, wanton and malicious disregard" by Genesis of Goss's rights.

An officer of Genesis testified that the magazine never sought written permission for the publication of photographs used for commercial purposes when the photographs were obtained from advertising agencies (although written permission was sought for the publication of editorial photographs). Apparently, Genesis assumed that when photographs were to be used for commercial purposes, the advertising agencies would obtain the necessary permission in accordance with industry practice. As a result, the court noted that the magazine's conduct, while intentional, was not a "wanton disregard" of Goss's rights, and the publication did not occur with "a knowledge and present consciousness not simply that a statute or right will be violated but that injury will result." In this case, therefore, punitive damages were inappropriate.

Genesis Publications, Inc. v. Goss, 437 So.2d 169 (Fla.App. 1983) [ELR 6:2:12]

Florida appellate court rules that retouched photograph of model in Hustler magazine was not defamatory because it did not convey a false impression when read with accompanying caption

A Florida appellate court has pointed the way to a victory for Hustler magazine in an action for libel and invasion of privacy brought by professional model Julian Byrd. Byrd had posed for a Viceroy cigarette advertising campaign in which one of the photographs depicted him making a "V for Victory" sign. Hustler magazine published a retouched version of the photograph in its January 1978 issue. In the Hustler version of the photograph, one of Byrd's fingers was airbrushed out - thus giving the impression that Byrd was making an obscene gesture.

The caption accompanying the photo read: "Up Your Ad. When you saw this ad in magazines or on billboards, you might remember having seen this gentleman with two fingers - rather than one - raised in front of his face. But the reader who sent us this couldn't resist the temptation to change the picture. We can't blame him - this is probably what the cigarette companies are saying to Americans."

Byrd alleged that Hustler created the false impression that he posed for the picture as it appeared in the magazine and thereby injured his professional reputation which was based upon a "conservative wholesome image."

A jury returned a $10,000 verdict for Byrd. But a Florida appellate court has reversed the judgment after an appeal by Byrd and a cross-appeal by Hustler.

The court pointed out that one of the fundamental principles of libel law is that a publication must be considered in its totality. In this case, the retouched photo alone would have conveyed that Byrd posed for the photograph. But the caption plainly indicated that the photograph was retouched. Viewing the photograph and its caption as a composite, the court held that a reader would conclude that Byrd did not pose for the picture as published since the caption sufficiently clarified the meaning of the picture.

Byrd's invasion of privacy claim was based on the same facts and legal positions as the libel claim and therefore also was rejected, and the matter was remanded with instructions to enter a judgment in favor of Hustler.

Byrd v. Hustler Magazine, Inc., 433 So.2d 593 (Fla.App. 1983) [ELR 6:2:12]

Federal Court of Appeals reverses International Trade Commission finding that Rally-X video game was not entitled to protection under the Tariff Act against allegedly infringing imported video games

Pac-Man and Rally-X video games trace their roots to Namco Limited of Japan. In 1980, Namco assigned all of its United States rights to the games, including all related copyrights and trademarks, exclusively to Bally/Midway Mfg. Co. in return for advance payments and royalties. Bally was authorized to produce, distribute and service Pac-Man and Rally-X in the United States. The games' sojourn in this country has not been uneventful in terms of litigation as well as public response. In 1981, Baily filed a complaint with the United States International Trade Commission alleging that 35 companies had violated section 337(a) of the Tariff Act of 1930 by importing video games that infringed Bally's copy- rights and common law trademarks in Pac-Man and Rally-X. Section 337 makes unlawful "unfair methods of competition and unfair acts in the importation of articles into the United States or in their sale ... the effect or tendency of which is to destroy or substantially injure an industry ... operating in the United States . . . ." After an investigation and a hearing before an Administrative Law Judge, the Commission adopted findings that Bally's copyrights on "audiovisual works" in the Pac-Man and Rally-X games and the company's trademark rights were valid and were infringed by various features of the complained-of games.

The Commission also found that the importation activities cited by Bally would substantially injure the domestic Pac-Man industry and therefore entered an order excluding from entry into the United States coin-operated video games which would infringe the Pac-man copyrights or trademarks. However, the Commission concluded that no domestic "industry," i.e., production and sales facilities, existed with respect to Rally-X. It was noted that Bally's inventory of the game was low; that the company no longer actively engaged in distributing or selling Rally-X games; and that the record did not indicate that Bally would resume the manufacture and marketing of the game even if the Commission found a violation of section 337. Furthermore, if a Rally-X industry existed, it was not injured by the infringing imports, stated the Commission, since there was no evidence that the decline in sales of the game was due to import competition. Rather, it appeared that the popularity of the game was in a state of "permanent decline."

A Federal Court of Appeals has reversed the Commission ruling as to the Rally-X game. Among the factors cited by the court in reaching its decision were: the date on which the Bally complaint was filed, rather than the market conditions existing when the Commission issued its decision should have been referred to in determining whether the Rally-X game constituted an industry entitled to protection under section 337; the fact that the Commission might not have entered an exclusion or a cease-and-desist order against the imported Rally-X games did not preclude a finding that there was a violation of the statute, because the violation and remedy phases of a case are separate under section 337; the Rally-X business although partaking of the short-lived nature of most individual video games - did constitute an existing "industry" under section 337(a) when Bally filed its complaint with the Commission; the number of infringing Rally-X games sold in the United States was significant, leading to complaints from Bally's distributors and to the "inescapable" inference that every sale of an infringing Rally-X game resulted in a lost sale of that game by Bally; and even a relatively small loss of sales may establish the requisite injury under section 337(a) where the unfair practice is the importation of products that infringe a domestic industry's copyright, trademark or patent rights. The court also pointed out that several of the Administrative Law Judge's findings concerning the potential harm of the infringing imported games applied to the video game industry generally, not just to Pac-Man. Furthermore, the situation of Rally-X could not be distinguished from that of Pac-Man with respect to the evidence showing that Bally's games and the infringing imports were virtually identical, that the imports were significantly cheaper than Bally's products, and that the market for video games is necessarily limited.

The court therefore reversed the determination of the Commission that there was no injury to the domestic Rally-X industry and remanded the matter to the Commission for further proceedings consistent with the court's opinion.

In concurring with the court, Judge Nichols stated that he would "go further" since the record appeared to reflect "little short of a total breakdown of the laws respecting unfair practices in import trade ... at least as applied to video games." Judge Nichols questioned the use of a "weird definition" of the phrase "domestic industry" and declared it obvious that there was one industry: all the law-abiding domestic producers of video games. Upholding the Commission's ruling, according to Judge Nichols, would have constituted a "public and obvious demonstration that the protective laws are ineffectual (and this might) induce capital to be withdrawn from the industry to some safer use, and prevent new video games from being conceived, manufactured and marketed in a lawful way" - an injury Congress presumably intended to prevent by the enactment of section 337(a).

Bally/Midway Mfg. Co. v. U.S. International Trade Commission, 714 F.2d 1117 (Fed.Cir. 1983) [ELR 6:2:13]

California Supreme Court to consider denial of Los Angeles Rams' petition to compel arbitration in contract dispute with former player Fred Dryer

In April 1980, Fred Dryer entered into a contract to play professional football for the Los Angeles Rams; the contract was extended to cover the 1981 football season. However, in November 1981, Dryer sued the Rams, contending that the club had removed him from the active team roster in violation of a no-cut clause in his employment contract. The Rams stated that Dryer's contract only prohibited the termination of his employment, not his removal from the active roster, as long as the club continued to pay him the full salary for the duration of the contract term.

The Rams sought to compel arbitration of the dispute pursuant to the employment contract. Los Angeles Superior Court Judge J. Leon Thompson denied the petition to compel arbitration on the ground that the arbitration clause in the employment contract was a contract of adhesion and that certain grievance and arbitration procedures set forth in the collective bargaining agreement between the NFL Players Association and the NFL

Management Council fell below the "minimum levels of integrity" required of a contractual arbitration provision.

A California appellate court upheld the trial court ruling on the clause in the employment agreement which permits the NFL Commissioner, after consultation with a player-club relations committee, to order any dispute filed as a grievance, which "gives rise to issues involving the integrity of, or public confidence in, the game of professional football," removed from the otherwise applicable arbitration process. According to the court, once the Commissioner exercises his removal power, he becomes the sole arbiter of any dispute so removed. And, the court noted, the NFL Commissioner's interests are closely allied with those of management; he functions "as something of a managerial overseer." The appeals court reasoned that given the Commissioner's bias, the power to remove disputes from arbitration might deprive a player of the fair opportunity to present his position. Since the phrase "public confidence" has no generally recognized meaning, any playermanagement dispute involving allegations of mistreatment or malicious conduct could, in the Commissioner's view, raise issues involving public confidence in professional football. Thus, if Dryer's claims were so characterized, the existence of a fair and impartial arbitration mechanism would be illusory. In effect, there would be no limit to the Commissioner's discretion to remove a matter from the arbitration process. Custom and usage have not yet provided a narrower construction of the removal power. The court therefore concluded that since the Commissioner apparently may exercise removal power in any dispute, the arbitration provision set forth in the collective bargaining agreement and incorporated into Dryer's contract was "so unfair as to be unenforceable."

The appellate court, while refusing to compel arbitration, did not agree with the trial court ruling that the arbitration clause in Dryer's player contract was a contract of adhesion, because the clause was not imposed and drafted by management dealing from a position of superior bargaining strength, but rather was a product of good faith bargaining.

Justice L. Thaxton Hanson, in dissent, stated that he would have directed the entry of an order compelling the parties to proceed to arbitration since the Dryer-Rams dispute arose from the parties' contract and not from a situation involving fines, suspensions or discipline, which are the typical grounds for invoking the grievance procedures. Justice Hanson observed that the arbitration procedures, while informal, do provide for player participation and for a "panoply" of procedural safeguards. Furthermore, there was no evidence that the NFL Commissioner had considered intervening in the dispute. Justice Hanson concluded by recalling the state's strong public policy favoring arbitration.

The California Supreme Court recently agreed to consider this case.

Dryer v. Los Angeles Rams Football Co., Inc., 198 Cal.Rptr. 497 (Cal.App. 1984) [ELR 6:2:13]

California Supreme Court rules that consumer action against General Foods alleging deceptive cereal advertising stated causes of action for injunctive relief and restitution under state's unfair competition and false advertising laws

Breakfast cereals have felt the crunching force of a battle being waged by various consumer organizations against allegedly fraudulent, misleading and deceptive advertising. In 1977, the Committee on Children's Television, Inc. brought a class action lawsuit against

General Foods, the manufacturer of such "sugared cereals" as Alpha Bits, Honeycomb, Fruity Pebbles, Sugar Crisp and the ever delightful Cocoa Pebbles. The lawsuit charged that General Foods, along with two advertising agencies and a supermarket chain, violated the California Business and Professional Code's prohibitions against false and misleading advertising and unfair competition and also engaged in fraud. The charges were based upon certain representations contained in television cereal commercials aimed at children representations supposedly stating that the children who eat "candy breakfasts" are "bigger, stronger, more energetic, happier, more invulnerable and braver..." The television advertising also maintained, as do advertisements appearing in other media and on the cereal packages themselves, that the sugared cereals are "grain products" that are "healthful and nutritious" The advertising does not disclose the sugar content of the cereal products and the potentially serious medical consequences of consuming Bits, Pebbles, Crisps and Combs.

The General Foods parties demurred to the fourth amended complaint for failure to state a cause of action. A trial court sustained the demurrer without leave to amend, noting that the advertisements which allegedly contained the fraudulent material were not sufficiently specified by the consumer parties.

The California Supreme Court has ruled that the consumers' complaint did provide sufficient notice to the cereal parties of the claims made against them and of the request for injunctive relief and restitution under both the unfair competition and false advertising statutes. There were no doubts as to which advertisements were at issue nor as to what deceptive practices were being called into question. Furthermore, since a large scale and constantly changing advertising program was involved, requiring the consumers to plead the specifics of each advertisement would render a lawsuit challenging the overall program discouragingly impractical, stated the court, possibly leaving companies such as General Foods immune from statutory and common law remedies designed to protect consumers from misleading advertising.

General Foods also received sufficient notice of the conduct giving rise to the consumers' fraud complaint, ruled the court, although the trial court might require the consumers to attach to the complaint a representative selection of advertisements along with a list of the misrepresentations made by those advertisements, and a specific statement that indeed the General Foods advertising campaign, if not a specific advertisement, did cause one of the individual complaining parties to purchase certain General Foods products. However, the organizational parties' claim for fraud was found inadequate to state a cause of action since no legally cognizable injury was incurred by any of the organizations. There may be a valid complaint on the part of a subclass of parents and children who incurred medical or dental expenses to treat injuries caused by the consumption of the dreaded cereals, but the pleadings did not specify such a subclass. The trial court judgment denying leave to amend the fourth complaint therefore was reversed to the extent that the individual consumer parties may correct the uncertainty in their fraud cause of action.

The California Supreme Court then upheld the trial court's denial of the consumers' cause of action based on a purported "fiduciary obligation" owed by General Foods to consumers. The court concluded by observing that the California legislature has not chosen to establish the necessary administrative structure for regulating advertising of "this scope and character" but has created consumer protection statutes which apply to all deceptive advertising "regardless of complexity and scale, and ... regardless of whether the advertising seeks to influence the consumer directly or through his children."

Chief Justice Bird concurred in the opinion but would have supported the position that the consumers, although noncompetitive parties, may recover damages (as opposed to only injunctive relief and restitution) for the harm purportedly suffered as a result of unfair competition or false advertising.

Committee on Children's Television Inc. v. General Foods Corporation, 197 Cal.Rptr. 783 (Cal. 1983) [ELR 6:2:14]

Mississippi statute prohibiting the intrastate advertisement of alcoholic beverages is upheld

The constitutionality of Mississippi's prohibition on liquor advertising originating within the state has been upheld by a Federal Court of Appeals. As a result of the ban, there were no billboard or local newspaper advertisements for hard liquor or wine in Mississippi, and radio and television stations operating within the state could not carry liquor commercials.

The parties challenging the advertising ban argued that it violated the First Amendment protection afforded pure commercial speech which does "no more than propose a commercial transaction." The state argued that liquor advertising was excluded from First Amendment protection because the advertising promoted an illegal activity and was inherently misleading. Nearly half of the counties in Mississippi are "dry" and even in the wet counties, there are restrictions on the manufacture and sale of alcoholic beverages, noted the state.

The court analyzed the issues raised in accordance with the method set forth in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980), and reached the following conclusions: liquor advertising in Mississippi should be treated as protected commercial speech; Mississippi has asserted a substantial interest in preventing alcoholic beverage abuse; liquor advertising and consumption are sufficiently linked to justify state regulation despite the fact that Mississippi consumers still may be exposed to liquor advertising originating outside of the state; and the advertising restrictions were not more extensive than necessary to serve the state interest in preventing "the artificial stimulation and promotion of liquor sales and consumption."

The court therefore affirmed the district court judgment in the case of Dunagin v. City of Oxford, 489 F.Supp. 763 (N. D. Miss. 1980) and reversed the judgment in

Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Commission, 539 F.Supp. 817 (S.D. Miss. 1982) (ELR 4:12:6). A panel of the Court of Appeals had heard a consolidated appeal of these cases and decided that the statute was unconstitutional. However, prior to the delivery of that opinion, the Tenth Circuit Court of Appeals upheld a similar advertising ban in Oklahoma Telecasters Assn. v. Crisp, 699 F.2d 490 (10th Cir. 1983), cert. granted sub nom. Capital Cities Cable, Inc. V. Crisp, 104 S.Ct. 66 (1983). The Fifth Circuit subsequently undertook an en banc vote in the case. The panel opinion, although vacated, nevertheless was published at 701 F.2d 314 (ELR 5:8:17)

Dunagin v. City of Oxford, 718 F.2d 738 (5th Cir. 1983) [ELR 6:2:15]

Artists' failure to reach mutual assent on scope of consent judgment entered in copyright infringement action rendered judgment unenforceable, rules Federal Court of Appeals

With one broad stroke, a Federal Court of Appeals in New York has declared unenforceable a Federal District Court consent judgment entered in a dispute involving the works of two artists, Jerome Schurr and Robert Wilson. Schurr is an artist who produces, via a silk screen technique, images of Western landscapes featuring mountains, bodies of water and the sky, in a genre known as the California or Western style. In 1982, Schurr became aware that Austin Galleries of Illinois was selling works of art by Robert Wilson which, Schurr claimed, infringed his copyrighted works. The parties subsequently entered into a Settlement Agreement and Consent Judgment providing that Austin would not manufacture or sell any work "which visually simulates the style and subject matter of any work created" by Schurr. Just prior to the signing of the consent judgment, Austin's counsel sent a letter to Schurr stating that the provisions of the proposed judgment were "not intended to and should not be interpreted to limit in any way any lawful right of Austin ... to use or sell works that imitate the style of Jerome Schurr, so long as such imitation does not constitute copyright infringement; the point is that Austin Galleries is not agreeing to surrender any of the lawful rights it may have under United States copyright laws."

In November 1982, Schurr claimed that Austin was violating the consent judgment by advertising the availability of four new works by Robert Wilson. Federal District Court Judge Stewart issued a temporary restraining order prohibiting further sales of the works. Then, after a hearing, Judge Stewart found Austin in contempt of the consent judgment and enjoined further sales of three of the works at issue, stating that the language of the consent judgment was "sufficiently clear and unambiguous." But Judge Stewart also stated that in interpreting the consent judgment, he took into account Austin's letter of June 16th.

The Court of Appeals has reversed the District Court's ruling on the ground that the court erred in considering the June 16th letter in conjunction with the consent judgment since the court had expressly found that the language in the consent judgment was unambiguous. Under New York law, a court may only consider extrinsic evidence in contract interpretation if the intent of the parties cannot be ascertained from the document itself because the language contained in it is ambiguous. For purposes of enforcement, a consent judgment is construed and interpreted as a contract.

In the Court of Appeals' view, the intent of the parties could not be determined from the face of the consent judgment. Thus, it was necessary to read the June 16th letter as an aid to determining the parties' intent. And after so doing, the court stated that the consent judgment was not enforceable because there had been no meeting of the minds regarding the scope of the restraint imposed on Austin as to its sale of works of art similar to Schurr's. The effect of the June 16th letter, accompanying as it did the proposed consent judgment, "was to render the consent judgment an utter nullity," stated the court, reversing the District Court finding holding Austin in contempt.

In a lengthy footnote the court addressed certain contentions which were raised as to the similarities and differences of the works of Schurr and Wilson, which, while unnecessary to the court's opinion, apparently were worthy of its attention. The court stated that it did not find many similarities between Schurr's works and the three Wilson works and pointed out such differences as the type of screening techniques used, the price differential between the works, and stylistic differences. At most, stated the court, the works were of the same broad genre and, in a stirring defense of creativity declared: "One hesitates to think of the creativity that would have been suppressed, and the beauty civilization would have been deprived of, if creative individuals were forbidden from creating art in the same genre ... Obviously there is a balance which must be struck between protecting the original creation of an individual and the creativity which is ignited in others who view the work of that individual, who view other works in the same genre, or who simply achieve a similar original creation but by a separate route. Herein, if one had to decide on which way the balance must swing, careful consideration would have to be given to protecting the creativity of those - including Wilson - who have viewed the California or Western style of painting and have translated those experiences into their own creations."

Schurr v. Austin Galleries of Illinois, Inc., 719 F.2d 571 (2d Cir. 1983) [ELR 6:2:15]

Central Intelligence Agency secrecy agreement requiring prepublication clearance of certain material written by former agents is upheld by Federal Court of Appeals

With a Bondian display of ingenuity, a Federal Court of Appeals in Washington, D.C. has deflected former Central Intelligence Agency officer Ralph W. McGehee's action challenging an agency secrecy agreement. McGehee signed the agreement in 1952 when he joined the agency; he promised not to divulge "classified information" obtained by virtue of his employment unless specifically authorized in advance by the agency to do so. In 1981, McGehee submitted an article to the agency for prepublication review. The article questioned the agency's policies in El Salvador and reviewed programs the agency allegedly had conducted in Iran, Vietnam, Chile and Indonesia. The agency notified McGehee that portions of the article contained "secret" information (a middle level security classification between Top Secret and Confidential) and withheld permission to publish those portions, stating that the publication threatened to cause "serious damage to the national security."

The Nation magazine published McGehee's article on April 11, 1981 with the censored portions deleted. McGehee then sought a declaratory judgment that the agency classification and censorship scheme violated the First Amendment and that even if the scheme were constitutional, his article contained no properly classified material. The District Court found that the agency had properly classified the censored material, and the Court of Appeals has agreed.

The court held that the agency's classification and censorship scheme was constitutional because the government had shown a substantial interest, unrelated to the suppression of free speech, in assuring secrecy in the conduct of foreign intelligence operations, and that the criteria for what constitutes "secret" information were neither overbroad nor excessively vague, "considering the particularity with which the criteria offer guidance to the censor" It was noted that information that might be subject to classification was enumerated in an Executive Order; the agency also has articulated narrowing standards to guide classification decisions. It appeared to the court that the clearance procedure actually may serve to reduce a chilling effect on free speech by "alleviating a former agent's fear that his disclosure of non-sensitive information might result in liability." The court therefore declined to find the entire classification scheme substantially overbroad and invalid due to the possible burdens placed on the speech of former CIA agents.

The District Court finding that the agency properly classified McGehee's material also was upheld. The Court of Appeals took the opportunity to point out that although neithe agency's administrative determination or any court order in the case would constitute a prior restraint "in the traditional sense" upon McGehee or any other party, the scheme of prepublication review is designed to prevent the publication of classified information. McGehee therefore did have a strong First Amendment interest in ensuring that agency censorship of his article resulted from the proper classification of the censored portions of the article. But, the court concluded, in order to accommodate the individual rights at stake in an agency classification decision while recognizing the agency's "technical expertise and practical familiarity" with sensitive information, any reviewing court should conduct a de novo examination of the classification decision while giving deference to a "reasoned and detailed" explanation by the agency of its decision, an explanation that should demonstrate a logical connection between the deleted information and the reasons for classification. The court stated that its detailed examination in camera of the affidavits filed by the parties resulted in its conclusion that the agency properly classified the information at issue.

In a separate statement, Circuit Judge Wald pointed out that the court's decision, reflecting existing restraints on its authority, failed to meet the need for a mechanism which would balance the public's right to know critical, although classified, facts about the activities of intelligence agencies as against possible risks to security.

McGehee v. Casey, 718 F.2d 1137 (D.C. Cir. 1983) [ELR 6:2:16]

Federal District Court in Louisiana denies motion seeking criminal contempt charge against CBS for failure to comply with court order to produce pre-broadcast transcript of "60 Minutes" segment

A Federal District Court in Louisiana has denied a special prosecutor's motion to hold CBS Inc. in contempt of court for refusing to produce for the court's inspection a prebroadcast transcript of a "60 Minutes" report. The report, which was scheduled for broadcast on January 16, 1983, dealt with the forthcoming trial, on February 7th, of seven New Orleans police officers for their alleged misconduct during an investigation of the death of a fellow officer. The police officers, on January 14, 1983, filed a motion for a Silence Order to prevent the broadcast of the report on the ground that the broadcast would jeopardize their Sixth Amendment fair trial rights. The New Orleans Federal District Court judge requested that CBS produce a transcript of the subject material so he could determine in camera whether any fair trial interest would be prejudiced. When CBS refused to produce the transcript on First Amendment grounds, the court enjoined CBS from broadcasting the segment "anywhere in the United States." The court also held CBS in criminal contempt of court for its conduct in connection with the transcript production order.

On an interlocutory appeal, the Fifth Circuit Court of Appeals held that the trial court's injunction was overbroad "geographically and temporally." On remand, the District Court ordered that the segment not be shown in the Dallas metropolitan area - the trial location - on

January 16th. But CBS prevailed on appeal, and the network broadcast the segment as planned.

Criminal contempt charges then were brought against the network, but a Federal District Court in New Orleans has ruled that CBS was not guilty of criminal contempt in refusing to comply with the production order since the order was invalid as an unconstitutional prior restraint on the network's First Amendment rights. The District Court, although legitimately concerned about fair trial rights, would be acting as a reviewing "editor" of the "60 Minutes" segment - a prohibited interference with First Amendment rights, stated the court. It was pointed out that there existed less restrictive alternative approaches to protecting the police officers' right to a fair trial. First, the case had not been highly publicized in the Dallas area. Thus the broadcast would not have created an "intense" or "pervasive" level of publicity which might have eliminated the presence of impartial jurors. And the trial court could have mitigated any adverse effects of pretrial publicity by the use of voir dire, continuances, change of venue or curative jury instructions. Furthermore, the District Court viewed the immediate imposition of a restraining order as a sanction for CBS' failure to comply with the production order; therefore the further sanction of a criminal contempt proceeding was found unnecessary.

In re CBS Inc., 570 F.Supp. 578 (E.D.La. 1983) [ELR 6:2:17]

Briefly Noted:

Cable Television.

A Federal District Court in the Southem District of Florida has assessed a total of approximately $425,000 in damages against Pirate T.V. and five other companies for violating section 605 of the Communications Act. In May 1983, the court had granted summary judgment against the Pirate parties and issued a permanent injunction barring the companies from engaging in the unauthorized manufacture, sale and installation of microwave receiving equipment which could be used to "unlawfully, willfully and wantonly" misappropriate Home Box Office television programming that was being transmitted via Private Channel Club. The amounts awarded to American Television and Communications Corp. (a wholly owned subsidiary of Time, Inc.) and to Unarco-Midwest Corporation, the joint venturers in Private Channel, represented each suppliers' gross receipts from the unauthorized sale and installation of the microwave equipment.

American Television and Communications Corporation v. Pirate TV, Case No. 81-969 (S.D.Fla., October 17, 1983) [ELR 6:2:17]

Cable Television.

A Federal District Court in New York has denied a motion by the City of Poughkeepsie for summary judgment against its cable television franchisee, Poughkeepsie Cablevision, Inc., for damages stemming from Cablevision's refusal to pay the full amount of the monthly franchise fee as specified in its contract with the City. Instead, the court has granted Cablevision's motion for dismissal of the action for lack of subject matter jurisdiction. In 1965 the City of Poughkeepsie entered into a contract with Cablevision, giving it a franchise to provide cable television services within the City for 25 years. Cablevision agreed to pay the City 5 % of its gross receipts from its city customers with yearly increases to culminate in a 7% fee in 1974 which would remain in effect until the franchise terminated in 1990. Subsequent to these agreements, the federal and New York state governments legislated a maximum fee which a cable television franchisor could charge the franchisee, thereby effecting a reduction in Cablevision's fee from 7% to 3%. After Cablevision reduced its monthly franchise fee payments to comport with these laws, the City brought an action seeking damages for breach of contract and a declaratory judgment that the contract was legally valid and that the state law was unconstitutional because it impaired the obligation of contracts. The court has held that the City could not invoke federal question jurisdiction by simply contending that Cablevision would raise as an affirmative defense a state law incorporating a federal regulatory restriction on franchise fees. Rather, the complaint must, on its face, state the federal law under which relief is sought. Here, the City's allegation of an anticipated defense that would be invalidated by the Constitution was insufficient to create subject matter jurisdiction over the breach of contract claim. Further, the court has held, that jurisdiction to issue a declaratory judgment on the same matter is necessarily lacking as well.

City of Poughkeepsie, New York v. Poughkeepsie Cablevision, Inc., 571 F.Supp. 1225 (S.D.N.Y. 1983) [ELR 6:2:18]

Music.

Fred V. Peay, Jr., a music company owner and alleged owner of a musical composition entitled "Close Enough To Perfect," brought a copyright infringement action against Larry and Ann Morton and their music company, Accredit Music, which a Federal District Court in Tennessee has dismissed on jurisdictional grounds. In May 1981, Peay alleged that he acquired this composition from songwriter Carl Chambers who composed it. Peay registered his claim to copyright in the composition a few months later and recorded the Assignment of Copyright with the Register of Copyright in August 1981. Peay alleged that the defendants represented themselves to be the sole and exclusive copyright owners of the same composition and authorized RCA Records to record a performance of the song by country music artists "Alabama" in deliberate infringement of Peay's rights. Peay then sought a permanent injunction restraining the defendants from exploiting the song and damages resulting from the alleged infringement. The court dismissed the complaint for want of subject matter jurisdiction without prejudice to Peay's right to maintain action in the appropriate forum. Since there was no diversity of citizenship, Peay brought the action under 28 U.S.C. section 1338(a), as arising under a federal law, namely the Copyright Act. However, the court has held that simply because an action is predicated on rights derived from the Copyright Act does not mean that the action is one for copyright infringement or one arising under the Copyright Act. The court concluded that the essence of the claim here was for a declaratory judgment to establish title to a copyrighted work. State courts have jurisdiction over such cases.

Peay v. Morton, 571 F.Supp. 108 (M.D.Tenn. 1983) [ELR 6:2:18]

Class actions.

In an appeal regarding the certification of a case brought as a class action by a former Olympic athlete for misappropriation of names and likenesses, the Supreme Court of Ohio has affirmed the certification of the action as a class action. Charles Vinci, Olympic gold-medalist in weightlifting, alleged that the defendants, American Can Company, Coca-Cola company and Minute Maid Corporation, used his and other Olympic athlete's names and likenesses on a series of promotional disposable drinking cups, thereby invading their privacy. The court determined that all requirements of Rule 23 governing class actions had been met. The class represented by Vinci numbered 68 members which the trial court had deemed to be a class so numerous that joinder of all members would be impracticable. Further, because all members of the class were potentially entitled to recovery, they shared common questions of both law and fact. The court disagreed with the appellants' claim that Vinci's claim was not typical of the class since he had not achieved the notoriety that some other class members had at the time of the alleged invasion. Rather, the court found this to be irrelevant, holding that the degree of notoriety only impacted the amount of damages of each class member, but did not prevent the invasion from being actionable. The court also found contrary to the appellants' argument, that Vinci would fairly and adequately protect the interests of the class since he did not suffer the same injury as others because of his alleged lesser fame. According to the court, to prevent the class action on this basis would confuse liability with the extent of recoverable damages. Absent incapable counsel or danger of a collusive suit which would be detrimental to the rights of the class, the protection requirement had been fulfilled here. Finally, the court disagreed with appellants' claim that the complaint didn't qualify as a class action pursuant because the varying amounts of damages would cause the question of damages of the individuals to predominate over questions of law and fact common to the class. The court held that this alone would not prevent a court from certifying a cause as a class action. What is important, noted the court, is that the injuries sustained by the class "flow from the identical operative facts" which in this case was the Olympic Games cup promotion.

Vinci v. American Can Co., 459 N.E.2d 507 (Ohio 1984) [ELR 6:2:18]

IN THE NEWS

Woody Allen agrees to interim settlement, pending trial, of claims against look-alike performer

Woody Allen has withdrawn his request for a preliminary injunction in his action against look-alike actor Phil Boroff and National Video. The parties have agreed to an interim settlement pending trial whereby Boroff may continue acting in commercials or making appearances as a celebrity look-alike as long as he does not suggest in advertisements or on television commercials that he might be Woody Allen, and does not appear in any commercial or advertisement unless Allen's name "or any variation thereof" is not used and unless there is a conspicuous disclosure that Boroff appears as a celebrity look-alike. Furthermore, Boroff must be prominently identified by name in any advertisement where he is "promoting an artistic or creative endeavor of his own or a commercial enterprise in which he has a significant proprietary interest."

Boroff and the Ron Smith Celebrity Look-Alikes company, which provided the actor's services to National Video, have contended that their agreement called for a disclaimer stating that Boroff was a celebrity look-alike; the disclaimer was included in the National Video advertisement which was published in November 1983, but the advertisement was published without the disclosure in March 1984, resulting in Allen's lawsuit. [July 1984] [ELR 6:2:19]

California Franchise Tax Board votes not to impose retroactive sales tax on services of music industry personnel

The California Franchise Tax Board has voted against imposing a retroactive sales tax on the previously taxexempt services provided by music industry personnel, including independent producers, engineers, production companies and recording studios.

The Franchise Tax Board's proposed reinterpretation of a 1975 statute would have meant that all income received by these parties prior to 1976, including royalties, would have been subject to a retroactive sales tax of six percent as well as a 10 percent penalty for failure to file and one percent per month interest. Furthermore, all expenditures from l976 on that were connected with the production of master recordings also would have been subject to the six percent sales tax, penalty and interest. Transfers of master sound recordings prior to 1976 were subject to California sales tax. (See ELR 3:14:5) [July 1984] [ELR 6:2:19]

American Federation of Musicians and television networks agree to contract covering videotaped performances of live television shows; terms are submitted to AF of M members for ratification

The television networks and the American Federation of Musicians have agreed on a two-year contract covering videotaped performances of live television shows. The details of the agreement have not yet been revealed pending ratification by AF of M members, but it is likely that the musicians will receive a five percent pay increase.

AF of M members also have been asked to approve an agreement between the major recording companies and the union covering the use of master recordings in music videos. The agreement, which would be in effect from July 1, 1983 to November 30, 1986, provides that musical groups will receive one percent of the gross receipts from the exploitation of each video once the work has earned a specified amount. That is, a video must return $50,000 in revenue to the record label before a payment is made for distribution by the AF of M (the recoupment figure escalates annually). Fees for the musicians who play on a record and appear in the video also are set forth in the agreement. [July 1984] [ELR 6:2:19]

Motion picture distributors and Group W cable settle dispute over unauthorized preview showings of films via pay cable television

Eight motion picture distributors have settled a dispute with Group W cable over the allegedly unauthorized preview showings of films available on Home Box Office, Showtime, and The Movie Channel.

The dispute arose in February 1982 when certain Los Angeles area cable customers were offered the pay services as the "Galaxy" package at no charge in an effort by Theta Cable (since acquired by Group W) to attract subscribers. The pay television services were due to be discontinued in the spring of 1982, but many nonpaying homes continued to receive the services.

Group W will pay an undisclosed amount of cash to the distributors and also agreed to increase its efforts to prevent the theft of cable services. The parties also resolved a disagreement over the calculation of film rentals for the Z Channel. [July 1984] [ELR 6:2:19]

New York court awards punitive damages in action alleging theft of cable television services

A New York state trial court has awarded Cablevison Systems of Long Island $34,000 in damages from four businesses and four individuals found guilty of the theft of cable television services. The attorney for Cablevision stated that the award ($5000 per each business, $1000 per each individual) was the first assessment of punitive damages against individuals in a cable piracy case since the passage of New York's anti-piracy law in September 1983. The award also included $10,000 to cover the costs incurred by Cablevision due to the removal of illegal cable descrambling equipment. [July 1984] [ELR 6:2:20]

Jury awards $1,975,000 in damages to five record companies in copyright infringement action

A Federal District Court jury in Greensboro, North Carolina has found four individuals liable for the willful infringement of sound recording copyrights and has awarded damages of $1,975,000 to five record companies. The jury determined that the infringement of 79 copyrights was intentional and that the damages for each infringement amounted to $25,000. The charges were based on evidence recovered during the FBI's extensive "Mod Sound" undercover operation. [July 1984] [ELR 6:2:20]

Wisconsin enacts blind-bidding statute

Wisconsin has enacted a statute prohibiting blind bidding and exhibitor guarantee payments to distributors. Furthermore, trade screenings must be held in either Milwaukee, Madison or Green Bay (the state's three largest cities).

The bill originally contained far more restrictive provisions, including a ban on advances, a listing of proscribed bidding procedures and a $10,000 penalty for the violation of the statute.

Anti-blind bidding statutes now have been enacted in 24 states. [July 1984] [ELR 6:2:20]

WASHINGTON MONITOR

Federal Communications Commission grants Donahue show an exemption from the equal opportunities provision of the Communications Act, reversing its prior ruling in the matter

The Federal Communications Commission has granted the Donahue show an exemption from the equal opportunities provision of the Communications Act, reversing its prior ruling (ELR 2:12:2) that the daily, syndicated Donahue show did not qualify for the section 315 exemption granted to regularly scheduled news interview programs such as Meet The Press. When Metromedia, Inc., the owner of the program, originally requested the exemption, the commission stated that the show's guests and topics only occasionally were selected for their newsworthiness and that the roaming format, including studio audience participation in the questioning of guests, did not insure the necessary licensee control.

In reaching its recent decision, the commission relied upon Metromedia's "assurance" that a significant number of the program's guests are selected because they are involved in newsworthy issues. Thus, the fact that some Donahue segments did not deal with politics or current events "would appear immaterial',' stated the commission. Furthermore, Metromedia pointed out that tickets to the show are distributed well in advance of a particular program. This would serve to reduce the possibility that a program could be used for partisan purposes. And Phil Donahue is well qualified to conduct guest interviews so as to exercise the licensee's skilled and responsible news judgment. [July 1984] [ELR 6:2:21]

Cable television association and cities reach agreement on cable deregulation, clearing the way for enactment of legislation by Congress

The National Cable Television Association, the National League of Cities and the U.S. Conference of Mayors have reached an agreement on terms which would be acceptable to these parties in a cable deregulation bill. The agreement covers such topics as the renewal of franchises, rate regulation, services and equipment, franchise fees, consumer protection, access, buy back and crossownership. Most significantly, local officials would retain their authority over franchise renewal, including the authority to require the renegotiation of franchise agreements at renewal time. However, cable companies may find it easier to obtain renewals of an exclusive local franchise under proposed federal standards for renewal. [July 1984] [ELR 6:2:21]

Equal Employment Opportunity Commission begins investigation of discriminatory hiring practices in film industry

The United States Equal Employment Opportunity Commission has commenced a fact-finding inquiry concerning discriminatory employment practices in the motion picture and television industries with respect to the hiring and promotion of women and minorities. The EEOC has declined to reveal the nature of the charge of alleged disdiscrimination filed with the Commission.

In 1969 the Commission, after an investigation of the industry and formal hearings, concluded that the film industry was engaged in "a pattern or practice of discrimination" against minorities in violation of Title VII of the Civil Rights Act of 1964. The Commission's general counsel at the time stated that the primary cause of discrimination in the film industry was the experience roster system. The Commission did not then have the power, which it now possesses, to bring lawsuits on its own, and the United States Department of Justice was unwilling to proceed.

Rather, the Justice Department arranged a voluntary settlement agreement with the Association of Motion Picture and Television Producers and the International Alliance of Theatrical Stage Employees. The agreement expired in 1974. [July 1984] [ELR 6:2:21]

DEPARTMENTS

Book Note:

"Entertainment Law" by Melvin Simensky and Thomas D. Selz

Have you ever thought about volunteering to teach Entertainment Law at your alma mater or local law school, but been put off by the absence of a published casebook on the subject? While several dozen law schools do offer Entertainment Law courses in one form or another, until now every professor has had to compile his or her own set of teaching materials. That is not a quick or easy task for anyone, no matter how experienced or knowledgeable the teacher may be.

Matthew Bender & Company finally has filled the void by being the first to publish an Entertainment Law casebook specifically designed for use in law school (and even business school) classrooms. Entertainment Law, the casebook, is written by Melvin Simensky and Thomas D. Selz, both of the New York Bar. Last year saw the publication of Selz and Simensky's three-volume treatise entitled "Entertainment Law: Legal Concepts and Business Practices" (ELR 5:5:20). Their new casebook shares a philosophy with their treatise - a philosophy that entertainment law "is a combination of legal principles and business practices," and that the business realities of the industry "give flesh to skeletal legal principles." As a result, the Entertainment Law casebook is unique among casebooks in a number of important respects.

While the casebook is an anthology, the materials that Simensky and Selz have compiled go beyond the usual judicial decisions. The casebook also contains articles from Variety, the New York Times, and magazines such as American Film and New York. The purpose of this material, and even the purpose of many of the judicial opinions, is not to convey black-letter law. Rather, their purpose is to give the student a sense of the business side of the entertainment industry, especially the economic risks involved and the ways in which people in the industry customarily have apportioned those risks among them.

Simensky and Selz are Adjunct Professors at New York University School of Law where they have used earlier versions of this casebook for some years. While at first glance, the selection and organization of their materials seems eclectic, the casebook contains important features which make it appear that the book actually will be quite easy to use in class. First, each chapter begins with a brief introduction which explains the significance of the material that is to follow. Next there is a complete list of that chapter's contents, immediately followed by a series of specific questions to be answered by the readings in that chapter. Thus, the student is told in advance why each reading has been included in the assignment and is given guidance on what to look for and think about as the assignment is studied. It appears that classroom time could well be spent doing nothing more than discussing the book's own questions.

The readings make up only the first of the casebook's three parts. Part I, which is entitled "Entertainment Industry Concepts," is itself divided into six chapters on the Structure of the Entertainment Industry, Artistic Control, Credit, Compensation, Grant of Rights, and Representations, Warranties and Indemnities. "Concepts" is a good title for this part, because the emphasis is on business and legal relations in the industry, rather than on legal doctrines.

Part II of the book consists of industry collective bargaining agreements and individual contracts of several kinds. This part is not meant to be read page-by-page, but instead is intended to supplement the materials in Part I and as a resource for the assignments contained in Part III. Entitled "Application of Entertainment Industry

Concepts," Part III consists of seven hypothetical situations - four contract negotiation hypos and three litigation hypos.

A one-semester course could be organized so that Part I is covered in the first half to two-thirds of the semester, with the rest of the semester being devoted to classroom discussion of the Part III hypotheticals. While an exam could be given at the end of the semester, the hypos lend themselves well to both in-class discussion and follow-up written assignments, so that the written assignments could be graded in lieu of an exam.

This casebook may not be perfect for every entertainment law teacher. Those who want to study the legal details of motion picture production financing and distribution, or those who want to study the legal details of music publishing and recording, may find that many of those details are not covered. On the other hand, there simply is not enough time in a two-unit, one-semester course to cover the details of movies, television, music, theater and publishing. Thus a one-semester overview of entertainment law requires that much detail be omitted. For those who teach an overview, or who are thinking about doing so, Simensky and Selz's casebook looks to be the proper tool.

For information on Entertainment Law, the casebook, contact the law school books division of Matthew Bender & Company, 235 E. 45th St., New York, N.Y. 10017; phone (212) 661-5050. [ELR 6:2:22]

In the Law Reviews:

Sports Broadcasting and the Law by Robert Alan Garrett and Philip R. Hochberg, 59 Indiana Law Journal 155 (1984)

The Reporter's Privilege: An Analysis of the Common Law, Branz burg v. Hayes, and Recent Statutory Developments by Paul Marcus, 25 Arizona Law Review 815 (1984)

Copyright and Contributory Infringement by Robert Conley, 23 Idea 185 (1983) (published by The PM Research Foundation, 2 White Street, Concord, N.H. 03301)

No time for classes: Many athletes go to college hoping to play professionally, but now are suing because they failed to get an education by Clark Norton, 4/7 California Lawyer 45 (July 1984)

Children's Television: Deregulating the Underregulated by William August, 8 Journal of Juvenile Law 1 (1984)

(published by the University of La Verne College of Law)

Origin and Development of the British and American Copyright Laws by Robert C. Hauhart, 5 Whittier Law Review 539 (1983)

UCLA School of Law and the Federal Communications Bar Association have published Volume 35, Number 3 of the Federal Communications Law Journal. Copies are available from UCLA School of Law, 405 North Hilgard Avenue, Los Angeles, California 90024. Subscriptions are $15.00 per year. The latest issue contains the following articles.

The RKO Case: Unique Facts with Extraordinary Circumstances by L. Andrew Tollin, 35 Federal Communications Law Journal 275 (1983)

United States v. National Association of Broadcasters: The Deregulation of Self-Regulation by Patricia Brosterhous, 35 Federal Communications Law Journal 313 (1983)

Copyright Misuse and Cable Television: Orth-O-Vision, Inc., v. Home Box Office by Robert A. Feitel, 35 Federal Communications Law Journal 347 (1983)

RKO and New Jersey: A Match Made in Congress by Stephen Villano, 35 Federal Communications Law Journal 375 (1983)

Hastings College of Law has published Volume 6, Number 1 of Comm/Ent, Hastings Journal of Communications and Entertainment Law. Copies may be ordered from Hastings, 200 McAllister Street, San Francisco, California 94102. Single issues are $6.50 and annual subscriptions are $20.00. The latest issue contains the following articles.

The Trouble with T-Shirts: Merchandise Bootlegging in the Music Industry by Andrew E. Clark, 6 Comm/Ent 1 (1983)

The Developing Methodology for Analyzing Privacy Torts by Duncan M. Davidson and Jean A. Kunkel, 6 Comm/Ent 43 (1983)

Trade Screening Laws: A Survey and Analysis by Thomas A. Bartasi, 6 Comm/Ent 91 (1983)

The Danger of Illusion: A Critique of Safety Regulations in the Television and Motion Picture Industry by Shawn

M. Christianson and S. Claire Soper, 6 Comm/Ent 137 (1983)

Eliminating the Network/Cable Cross-ownership Ban: Does a Free Market Protect the Marketplace of Ideas? by Noy S. Davis, 6 Comm/Ent 163 (1983)

Simon Geller and the Comparative Renewal Process: What's Good for Gloucester? by Frances C. Lindemann, 6 Comm/Ent 185 (1983)

FCC Citator, 6 Comm/Ent 219 (1983)

Columbia University School of Law and Volunteer Lawyers for the Arts have published Volume 8, Number 3 of Art and the Law. Copies may be ordered from Art and the Law, 1560 Broadway, New York, N.Y. 10036.

Subscriptions are $15.00 per issue or $30.00 per year. The latest issue contains the following articles.

Copyright and the Art Museum by Rhoda L. Berkowitz and Marshall A. Leaffer, 8 Art and the Law 249 (1984)

Inviting the Pig to the Parlor: The Case Against the Regulation of Indecency and Obscenity on Cable Television by Cynthia Graham McFadden, 8 Art and the Law 317 (1984)

An Introduction to the New York Artists' Authorship Rights Act by Pamela C. Scott and Wendy H. Cohen, 8 Art and the Law 369 (1984)

Serving God and Mammon: Financing Alternatives for Nonprofit Cultural Enterprises by Peter A. Levitan, 8 Art and the Law 403 (1984)

Meckler Publishing, 520 Riverside Avenue, Westport, CT06880, has published Volume 6, Number 2 of Communications and the Law. It contains the following articles.

The Cost of Prior Restraint: US. v. The Progressive by John Soloski and Carolyn Stewart Dyer, 6/2 Communications and the Law 3(1984)

A Strange Animal: The FCC and Broadcast EEO by Karen A. Kalmanir, 6/2 Communications and the Law 25 (1984)

Carter-Mondale: Affirming the Affirmative Right of Access to Broadcast Media by Mark Johnson, 6/2 Communications and the Law 65(1984)
[ELR 6:2:23]