

BUSINESS AFFAIRS

**Radio Program Distribution Agreements:
A Checklist for Protecting the Program
Producer's Interests**

by Marc G. H. Giattini

Most Americans who listen to radio think they hear nothing more than a disc jockey's personal selections from a station's music library, or packaged news from some wire service. They're often correct.

Yet that often valid assumption fails to consider the rather substantial number of independently and highly produced radio programs which find their way into the program schedules of both commercial and non-commercial radio stations.

The average listener often may not know that the rock ballad or diva's aria filling a room or car with sound may be the product of an independent radio producer who, months previously, produced and then licensed this programming for national radio distribution.

Independently produced programs, not at all similar to the routine selection of music or the chatter of the average D.J., cut across the widest range of conceivable program types, from in-concert and automated music services to topical news, information, public affairs and dramatic programming.

Such highly produced sounds and words are often fed by satellite, to radio stations which convert the signal for tuner and car radio reception.

Some of the better known distributors include the radio arms of CBS, NBC and ABC, in addition to CNN, Mutual Broadcasting System, Westwood One and National Public Radio. The market for independent audio

production even extends to the ever growing business of inflight music and information services offered by the major domestic airline carriers.

Knowing the market for the sale or licensing of radio programming, an independent producer and his lawyer must understand how the producer's work may be controlled and how revenues from its use may be maximized.

If control is not the producer's paramount concern, it certainly ought to be in most instances. Virtually all radio producers, regardless of their size and visibility, should attempt to control their programs against the desire of distributors to purchase them outright for all purposes and in perpetuity.

To establish and maintain control, radio producers should attempt to license their program's use. Radio producers will be able to exert only nominal control if they are commissioned to produce programming, are only

employees of a production house, or if they agree to share rights to the work produced, which is typical of co-production arrangements.

Lack of control over the produced work may mean loss of artistic and editorial control, the potential variation of production themes or premises and often unwholesome disagreements about production standards. Certainly, the loss of revenues is necessarily tied to the loss of control of the produced work.

Legal Aspects of Program Licensing

However, before licensing programming to preserve the essentials of control, radio producers must ensure that their programs do not suffer from some potential exposure or liability. Taking certain precautions in securing rights and being certain that suppliers also secure rights will help to avoid possible litigation. The dangers

and perils of not securing rights are myriad. While even the most egregious failure to secure rights has not resulted in the delinquent producer being jailed, the financial penalties for copyright infringement, plagiarism or theft of a creative work generally can be prohibitive.

If the producer does not impose specific and stringent terms on talent and suppliers of program elements which comprise the program he produces, he invites disaster, the possible institution of suit and the loss of revenues reasonably projected to flow from what appeared to be a "clean" program. These "stringent" terms are typically the same terms the distributor will seek to impose upon the producer, whether the distributor purchases the programming outright, works a joint venture with the producer or takes it under a license.

The need to secure certain rights can best be understood by recognizing that the production of

programming and its entry into a vehicle for distribution follows a natural and sequential chain.

A writer of original material may draft a script which, with other program elements, including the scoring of original music and its performance, would establish the underlying artistic components of the programming intended to be produced. That is the first link in the chain. The producer puts these components together in producing the final product, which comprises the second link.

The producer's representative can protect his client's interest only by requiring in specific contract language that the writer and composer individually warrant that they have secured all of the necessary rights, releases or clearances to the program elements for which they are responsible. ideally, if the warranty is bolstered by an indemnification which would protect the producer to the extent of any financial liability, the producer can comfortably and without worry license the program's

distribution. Warranties and indemnities to that effect will ensure producers against claims of copyright infringement or other potential claims over elements which they simply cannot control.

The problems which may arise were illustrated when a major symphony orchestra scored and performed original music only for use in a major motion picture soundtrack. The picture was distributed successfully, and, thereafter, the rights to use the storyline, characters and associated underlying music and original soundtrack were licensed for adaptation and conversion to radio for radio distribution. The radio producer did not secure a warranty and indemnity with regard to its use in association with the radio series it produced. (This example is taken from real facts involving one of the largest grossing pictures in history. As can be imagined, when the radio producer was charged with failure to secure appropriate permissions, it was faced with an hellacious

problem. It ended up paying for rights it thought it already had secured with the profits it made on foreign distribution.)

Another example is that of the estate of a famous writer which had granted the right to adapt one of the writer's works for radio use. After production and distribution, an heir to the writer, who really owned the rights, sued the producer. The producer screamed with righteous indignation; but in the absence of the estate's warranty and indemnification, the producer was held wholly liable. (Clearly in trouble financially, this producer also faced the famous heir's shrill public criticism of what had taken place, which surely did not help the producer's credibility.)

Areas of Potential Conflict in Licensing

After ensuring that program segments are secured and clear for the use intended, the producer must delineate the areas of potential conflict between distributor and producer in the licensing process. They include: the actual program rights to be granted; the specific warranties and indemnities the distributor will itself attempt to seek; the distributor's obligation to use the material it acquired or licensed for distribution; program publicity and promotion; options to produce or repeat programs in the future; editing; audits and accounting; profit participation; the right to enter programs into awards competitions; the failure of performance for reasons beyond the control of either party; the settlement of disputes and termination of the relationship or the reduction in license fee for failure to perform.

Rights; Limitations on Use Time Periods; Territorial Limitations; Medium of Distribution

As talented at their craft as they are, even the best producers struggle with whether to grant the exclusive or the non-exclusive right to distribute their programs. The answer more often than not depends simply on whether the fee for an exclusive right will be higher than the fees which could be generated cumulatively from a program. Is nonexclusive distribution and whether the market for nonexclusive distribution will support multiple distributions by different distributors. Exclusivity will generally command higher fees. Not surprisingly, distributors are less likely to take on programming only non-exclusively, because the programming's value is often considered diluted.

The producer's choice should be based upon an educated assessment of projected revenues from the different distribution schemes which may be available. However, the dangers in establishing multiple

distribution arrangements must be known in terms of cost and expense. Scattershot non-exclusive distribution schemes may result in the loss of more revenue in setting up and collecting revenues from multiple distribution outlets than might be received through licensing a program exclusively to a single distributor. Choosing not to license the distribution of programming through a recognized national interconnected radio network, but instead choosing to select local stations randomly to which tapes would be sent for local distribution, can generate prohibitive costs to dub tape for, and to identify, contact and collect fees from these stations.

The same balance of revenue producing opportunities underlies the producer's decision to license distribution for limited or unlimited time periods. The producer must decide whether limited exposure will preserve the value of the work or whether its potential value will be fulfilled with no limitation whatsoever. No limitation may

be justified simply on the size of the dollar commitment payable by the distributor. In many instances, some limitation is necessary to avoid over exposure and staleness.

The same is true of territorial limitations. The program's value may be enhanced by carving out territorial distribution areas, or may not at all, or only marginally.

The vehicle of distribution must be selected carefully to reach the targeted audience. A radio program for general audience consumption which would attract many demographic groups is likely to be more suitable for main channel distribution than through subcarrier (SCA) distribution, which is the domain of print-handicapped, background music and data services type radio programs.

Right to Advertise and Promote Programming; Nature of Promotional Activity and Responsibility for Costs

The rights the producer may grant to the distributor with regard to advertising and promotion should include the use of the names, likenesses, voices and biographies of the various individuals and talent involved in the program. Producers may grant only the rights they hold, and distributors necessarily must fashion a promotion campaign based on those granted.

A producer's failure to secure the full complement of rights from artists and other performers may cause problems for the distributor, and tremendous embarrassment for the producer. It will not help the cause of production to have secured the right to use an artist's name for promotion, but not the right to display or exhibit his picture or describe him in a narrative. (Many artists are often concerned that certain pictures not be used, because they may be dated, do not represent the artist's "new image," or are simply considered bad pictures or inappropriate "candid." The distributor's breach or violation of

any such specified use or constraint must be born by the distributor solely.)

The distributor must be encouraged to promote the program and be committed under contract to a specific obligation to promote.

The nature and extent of the promotional activity necessary to advertise a program successfully in an effort to gain audience for all potential commercial purposes is also of uncontroverted importance. Good publicity does not "come cheap" and therefore, some exploration regarding the distributor's possible commitment is necessary. The distributor should help to cover the costs of marketing and promoting the producer's work. If the distributor seeks to benefit from the distribution, and no doubt it would only enter a distribution arrangement believing it could benefit by distributing another's work, the distributor will agree to cover some or all these costs. They are all negotiable.

Non-Broadcast Rights and Merchandising

Non-broadcast rights to the program are of substantial significance due to the existence of cassette recorders, home taping and private recording generally, and the use by institutions of new technologies for teaching and other educational purposes. Non-broadcast rights are valuable. They ought to be licensed along with broadcast rights, but at an incremental or additional license fee.

Additionally, the potential value of the product should be known in the context of the commercial merchandising of characters (e.g., E.T., Indiana Jones, etc.). The strength and independent value of the program's characters, with a bit of luck and the correct exposure, might lead to the execution of lucrative merchandising agreements.

Significant Warranties and Indemnities

The specific warranties and indemnities the producer should impose upon suppliers of program elements and which distributors will likely attempt to impose upon the producer (which the producer should attempt to avoid, dilute or make bilateral as much as possible) are the following.

1. That [supplier or producer] has secured all necessary rights, releases and clearances for all program elements, materials and personnel.
2. That the program will not violate or infringe the copyright, trademark, privacy, creative or other rights of any third party.
3. That there are no conflicting contracts, encumbrances or restrictions on the [programs or the supplied

program elements] that are inconsistent with the licensed rights.

4. That the [programs or the supplied program elements] comply with all state and federal laws and the licensed [programs or the supplied program elements] do not create a substantial risk of civil or criminal liability.

5. That the [supplier or producer] shall indemnify and hold the [producer or distributor] and any authorized user harmless against any claims, damages, liabilities, or costs arising out of the breach of the foregoing warranties. (U.S. insurance carriers currently make premium policy coverage available for the protection of programming against various claims.)

Obligation to Distribute or Utilize Programming

Consider how a talented radio producer might feel when, after he receives a fair but hardly commanding

license fee, the distributor never airs his program and, as it turns out, never had an obligation to?

For it to be of any real value to the producer, the distributor must be required to use the material which the distributor has acquired. The special visibility that the producer might receive from the distribution of the material may be more valuable to the producer than the license fee he has received. If that is so, the producer must secure both the distributor's fee and its obligation to utilize the licensed programming within a certain time, and the failure to do so should clearly be made a breach of their agreement. If it "sits on the shelf" or "stays in the can," the producer's program is simply not likely to help the producer undertake new projects or further his reputation.

Reversionary Interests

The producer should also couple the obligation to distribute with a reversionary interest which would require the distributor to relinquish its distribution rights and the physical property (e.g., reel-to-reel, or audio cassette), if distribution has not commenced by the agreed date. Not to have the clear ability to find another distributor without impediment or delay, if the distributor has failed to meet its obligation, would toll the death of the program, a singular, but avoidable catastrophe.

Options

Among the array of other substantive provisions that the producer will likely want to secure is the right of first negotiation and first refusal with regard to the production of future programs for distribution. If the distributor has had a good run on the programs produced by the producer without such a right having been

negotiated in their license, the distributor may choose to have another producer produce virtually the same kind of programming on more favorable terms to the distributor. The distributor may attempt to circumvent the original producer if there are enough dissimilarities in the newly produced programming so that claims of infringement are unlikely to be successful. Ensuring these rights will help to secure the future services of the producer if his program or series begins to receive some acclaim. Being able to continue producing an increasingly successful program or series will obviously result in greater financial returns to the producer.

Similarly, the producer should be certain to negotiate substantive provisions which determine in what manner and number programs may be repeated, and who controls the right to select repeat episodes. The producer may have very good reasons, based on his original conceptualization, for not taking programs out of sequence

or for determining that some programs should not be repeated.

Editing

The right to preserve all editing responsibility is key to the producer's interest in preserving the integral quality of the work produced. Except as carefully specified by the producer, the distributor should not be permitted to edit down programs, not even for the purpose of meeting time constraints, except with the approval and/or actual editing by the producer.

Audits and Accounting; Profit Participation

In the area of audits and accountings, if payments to the producer by the distributor are related to distribution revenues, the producer must be certain that he has

access to all books, records and related accounts to determine the flow of income and its disposition with regard to the program's distribution.

However, having access to books and accounts alone is not sufficient to guarantee the return of profits to the producer without the producer's also having negotiated a formula for profit participation. A secure participation scheme is one which can be monitored, which is relatively simple to effect and to understand, and which does not contain hidden traps to reduce the payments which are normally, legitimately and rightfully owed to the producer for distribution of the program. The horror stories of badly or insidiously crafted formula provisions, or the complete absence of any such provisions, are legion. The victimized producer may not even have the revenues to institute litigation to determine and trace how such funds actually disappeared.

Miscellany: Awards, Force Majeure, Arbitration, Termination

Miscellaneous provisions of interest to the producer would include the following.

1. The right to enter programs in any awards competition, all prizes or prize money from which the producer alone would receive.

2. The standard provision of "force majeure" providing an excuse without penalty for failure to perform due to events beyond the reasonable control of the producer, or anyone working for or with the producer. Penalties simply should not be meted out if acts of God make it impossible for the producer to produce or deliver programs.

3. Some form of arbitration or dispute resolution. Typical arbitration provisions call for each side of a dispute in a claimed breach of contract to select an arbitrator,

who together select another independent arbitrator to settle the dispute. Other provisions establishing procedures for resolving disputes, if not specifically calling for arbitration, may make reference to other independent and trusted bodies, outside the immediate domain of the parties, who can act as arbitrators to effect settlement.

4. Termination, setting forth dates by which full performance of obligations must be satisfied and for earlier termination if a breach has occurred which has not been cured by the breaching party. Corollary provisions should be included for the reduction of payments, reversion or use limitations, the voiding or enforcing of guarantees or options to preserve the contract to the extent possible. (Some portions of the agreement may have been completed which may be of value. For example, if five out of 13 programs in a series have been fully produced and are ready to be distributed, the license or agreement ought to be maintained, unless failure to

produce or distribute all 13 programs goes to the very heart of the agreement.)

Conclusion

The contractual protections which have been described here are critical to protecting the radio producer's interests. Failure to secure any of the described protections has the real potential for putting the producer out of business. With caution and particular attention to these details, the producer can continue to produce quality radio programs and remain competitive.

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RECENT CASES

Tax Court rules that Goodson-Todman Enterprises is entitled to investment tax credit in connection with its production of game show "To Tell The Truth"

Goodson-Todman Enterprises, the producer of the popular game show "To Tell The Truth," was entitled to claim an investment tax credit for certain costs incurred in the production of the show, a United States Tax Court judge has ruled.

The Commissioner of Internal Revenue had contended that the tapes did not qualify for the credit since they were "primarily topical or ... otherwise essentially transitory in nature." According to the relevant revenue ruling, a film or tape is topical or essentially transitory in nature "if it primarily deals with events and personalities of current interest at the time the film or tape is placed in

service ... These films and tapes include news shows ... interview shows, such as 'The Tonight Show' . . . game shows, award shows, and shows consisting of sporting events."

After describing the format of "To Tell The Truth," Judge Samuel B. Sterrett tackled the "rather slippery and elusive current interest test." Without expressing an opinion with respect to the validity of the test, the court determined that the show did not deal primarily with events and personalities of current interest at the time the tapes were made. Rather, the program "presented durable human interest stories whose audience appeal was as potentially long-lasting as that of many situation comedies or dramatic shows." The tapes would not become dated as would tapes of a sporting event or the evening news, noted the court, because the passage of time did not seem to effect the original appeal of the show's more general subject matter.

The Commissioner argued that the show's staff relied on newspapers to locate guests and that there were several occasions when the show's guests also appeared on newsoriented programs such as "The Today Show." But the court discounted these arguments, taking judicial notice that newspapers and news programs do cover general human interest stories, and stating that "the mere fact that a personality has achieved a currently newsworthy feat does not mean that the interest in that feat is per se fleeting."

It also was found significant that "To Tell The Truth" has been distributed extensively in the syndication market. Some of the tapes of the show may not be telecast for six months after being produced; some episodes are rebroadcast often; and some tapes are last telecast two to three years after their initial production. Thus, in order to maintain successful syndication, the program could not feature, consistently, "a celebrity of the

moment." In all, the current interest test requires a particular tape to be "of sufficiently long-lasting interest that it reasonably may be expected to be rebroadcast over a period of time," and that test was met.

The Commissioner next argued that the regulatory language specifically excludes game shows, as a category, from eligibility for the investment tax credit. "To Tell The Truth" is a game show within the ordinary understanding of that genre of show, ruled the court, notwithstanding GoodsonTodman's attempt to remove the program from the scope of the provision. However, the validity of the regulation would not be upheld if it were interpreted as an inflexible blanket exclusion of game shows, for such an exclusion might eliminate the allowance of the investment tax credit for a show whose market was not primarily topical or essentially transitory.

The Commissioner further contended that the legislative intent was to allow the investment tax credit only

with respect to films and tapes embodying "lasting, permanent art." Thus, films incorporating the work of writers, directors and editors would be a "single unique asset" entitled to the credit as distinguished from typically unrehearsed game shows. But the court did not find any support for the Commissioner's position and expressed doubt that Congress intended the Commissioner to assume the role of an art critic qualified to pass judgment on whether a particular genre of films constitutes "lasting, permanent art." The development of the "To Tell The Truth" shows did require substantial creative effort and a substantial production process, albeit limited scripts and rehearsals. And even more significant, the statute was adopted to promote domestic employment in the entertainment industry. The types of jobs created by the production of "To Tell The Truth" were the very jobs Congress sought to encourage.

The Commissioner next pointed out that failing to read the regulation as imposing a blanket exclusion of game shows would mean that the Internal Revenue Service might be in jeopardy of having to review the qualifications of every game show for the investment tax credit. Judge Sterret, while recognizing this potential burden, did not find persuasive the administrative inconvenience argument.

The court concluded by analyzing the statutory phrase "primarily topical or otherwise essentially transitory in nature" to refer to tapes of events, such as sports activities "of uniquely contemporary interest" which become dated almost immediately. The market for the "To Tell The Truth" tapes, again, was not topical or transitory, ruled the court; the Commissioner's restrictive position was "at odds" with the statute and its purpose to encourage investment and domestic employment; and Goodson-Todman accordingly was entitled to recover

the investment tax credit which totalled about \$440,000 for the years 1973 through 1978.

Goodson-Todman Enterprises, Ltd., 84 T.C. No. 20 (1985) [ELR 7:3:7]

California appellate court upholds preliminary injunction barring the Steinberg Group from disbursing profits from "greenmail" of Walt Disney Productions; court finds that stockholders would likely prevail on claims of breach of fiduciary duty

The "Greenmail Trust" is not a clever new Walt Disney cartoon caper about an elfin delivery service; it is, rather, a remedy very seriously imposed by a California appellate court in a lengthy response to an action brought by a group of stockholders in Walt Disney

Productions who seek to recover a greenmail payment made by Disney directors to the Steinberg Group, i.e., Saul P. Steinberg and various financial entities.

A greenmailer, as defined by appellate court Judge Earl Johnson, "creates the threat of a corporate takeover by purchasing a significant amount of the company's stock. He then sells the shares back to the company at a premium when its executives, in fear of their jobs, agree to buy him out."

In March 1984, the Steinberg Group purchased more than 2,000,000 shares of Disney stock, and subsequently acquired approximately 2,000,000 additional shares, for a total ownership interest of about 12 per cent of the outstanding Disney shares. In June 1984, the Steinberg Group advised Disney's directors of its intention to make a tender offer for 49 percent of the outstanding shares at \$67.50 per share and to tender later for the balance of the outstanding shares at \$72.50 per

share. The directors quickly proposed that Disney repurchase all the stock held by the Steinberg Group, and proceeded to do so for \$297,400,000. Disney also reimbursed the estimated costs of \$28,000,000 incurred by the Steinberg Group in preparing the tender offer for a total payment of \$325,400,000 - about \$77 per share. The Steinberg Group obtained a profit of about \$60,000,000 for its agreement not to purchase the Disney stock. Disney increased its total indebtedness to \$866,000,000 (as compared to about \$585,000,000 before the Steinberg Group came on the scene). And when the repurchase agreement was announced, Disney stock dropped to below \$50 per share.

The Disney stockholders brought an action seeking to rescind the repurchase agreement, claiming that the Steinberg Group used its tender offer and related litigation concerning Disney's purchase of a company known as Arvida, to obtain a premium price for the Group's

shares, in violation of its fiduciary duties to Disney and the other stockholders.

The trial court issued a preliminary injunction enjoining the Steinberg Group from transferring, investing, or disposing of the profit from its sale of the Disney stock except in accordance with the statutory standards applicable to a "prudent trustee."

In affirming the trial court's issuance of the injunction, the appellate court stated that, despite finding no case in which a greenmailer was ordered "to return his ill-gotten gains," there were precedents for such a judgment. In particular, Judge Johnson cited the stockholder's "Magna Carta," the case of *Jones v. H.F. Ahmanson & Co.*, 1 Cal.3d 93 (1969), for the position that a director is a fiduciary, as is a dominant or controlling stockholder or group of stockholders.

In this case, the evidence presented was sufficient to demonstrate a probability of the stockholders' success

on the merits of the breach of fiduciary duty claim. The corporate directors' "naked desire to retain their positions of power and control over the corporation" would not be considered a valid reason for repurchasing company shares.

The Steinberg Group attempted to argue that there was no evidence that the repurchase agreement was reached because the Disney directors wished to maintain their control. The directors could as well have had a good faith belief that the corporate interest would be best served by their action. But the directors, who did maintain their authority via the repurchase agreement, were required to demonstrate not only that a good faith transaction occurred, but to show its "inherent fairness from the viewpoint of the corporation..." stated Judge Johnson. The directors' "vague" assertion that they were seeking to avoid the damage to Disney and its stockholders which might result from the tender offer was

found not to constitute evidence of a transaction conducted in good faith and of inherent fairness.

If it is found that the Disney directors breached their fiduciary duty to the stockholders, the Steinberg Group could be held jointly liable as an aider and abettor of such conduct. The court pointed out that the Steinberg Group knew or should have known that it was reselling its stock at a price considerably above market value; and knew or should have known that the debt incurred by Disney would adversely affect the company's credit rating, and the price of its stock.

The court then turned to the stockholder's claim that the Steinberg Group, without reference to the actions of the Disney directors, breached its own fiduciary duty to the Disney stockholders. When the Steinberg Group sued Disney to block the company's purchase of Arvida, it assumed a fiduciary duty to the other stockholders with respect to the derivative claims asserted in the

lawsuit, noted the court. The Group's subsequent abandonment of the Arvida litigation, just two weeks after the lawsuit was filed and after the Steinberg Group had promised to fairly and adequately represent the interests of Disney and its stockholders, made it a reasonable probability that the Group breached its fiduciary duty to the other Disney stockholders by using its position as class representative for its own financial advantage.

The court next found, after a thorough review of the issues, that a constructive trust would be an appropriate remedy notwithstanding the alleged solvency of the Steinberg Group. And injunctive relief and periodic accountings were found necessary to prevent the "dissipation or disappearance of the proceeds and profits of the [repurchase] transaction."

Heckmann v. C.L. Ahmanson, 168 Cal.App.3d 119 (1985) [ELR 7:3:8]

French conductor Pierre Boulez was properly taxed on income from contract with CBS Records; income did not qualify as tax exempt royalties under applicable foreign treaty

The Tax Court has ruled that orchestra conductor Pierre Boulez was liable for about \$20,000 in income taxes for the year 1975 since certain payments he received constituted compensation for personal services rather than tax exempt royalties within the meaning of the applicable tax treaty between the United States and West Germany.

In 1969, Boulez entered a contract with CBS Records whereby Boulez agreed to provide his services to the company as a producer and/or performer in return for the payment of royalties pursuant to "an elaborate

formula" based upon CBS's sales of the recordings on which Boulez worked.

During 1975, a year when Boulez, a citizen of France, was a resident of Germany and a nonresident alien of the United States for federal income tax purposes, CBS paid Beacon Concerts Ltd., Boulez' agent, approximately \$39,500. Beacon paid this amount to Boulez in 1976, and Boulez reported the amount on his 1976 German income tax return and paid German income taxes.

In considering the Commissioner of Internal Revenue's claim that there was a deficiency in Boulez' individual income tax for 1975, the court first noted that the CBS contract consistently referred to the conductor's compensation as royalty payments which would be based on a percentage of future sales of recordings. But the contract also was "replete" with language suggesting that the rendering of personal services by Boulez was the essence of the contract. The parties had agreed that

the recordings, once made, would be entirely the property of CBS. There was no language by which Boulez conveyed to CBS any property interest in future recordings.

Boulez pointed out that while he may not have had any property interest in the recordings of 1969, the Sound Recording Amendment of 1971 created, for the first time, a copyrightable property interest in a musical director or performer who makes a sound recording of a musical work. Nevertheless, observed the court, the parties' contractual relationship was not modified to reflect any "licensable or transferable" property rights possessed by Boulez in the recordings. Boulez remained an independent contractor subject to the "works for hire" doctrine, and accordingly, his 1975 income was properly taxed, concluded the court.

Boulez v. Commissioner of Internal Revenue, 83 T.C. No. 31 (1984) [ELR 7:3:9]

Federal District Court's refusal to set aside 1983 Writers Guild election is upheld on appeal

When the Writers Guild of America West held an election for officers in September 1983, the Guild permitted two individuals who held supervisory or management positions in the entertainment industry to participate as candidates. One individual was employed as a director-producerwriter for a television series; the other was a director for a television program. The Guild's constitution and bylaws do not restrict the candidacy of supervisors for union office.

A Guild member filed a complaint with the Secretary of Labor alleging that the election violated section

401(c) of the Labor Management Reporting and Disclosure Act of 1959. The Secretary determined that by allowing supervisors to participate as candidates in the election, the Guild failed to provide the statutorily required safeguards to insure a fair election. The Secretary therefor sought an order in a Federal District Court setting aside the election and directing that a new election be held under the Secretary's supervision.

However, the District Court granted the Guild's motion for summary judgment (ELR 6:1:21) and awarded the Guild its costs and reasonable attorneys fees. A Federal Court of Appeals has affirmed the District Court's judgment, solely on the ground that the relevant statutes did not authorize the Secretary of Labor to set aside a union election based on the participation of supervisor-candidates.

According to Judge Alarcon, neither the language of the cited section, nor Congressional intent, legislative

history, or the Secretary's own administrative regulations, provide support for the broad grant of authority to intervene in union elections assumed by the Secretary. Rather, section 401(c) addresses the procedural standards for conducting elections - standards to insure that every candidate for union office has equal access to the voting members. The section does not refer to any substantive protections, such as restrictions on candidate eligibility, concluded the court.

Although affirming the District Court ruling, the Court of Appeals remanded the matter in order to allow the Guild to remedy a procedural error in connection with the award of its attorneys fees.

Brock v. Writers Guild of America, West, Inc., Case No. 84-6013 (9th Cir., June 11, 1985) [ELR 7:3:9]

Retail music store owners may proceed with Robinson-Patman Act claims against record distributors, rules Federal District Court in California; summary judgment is granted to distributors only on claims related to items made and distributed within the state

The turntable, which in 1975 began playing Charles and Jane Zoslaw's rendition of "You Record Distributors Violated the Robinson-Patman Act and Put Our Record Store Out of Business," has completed several more revolutions during the past few years.

The Zoslaws had operated a retail music store in Marin County from 1965 until 1977 when the store went out of business. In 1975, the couple brought a lawsuit alleging, inter alia, that several record distributors had violated section 2(a) of the Robinson-Patman Act by selling records and tapes to retail chain stores at lower prices

than those offered to single outlet stores such as the Zoslaw's Marin Music Centre. The complaint also alleged unlawful discrimination in favor of retail chain stores in granting promotion allowances and furnishing special services.

A Federal District Court granted motions for summary judgment on behalf of Warner/Elektra/Atlantic Corp., ABC Records, Polygram Distribution, Inc., MCA Distributing Corp., and MTS, a record retailer. The Federal Court of Appeals, while affirming the District Court's ruling on certain Sherman Act claims, reversed the judgments in favor of the record distributors with respect to the Robinson-Patman Act claims on the ground that the District Court had applied an incorrect test to determine the presence of jurisdiction (ELR 4:17:1).

(The United States Supreme Court denied the Zoslaw's petition for certiorari on the Sherman Act ruling.)

Jurisdiction under section 2(a) requires a finding that a party has engaged in interstate commerce, that the alleged price discrimination occurred "in the course of such commerce," and that the purchases involved in the discrimination were in commerce. The District Court had held that the record distributors stocked their California warehouses for general inventory purposes and that subsequent sales to Bay Area retailers were not in the flow of commerce.

But the Ninth Circuit declared that purchases of records and tapes from ABC and MCA's California warehouses indeed were "in commerce" because these companies manufactured the items out-of-state and merely stored them in California pending retail sales. Therefore, the flow of commerce was not interrupted. However, WEA and Polygram did not themselves manufacture records, but were wholly owned subsidiaries of companies producing records and tapes. The

question of whether a sale to a subsidiary interrupts the flow of commerce requires an examination of the extent to which the subsidiary acts as an independent distributor in its pricing and marketing decisions. Since the District Court had not conducted such an examination, the Court of Appeals reversed the grant of summary judgment in favor of WEA and Polygram.

On remand, the District Court reviewed, at length, the jurisdictional issues raised and concluded that sufficient factual information had been presented to support a ruling that WEA was not, as a matter of law, an independent distributor and that the court therefore possessed Robinson-Patman Act jurisdiction over the company. Jurisdiction also was asserted over Polygram. There was not such a "dearth of evidence" as to warrant summary judgment, because a basis was present, "albeit a weak one," from which a jury could infer "that Polygram's pricing and marketing decisions were subject to the

desires of those who also controlled the out-of-state production of the records that Polygram distributed."

WEA and Polygram next argued, successfully, that the court did not possess Robinson-Patmann Act jurisdiction over records and tapes manufactured in California since such items were never "in commerce." The companies were granted partial summary judgment as to transactions involving those items.

The court rejected WEA's claim that the alleged price discrimination between the single outlet store and chain retailers was a good faith effort to meet competition, an affirmative defense under the Act, and also rejected the company's argument that it did not discriminate against Marin Music Centre in granting advertising allowances. Various claims propounded by retailer MTS in support of its motion for summary judgment also were denied.

The court concluded by refusing to strike the Zoslaw's claims for damages, stating that it was not prepared to

hold that the claims were too speculative to be recoverable or damages for "injury to the going concern value of a business that was subjected to price discrimination."

Zoslaw v. MCA Distributing Corp., 594 F.Supp. 1022 (N.D.Cal. 1984) [ELR 7:3:9]

Federal Court of Appeals reverses \$10 million award to writer Jackie Collins for invasion of privacy and right of publicity claims against distributors of magazine containing nude photographs of a woman misidentified as Collins

While California state appellate courts seem to be indulging the pursuit of libel and invasion of privacy actions brought by men in entertainment industry-related

roles (see ELR 7:2:14 and 7:2:15), a Federal Court of Appeals in New York has denied, with a thoroughness approaching vehemence, the claims of author Jackie Collins Lerman in connection with the nationwide distribution of a magazine containing nude photographs incorrectly identifying a "starlet" displayed, topless and in an orgy scene, as Lerman.

The Lerman litigation was occasioned by the publication of the May 1980 issue of Adelina magazine. The magazine contained two photographs which misidentified Lerman as an actress who appeared in the movie "The World is Full of Married Men." Lerman wrote the "Married Men" book and the screenplay for the movie; her husband directed the movie, in which Lerman did not appear. The cover of Adelina proclaimed: "In the Nude From the Playmen archives ... Jackie Collins." And an article accompanying the photographs

commented on the increasing willingness of "serious" actresses to appear nude in films.

Lerman filed a lawsuit alleging several causes of action against the publisher of the magazine, Chuckleberry Publishing Inc., and against the original national distributor, Publishers Distributing Company, Inc. Publishers Distributing sold its contract to distribute *Adelina* to Flynt Distributing Company; and Flynt, in 1981, became a party to the litigation. The lawsuit eventually was expanded to include claims based upon Chuckleberry's inclusion, in the June 1980 issue of *Adelina*, of a subscription solicitation page reprinting the May 1980 cover (along with other reprinted covers). This solicitation page also appeared in the January 1981 issue of the magazine.

The District Court granted Lerman's motion for summary judgment against Chuckleberry, Publishers Distributing and Flynt for the violation of New York Civil

Rights Law sections 50151 and for the invasion of Lerman's right to publicity (ELR 2:18:7 and 3:17:6). The libel action was dismissed. Lerman settled with Publishers Distributing for \$100,000 and Chuckleberry entered into a Chapter 11 bankruptcy reorganization, leaving Flynt to face a jury's verdict awarding Lerman \$7 million in compensatory and \$33 million in exemplary damages, an amount from which the trial court struck \$30 million.

Confronted with a \$10 million damage award, Federal Court of Appeals Judge Cardamone sought guidance from a number of sources in order to evaluate Lerman's claim, beginning at the wellspring with a review of Samuel Warren and Louis Brandeis' seminal right of privacy article. In New York, the right of privacy currently is recognized in sections 50/51 of the Civil Rights Law. Section 51 provides that an injunction and cause of action for compensatory and exemplary damages are

available to "Any person whose name, portrait or picture is used in this state for advertising purposes or for the purposes of trade without [his/her] consent. . ."

After extensive consideration of the case law, the court stated that Lerman could not argue that the use of her name was for advertising purposes for a particular service or product since she did not show a "use for the solicitation of patronage." The republication of the magazine's cover in two subsequent subscription solicitations was designed simply "to convey the nature and content of past Adelina issues" and thus did not provide a basis for an independent claim of unauthorized advertising use. Adelina also did not use Lerman's name for purposes of trade under the statute. Rather, according to the court, the appearance of the author's name in the magazine's piece on the film was a matter of legitimate public interest. Lerman did not show that the use of her name had "no real relationship" to the article, i.e., that

there was an objectionable "disguised advertisement," and Lerman was not an "innocent bystander" without a connection to the subject matter of the article or photographs.

Also unavailable to Lerman, in attempting to counter the newsworthy privilege, was an argument that the use was fictionalized or falsified. Citing the recent case of *Davis v. High Society Magazine, Inc.* (ELR 4:23:4), the court declared that the critical element in *Davis*, as in the case before it, was "the misidentification, i.e., the factual error. [And] when presented with a factual error which brings an otherwise privileged newsworthy use within the trade purpose prohibition, the Supreme Court and the New York Court of Appeals have required that there be a finding of fault." Thus, although Lerman's name was falsely used in all three challenged issues of *Adelina* - and the degree of falsity was "severe" - Flynt could not be held liable for the unauthorized trade use of

the name absent a showing of fault. It was this showing that was not adequately made by Lerman either as to the section 51 claim or as to the right to publicity claim to which the court next turned.

Lerman did not establish a prima facie cause of action for the violation of her right to publicity declared the court, somewhat disingenuously noting that Lerman "had never exploited the value of her nude appearance ... " Judge Cardamone also pointed out that the nature of the relief sought by Lerman - to enjoin publication and "to salve her wounded feelings" - confirmed the conclusion that the magazine did not deliberately exploit Lerman's right of publicity and that this cause of action should have been dismissed.

The court nevertheless discerned that while the right of publicity cause of action may have been invalid, Lerman had presented (without specifically alleging) a "classic" false light invasion of privacy claim. But in such a claim,

it is insufficient to cite a factual error, rather than a falsity. And constitutional protections available to the media also served to defeat Lerman's claim.

The constitutional issues, which the court applied both to the trade purposes aspect of section 51 and to the false light claim, first required an analysis of Lerman's stature as a public/private figure. Lerman was ruled a limited purpose public figure. She is an internationally known author of nine novels, focusing on the purportedly "controversial" subject matter of the "double standard in sexual mores"; the books contain many descriptions of sexual encounters; and Lerman has availed herself of media attention to herself and her books. The topics addressed by Lerman were matters of public controversy, defined by the court as "any topic upon which sizeable segments of society have different strongly held views."

Lerman had argued successfully before the District Court that the actual malice standard of fault did not apply in this case despite her public figure label, because the magazine's use of her name was "completely exploitive" and not newsworthy. But the magazine, while distasteful, was not obscene and did not lose its First Amendment protection, stated Judge Cardamone.

The court then emphasized that imposing liability on Flynt without clear and convincing evidence that a company employee acted with a high degree of awareness of the probable falsity in the use of Lerman's name would "unquestionably" chill the exercise of the distributor's First Amendment rights. The District Court did not instruct the jury on the question of actual malice and this of itself would require the reversal of the verdict. But the record was complete enough as to Flynt's knowledge and conduct so that a new trial was not warranted. Lerman had not demonstrated that Flynt had a duty to

inquire about the contents of the magazines at issue or that the company had any reason to misidentify Lerman as the actress portrayed in the photographs. The fact that Flynt had notice of Lerman's lawsuit regarding the May 1980 issue and did not further investigate the allegedly false caption did not constitute clear and convincing evidence of subjective awareness of probable falsity or awareness that the misidentification would reoccur in the June and January issues, especially given the "miniscule mention" of Lerman in those issues. The court pointed out that the failure to investigate is a weak criterion on which to evaluate actual malice in the case of a distributor of hundreds of publications. Thus, as a matter of law, a jury could not "fairly and rationally conclude" that Flynt acted with actual malice, and Lerman's claims were dismissed accordingly.

The court did take the time to discuss the damages question, pointing out the chilling effect of a \$7 million

verdict on First Amendment rights-an effect, which in the court's view, actually might "deep-freeze" a particular media party. Lerman's "lacerated feelings" could not have been worth anything close to the amount of the verdict, opined Judge Cardamone, especially since no proof was offered of Lerman's requirements for professional counseling. The court cited awards in "injury to feelings" cases which ranged from \$25,000 to about \$45,000. And Lerman's reputational injury could not have been significant - Adelina had a relatively modest circulation and the court piquantly wondered whether "given the number of famous persons portrayed in this fashion ... such pictures [are] even capable of producing genuine reputational harm." After all, the main source of publicity for the pictures was Lerman's lawsuit, noted the court. The exemplary damages award also "shocked the conscience" and "reinforced" the conclusion that the

verdict represented a reversible appeal to passion or prejudice.

District Court Judge Bonsal (sitting by designation) concurred in the court's finding that Lerman was a limited purpose public figure who injected herself into an on-going controversy. However, Judge Bonsal would have given Lerman the opportunity for further discovery and a trial on the issue of actual malice.

The United States Supreme Court has refused to review the Court of Appeals decision.

Lerman v. Flynt Distributing Co., Inc., 745 F.2d 123 (2d Cir. 1984) [ELR 7:3:10]

Paperback publisher granted summary judgment in libel action brought by three government officials in connection with film "Missing" and its underlying

book; but court upholds jurisdiction over French director Constantin Costa-Gavras

The film "Missing" has found an attentive audience in Federal District Court Judge Sofaer's courtroom. The 1982 Universal film was based on author Tom Hauser's account of the disappearance and death of Charles Horman, a United States citizen, in the aftermath of the 1973 Chilean military coup which deposed the government of Salvador Allende Gossens. Three United States officials who had been stationed in Chile during the coup brought an action for libel against: Harcourt Brace Jovanovich, the publisher of "The Execution of Charles Horman: An American Sacrifice"; The Hearst Corporation, the paperback publisher (via its Avon division) of the book; Constantin Costa-Gavras, the director of "Missing"; and Universal City Studios and MCA, Inc. The government officials asserted that the "Missing"

parties had falsely accused them of ordering or approving the order for the murder of Horman.

In early 1984, the court granted motions for summary judgment on behalf of Hauser and Harcourt Brace (ELR 6:8:13); the Hearst Corporation's motion for summary judgment now also has been granted.

The court noted that Avon's 1982 paperback edition of Hauser's work did not change the text of the 1978 hardcover book, although the paperback's title was changed to "Missing" and the cover artwork was redesigned to display artwork from the film. Avon did not make an independent inquiry into the accuracy of Hauser's report, but relied on Harcourt Brace's assurance that the book had been thoroughly reviewed for libel, and on an express warranty in the paperback licensing agreement that "Execution" contained "no libelous or unlawful matter."

Judge Sofaer recalled that New York courts have held that a republisher need not conduct its own independent accuracy check, absent some reason to believe that the material to be published is false, but may rely on the research and reputation of the original publisher. Furthermore, the government officials did not raise an issue of fact as to whether Hearst acted with actual malice.

The officials also claimed that Hearst was liable for the republication, in the film "Missing," of allegedly defamatory material contained in the book. But there was no evidence that Hearst was even "peripherally involved" in the production of "Missing." The company may have capitalized on the "movie tie-in" via the redesigned cover of the paperback edition; but this did not establish Hearst's authority or control over the planning, writing, production or distribution of the film, and summary judgment therefore was appropriate.

Director Costa-Gavras was not accorded as receptive a hearing as Hearst in that Judge Sofaer denied the director's motion to dismiss the action for lack of personal jurisdiction. Costa-Gavras, a citizen and resident of France, coauthored the screenplay for "Missing," and directed the film. In order to accomplish these tasks, he was in New York on many occasions and conducted extensive activities in the state on behalf of the film. Judge Sofaer concluded that the director's activities met New York's statutory requirements for jurisdiction - Costa-Gavras transacted business within the state; engaged in conduct which was "sufficiently proximate" to the allegedly unlawful acts that the cause of action could have arisen out of that conduct; and the state had a significant interest in adjudicating the dispute.

Davis v. Costa-Gavras, 595 F.Supp. 982 (S.D.N.Y. 1984) [ELR 7:3:12]

New York trial court grants summary judgment to author and publisher of magazine article in libel action brought by business associate of performer Jimi Hendrix

In the article in the October 1980 edition of a small music magazine, *Musician, Player & Listener* (published by Amordian Press), writer David Marsh referred to Edward Chalpin, a recording studio owner, manager, and publisher as "an unbelievably unscrupulous character. . ." The article, entitled "Jimi Hendrix, the Voodoo Lives On," described the career of the rock musician and expressed the view that Hendrix was prevented from fully developing his talent, in part, because of an unfortunate business arrangement with Chalpin which Hendrix entered into as an "unknown" artist. Marsh's source of

information concerning the Hendrix-Chalpin relationship was 1978 biography written by David Henderson.

The Henderson book, "Jimi Hendrix-Voodoo Child of the Aquarian Age," set forth the terms of Hendrix's onepage contract with Chalpin's company, PPX Enterprises, Inc. The contract called for Hendrix to render creative services to the company and to perform as an instrumentalist at "no cost" on an exclusive basis for three years; the contract apparently did not impose an obligation on PPX to further Hendrix's career. The only guaranteed payment to Hendrix was the sum of \$1.00. If Hendrix worked as a vocalist, he was to receive a one percent royalty. However, this amount was about one-third the normal minimum royalty rate for a beginning performer.

Chalpin's pursuit of claims for royalties from Hendrix's records resulted in lengthy litigation in the English courts; the litigation eventually was settled, after

Hendrix's death in 1970, in favor of the artist's estate. Chalpin provided another source of concern, however, by releasing several records which he tried to "pass off" as Jimi Hendrix records, but which were, according to Justice Ascione, "very poor, out-of-date recordings by other artists for whom Hendrix performed as a background instrumentalist." Some reviewers of these records called their release "an unethical and shoddy commercial trick."

Notwithstanding his somewhat less than successful track record, Chalpin brought a claim against Marsh and Amordian to recover \$500,000 in damages for libel due to the publication of the article. Justice Ascione promptly granted the writer's and publisher's motions for summary judgment dismissing the complaint.

The court first observed that the statement at issue was a protected expression of opinion in that it set forth "a general criticism of [Chalpin's] fairness in his business

dealings. It does not accuse [Chalpin] of any particular act of wrongdoing." Furthermore, assuming that the alleged defamatory statement was a statement of fact rather than an expression of judgment or opinion, Chalpin was required to prove the falsity of the statement. But Chalpin not only failed to establish the falsity of the statement, he also did not prove the occurrence of any compensable injury to his reputation, or show actual malice from which injury to his reputation might be presumed. And since the subject matter of Marsh's article was of legitimate public concern, Chalpin also would have had to show that Marsh and Amordian acted in a grossly irresponsible manner "without due regard for the standards of information gathering and dissemination ordinarily followed by responsible parties." Marsh had [more than an] adequate basis" for his conclusion that Chalpin was an "unscrupulous" businessman; the editors of the magazine properly relied on this experienced and

well-respected journalist; and Amordian had no reason to question the accuracy of the article, concluded the court.

Chalpin v. Amordian Press, Inc., New York Daily Journal, p. 6,col.2 (N.Y.Cnty., July 11, 1985) [ELR 7:3:12]

Briefly Noted:

Broadcasting.

A Federal Court of Appeals in Washington, D.C., has upheld a Federal Communications Commission's ruling denying City of Angels Broadcasting, Inc., leave to intervene in the ongoing comparative renewal proceeding involving the license for Channel 9, Station KHJ-TV in Los Angeles. RKO General has held the license for

Channel 9 throughout an often dramatic 20-year licensing saga, described at length by the court. When City of Angels filed its construction permit application 14 years after the applicable cutoff date, the Commission determined that the company had not shown any unusual or compelling circumstances which would warrant a waiver of the cutoff rule. The Court of Appeals concluded that the Commission did not abuse its discretion in so ruling, or in rejecting City of Angels' request to have the FCC terminate, for "staleness," the ongoing proceeding and to open an entirely new comparative proceeding in which RKO and longstanding construction permit applicant, Fidelity Television, Inc., might participate. In a thorough and vocal dissent, Judge Wilkey stated that the effect of the majority's decision would be to limit competition for Channel 9 to two "equally poor contenders," thereby ill-serving the purpose of holding comparative hearings. On the basis of prior Commission

decisions, court rulings, changes in RKO's status and Fidelity's ownership, and the fact that Los Angeles' communications needs have changed in the course of 20 years, Judge Wilkey would have required the Commission to convene a new licensing proceeding in order to receive applications from new and possibly superior, candidates for Channel 9's broadcast license.

City of Angels Broadcasting, Inc. v. Federal Communications Commission, 745 F.2d 656 (D.C. Cir. 1984) [ELR 7:3:13]

Copyright.

A Federal District Court in Minnesota has granted summary judgment to Southern Satellite Systems and Turner Broadcasting in a copyright infringement action

brought by Hubbard Broadcasting, Inc. Hubbard had alleged that Turner's Atlanta "superstation," WTBS, and Southern Satellite, a cable television system acting as a resale common carrier, engaged in the unauthorized retransmission of five unidentified copyrighted works in the same geographical area in which Hubbard conducted its broadcast operations. The court first found that Hubbard possessed standing to bring its copyright infringement claim by virtue of the company's exclusive contractual right to transmit the copyrighted works at issue to television viewers in its broadcast area.

However, after a thorough review of section 111 of the Copyright Act, District Court Judge Alsop concluded that Southern was a passive carrier under the statute and that the statutory compulsory licensing scheme which allows cable television systems to retransmit the copyrighted programming of distant broadcast stations in return for certain royalty payments, was available to

Southern's customer, Turner Broadcasting. Although WTBS altered some of the content of the primary transmission, this practice of "commercial substitution" did not create a separate primary transmission distinct from the over-the-air signal received by Southern. And Southern, in retransmitting the programs broadcast to the general public by WTBS exercised no control over the content of the transmission so as to alter its common carrier status or to subject the company to copyright liability. Turner therefore could not be held liable as a contributory infringer, concluded the court.

Hubbard Broadcasting, Inc. v. Southern Satellite Systems, Inc., 593 F.Supp. 808 (D. Minn. 1984) [ELR 7:3:13]

Copyright.

An article in the August 1982 edition of *The American Lawyer*, published by Am-Law Publishing Corp., reported on a fee dispute between author Kitty Kelley and New York attorney John Diamond, and stated that Kelley had filed a grievance with the New York bar association against Diamond due to the attorney's purportedly "persistent" efforts to collect the disputed \$1,600 fee. After an unsatisfactory exchange of letters between Diamond and *The American Lawyer*, the attorney filed an action against Am-Law and various individuals associated with the magazine alleging invasion of privacy, defamation and copyright infringement. The copyright infringement claim was based on the magazine's use of excerpts from one of Diamond's letters. The attorney had stated that the publication was authorized to publish the letter, but only in its entirety. A Federal

District Court granted summary judgment to the Am-Law parties and dismissed the copyright infringement claim on the ground that the use of a "substantial excerpt" from Diamond's letter constituted fair use within the meaning of section 107 of the Copyright Act, and was legitimate news reporting. Because the copyright claim was "wholly without merit" and had "no reasonable basis," the District Court granted attorneys fees and costs totalling \$15,000 to Am-Law and dismissed the pendent state claims. A Federal Court of Appeals has upheld the District Court's ruling that the excerpts were informational and newsworthy and that the editing of the letter did not portray the copyrighted work in an unfair light or materially mislead the public as to its contents. The award of attorneys fees also was upheld as within the court's discretion.

Diamond v. Am-Law Publishing Corp., 745 F.2d 142
(2d Cir. 1984) [ELR 7:3:14]

Copyright.

A Federal Court of Appeals has held that the copyrights to two editions of a baseball card price guide were infringed by the publishers of a similar work. Publishers of a copyrighted comprehensive listing of collectable baseball cards along with their value brought a copyright infringement action against two partners who published a monthly price update listing the latest prices for selected collectable baseball cards and their price trends. The plaintiffs alleged that the defendants copied their format and nearly 18,000 prices. The court was not persuaded by the defendants' argument that copyright protection does not extend either to the idea of a baseball

card compilation or to facts and information contained in the compilation. Copying of a work may be established by showing the defendants had access to the protected work and that the works are substantially similar. Defendants' access was conceded at trial. And the court found strong credible evidence of actual copying by the existence of common errors and unique patterns of presentation in the similar works. The court also found that the copying was particularly egregious, because the first issue of the monthly guide used as its "base" prices those actually reported in plaintiffs' copyrighted edition, which in combination with other factors, gave the misleading impression that the defendants had been authorized to update plaintiffs' guide.

Eckes and Beckett v. Card Prices Update and Suffolk Collectables, 736 F.2d 859 (2d Cir. 1984) [ELR 7:3:14]

Libel.

A Federal District Court in Washington, D.C., has granted summary judgment to Xerox Corporation in a libel action brought by Joel D. Joseph, the author of the book "How to Fight City Hall ... And the IRS, Banks, Corporations, Your Local Airport and Other Nuisances." Joseph claimed that a review of his book appearing in Publishers Weekly (published by The R.R. Bowker Co., a division of Xerox) was false and damaged his reputation as a lawyer and writer. District Judge Gesell stated that while the less than enthusiastic book review might be capable of a defamatory meaning, Joseph was a public figure who had failed to establish that there was an issue of fact as to actual malice sufficient to defeat Xerox's motion for summary judgment. Joseph's status as a limited purpose public figure was based on: the presence of a public controversy as to the

effectiveness of self-representation by consumer and civil rights activists against "big government and big business"; Joseph's active role in trying to influence the outcome of this controversy (the court noted that an advance copy of the book had been sent to Publishers Weekly); and the connection between the alleged defamation and Joseph's role in the controversy. Joseph did not demonstrate that the publication or Donn A. Randall, the author of the book review, had serious doubts as to the truthfulness of the piece. Randall, an attorney and experienced book reviewer, had researched certain statements contained in the review, and the statements were not so "inherently improbable" as to cause the editors of the publication either to doubt Randall's accuracy or to conduct further investigation.

Joseph v. Xerox Corporation, 594 F.Supp. 330 (D.C.Cir. 1984) [ELR 7:3:14]

New York Civil Rights Law.

A New York trial court has granted summary judgment to an individual whose nude photograph was used, without written consent, in a book entitled "World Guide to Nude Beaches and Recreation." Summary judgment was appropriate, ruled the court, although the complaint did not allege, explicitly, the violation of sections 50 and 51 of New York's Civil Rights Law, or that the photographs were used "for advertising purposes or for the purpose of trade." Justice Greenfield rejected the publisher's argument that the pictures were incidental to a matter of public interest, noting that "There may indeed be widespread interest in nude pictures, but that alone does not make their publication newsworthy rather than commercial." The court found it apparent that the

publication of the photographs was intended to stimulate sales of the book, particularly since 200 such photographs of various individuals were included in the 218 page work. And since "There is no constitutional right ... to uninhibited commercial exploitation," Justice Greenfield concluded that damages were available under sections 50/51 because the use of the photographs was not a protected form of speech.

Creel v. Crown Publishers, 11 Med.L.Rptr. 1541 (N.Y.Cnty. 1985) [ELR 7:3:14]

Motion Picture License Agreement.

A Federal District Court in New York has ruled that Demalco Ltd., the holder of a distribution license for the film "Satanik," did not adequately allege causes of

action for conspiracy to defraud or for tortious interference with contractual relations in the company's lawsuit against C. Ervin Feltner, its former vice president. During the time that Feltner worked for Demalco, the company assigned its rights to Satanik for a ten-year period to Monroe Rapaport; the license was to expire in 1981. However, Demalco alleged that in 1980, Feltner assisted Rapaport in perpetrating a plan to license Rapaport's almost expired rights in the film to Lorimar Distribution International for a term extending to October 1986. Feltner purportedly was to receive part of the proceeds of the license for his part in the alleged scheme. Demalco learned of the unauthorized licensing agreement in the spring of 1982, and notified Lorimar that Rapaport no longer had any rights to the film. Lorimar then canceled its agreement with Rapaport. In Demalco's action against Feltner, the company claimed that the licensing scheme prevented it from being able to license the film

since December 1981 and sought to recover damages, legal fees and expenses for a related arbitration proceeding. In dismissing Demalco's claims, Federal District Court Judge Edward Weinfeld pointed out that an alleged civil conspiracy to commit fraud is not actionable, absent an underlying independent tort. Demalco did not adequately plead the five essential elements of fraud, the court held. Furthermore a claim of prima facie tort was not available to Demalco, because the company did not claim that malice was Feltner's sole motivation for participating in the alleged scheme. The absence of malice also impaired Demalco's claim of tortious interference with contract, as did the fact that Demalco successfully thwarted the attempted licensing of film rights to Lorimar.

Demalco v. Feltner, 588 F.Supp. 1277 (S.D.N.Y. 1984)
[ELR 7:3:15]

Trade Name.

Nautilus devotees (of the male persuasion) will be pleased to learn that during visits to Massachusetts, they may identify themselves as the "World's Strongest Man" without fear of (legal) reprisal from William Kazmaier, the three-time winner of the "World's Strongest Man" competition. When Kazmaier saw a Ford Motor Company television commercial which referred to John Wooten as the "World's Strongest Man;" Kazmaier was displeased. He proceeded to bring an action against Wooten and Ford seeking damages and injunctive relief for alleged trade name infringement and the commission of unfair trade practices. A Federal District Court in Massachusetts granted the Ford parties' motion for summary judgment on all counts since the disputed title was

not subject to protection as a valid trade name. Kazmaier had not registered the title as a federal trademark or as a state trade name. And, under Massachusetts law, even if Kazmaier had been declared the "World's Strongest Man," he could not appropriate this phrase so as to prevent Wooten's use of the title, as long as Wooten did not present himself as William Kazmaier.

Kazmaier v. Wooten, 593 F.Supp. 390 (D.Mass. 1984)
[ELR 7:3:15]

Sports.

A Minnesota trial court ruling that professional basketball player Mychal Thompson had sufficient contact with the state for the assertion of personal jurisdiction over him has been upheld on appeal. Thompson, an

Oregon resident, challenged the court's jurisdiction in an action brought by the First National Bank of St. Paul seeking to recover loans extended to the Mychal Thompson Basketball Camp, Inc. Thompson was president of the corporation, worked at the camp during two summers, had agreed to permit the use of his name in camp advertising, and allegedly individually signed a \$20,000 guarantee of indebtedness and a \$10,000 promissory note on behalf of the camp. The appellate court found that these factors supported the denial of Thompson's motion to dismiss the action since the athlete had "purposefully availed himself of the privilege of conducting activities in Minnesota. . ." and the cause of action was directly related to his contacts with the state.

Thompson v. First National Bank of St. Paul, 360 N.W.2d 446 (Minn. App. 1985) [ELR 7:3:15]

Trademark Infringement.

Cherish Books has been adjudged the owner of the trademark "Cherish Romance" in connection with a series of paperback romance novels and has been awarded permanent injunctive relief in its counterclaim alleging various causes of action against Thomas Nelson, Inc. Nelson had claimed to be the owner of the trademark "Cherish Romances." But a Federal District Court in New York ruled that Cherish was the first user, in commerce, of its almost identical mark. Furthermore, Cherish had demonstrated the requisite likelihood of consumer confusion since the books would be competing "head to head displaying virtually the same mark on the same product to the same consumers," and also demonstrated that consumers identified the mark with Cherish as the source of the novels. On the basis of these facts and Cherish's showing that the sales of its

novels probably would be harmed if Nelson continued to use the phrase "Cherish Romances," the court granted Cherish's request for a permanent injunction and dismissed Nelson's action. However, the court found that it would be inappropriate to award Cherish compensatory or punitive damages or attorneys fees and refused to recall Nelson's books for destruction.

Thomas Nelson, Inc. v. Cherish Books Ltd., 595 F.Supp. 989 (S.D.N.Y. 1984) [ELR 7:3:15]

Workers Compensation.

In October 1978, Edward F. Mulcahy, the sports editor of the Pawtucket Times in Rhode Island, died of a cerebral hemorrhage five days after attending and reporting on a professional football game. Mulcahy's widow

sought workers compensation payments, alleging that the death was attributable to Mulcahy's employment. After an initial ruling rejecting the claim, an appellate commission granted Mrs. Mulcahy about \$55,000 in retroactive benefits and weekly payments of \$185 for the rest of her life. The appellate commission's ruling has been upheld by the Rhode Island Supreme Court. The court noted that Rhode Island is a state in which the workers compensation statute does not require proof of an accidental injury in order to award compensation to an injured worker. In cases involving workers who have suffered heart attacks, a causal relationship between the work and the injury must be shown. But this "causal relationship" is not equivalent to the proximate cause standard in negligence actions. Rather, a party must demonstrate that "the conditions and nature of the employment contributed to the injury." The court stated that the principles developed in the heart attack cases

would apply in this instance where a failure of the cardiovascular system occurred, noting that "an employer takes its workers as it finds them Thus, when an employee aggravates an existing condition, and the result is an incapacity for work, the employee is entitled to compensation for the incapacity. The court concluded that the evidence presented, including the testimony of several medical experts, was sufficient to support the finding that Mulcahy's death was due to a cerebral hemorrhage resulting from the aggravation of his preexisting hypertension. Many of the witnesses stated that the stress of meeting numerous deadlines and of working varied schedules could have aggravated this hypertension to the point where the fatal attack occurred.

Mulcahy v. New England Newspapers, Inc., 488 A.2d 681 (R.I. 1985) [ELR 7:3:16]

Workers Compensation.

When the coach of the Adirondack Red Wings, a farm club affiliate of the Detroit Hockey Club, Inc., died about four weeks prior to the opening of training camp while jogging near his home, an administrative law judge granted death benefits under the workers compensation law to the coach's widow and minor son. The coach's death from a coronary-related incident arose out of the course of his employment, according to the administrative law judge, whose decision was affirmed by the Workers Compensation Board. But a New York appellate court has reversed the Board's finding, on the ground that the coach was not contractually required to maintain excellent physical condition. The employer may have had an expectation that the coach would be in good physical condition at the opening of training camp, but such an expectation did not supply the requisite

"nexus" to the coach's off-season exercise so that the death, possibly precipitated by physical exertion, arose "out of and in the course of employment." There was no suggestion that the coach's employment contract would have been terminated if he had not engaged in his personal exercise program, declared the court as it declined to enlarge the workers compensation law into "an insurance policy."

Wilson v. Detroit Hockey Club, Inc., 483 N.Y.S.2d 819 (N.Y.App. 1984) [ELR 7:3:16]

Artist Dwelling Law.

A New York trial court has ordered the city's Department of Cultural Affairs to reconsider a photographer's petition for artist certification. Artist certification is

necessary, under New York's Multiple Dwelling Law, in order for an individual to qualify for joint livingwork space in a district of the city designated for such housing arrangements. The agency's ruling, which was based on the ground that the photographer "failed to demonstrate a clear commitment to photography as a fine art and ... failed to indicate a sufficient history of professional experience in fine art photography," was upheld by the Artists Certification Appeals Board. New York Supreme Court Justice Smith noted that the question of whether the photographer was an artist under the applicable statutory definition was a determination best left to the Department of Cultural Affairs, but that the agency had not promulgated any formal rules, regulations or procedures to be followed in making such determinations. The guidelines used by the agency were "too general, vague and prone to subjective analysis to be considered reasonable criteria in determining who is an artist for the

purpose of determining eligibility for joint living-work quarters for artists." Thus, in remanding the matter, Justice Smith stated that the photographer's petition would have to be reviewed under new definite and objective guidelines to be adopted by the agency.

Matter of Marhoffer, New York Daily Journal, p. 13, col. 4, (N.Y.Cnty., Jan. 14, 1985) [ELR 7:3:16]

IN THE NEWS

Jury awards \$200,000 to journalist for ABC's failure to comply with promise of on-air credit

A Federal District Court jury has awarded freelance journalist Peter Peckarsky \$150,000 in compensatory

damages and \$50,000 in punitive damages in Peckarsky's claim for fraudulent misrepresentation against American Broadcasting Companies, Inc.

Peckarsky contended that an ABC news executive orally promised to give him on-air credit for a report detailing alleged irregularities in President Carter's personal and campaign finances. But the story was broadcast in October 1978 on ABC's "World News Tonight" and "Good Morning America" without the agreed-upon credit, according to Peckarsky.

The jury ruled in favor of ABC on the journalist's separate breach of contract claim. [Aug. 1985] [ELR 7:3:17]

Los Angeles judge imposes \$10,000 fine and 90-day jail term on adult film producer convicted under state "pandering" law

Los Angeles Superior Court Judge James A. Albracht has fined adult film producer Robert Harold Freeman \$10,000 and sentenced the producer to 90 days in county jail and a five-year probation term pursuant to a jury finding that Freeman was guilty of five felony counts of pandering.

Freeman is the first filmmaker to be convicted under a 1982 law which provides for a mandatory three-year state prison term for individuals who hire people to perform sex acts. The prosecutors charged that the women Freeman hired to appear in the X-rated theatrical film "Caught From Behind, Part II" were prostitutes, not actresses.

In sentencing Freeman, Judge Albracht called the three-year minimum sentence "cruel and unusual punishment," and "grossly disproportionate to the offense." And the court stayed the imposition of the fine and jail term pending Freeman's appeal of the conviction. The

prosecutors in the case have indicated that they also may appeal the reduced sentence. [Aug. 1985] [ELR 7:3:17]

Federal Court of Appeals grants Metromedia's request to set aside \$325,000 jury award to former television news anchor Christine Craft

A Federal Court of Appeals in Missouri (via a three judge panel) has overruled a jury verdict which awarded \$325,000 to former television new anchor Christine Craft. The court also denied Craft a new trial on her sex discrimination action against Metromedia, Inc., the former owner of television station KMBC in Kansas City.

A trial judge has dismissed Craft's sex discrimination claim in which it was alleged that station officials demoted her to reporter from co-anchor because of her on-air appearance. The jury award was based on Craft's

fraud claim in which she contended that Metromedia officials had falsely promised that Craft would not be required to undertake substantial changes in her appearance as a condition of employment. A Federal District Court judge refused to set aside this verdict (see ELR 5:11:19; 5:9:18; 5:7:12). But the Court of Appeals concluded that Craft failed to establish "a submissible case of fraud." [Aug. 1985] [ELR 7:3:17]

ABC settles sex harassment action brought by former employee

ABC has reached a settlement with Cecily Coleman, a former network employee, who had charged in a sex harassment suit against the company that she was discharged by ABC after complaining that her boss had sexually harassed and assaulted her. Details of the

settlement, which was reached as a trial was scheduled to begin, were not announced. [Aug. 1985] [ELR 7:3:17]

WASHINGTON MONITOR

Federal Communications Commission refuses to reconsider denial of Central Intelligence Agency's Fairness Doctrine complaint against ABC News; but Commission declines to prohibit federal agencies from filing Fairness Doctrine complaints against broadcast licensees

The Federal Communications Commission has refused to reconsider its ruling (ELR 6:9:22) rejecting the Central Intelligence Agency's Fairness Doctrine complaint against ABC News.

The CIA had challenged an "ABC World News Tonight" broadcast concerning alleged covert operations conducted by the agency via a now-defunct investment firm in Hawaii and an unsubstantiated claim that the agency plotted to assassinate a Honolulu businessman who may have worked for the agency. Although ABC admitted that it could not support certain statements in the challenged report, the FCC's Mass Media Bureau concluded that the CIA had not presented evidence that ABC falsified the news or intended to deceive its audience.

The Commission also denied a request by the American Civil Liberties Union which had asked the FCC to prohibit government agencies from filing Fairness Doctrine complaints against broadcasters. Commentators have expressed the view that allowing federal agencies to contest the fairness of news broadcasts will have a

"chilling effect" on investigative reporting. [Aug. 1985]
[ELR 7:3:18]

DEPARTMENTS

Book Notes:

Representing Professional Athletes and Teams 1985 by Philip R. Hochberg and Martin E. Blackman (Editors)

This more than 700-page volume was compiled in connection with PLI's annual sports law program, held this past June in New York City. It contains cases, outlines, forms and other materials on a wide variety of topics, including: player agent regulation; tax planning for athletes; student eligibility issues; product endorsements

and promotions; television licensing arrangements; and team relocations.

The book is available for \$40 directly from the Practising Law Institute, 810 Seventh Avenue, New York, N.Y. 10019; phone (212) 765-5700. (Catalogue number G4-3767.) [ELR 7:3:19]

Current Developments in Copyright Law 1985 by David Goldberg (Editor)

Ever since Congress revised the Copyright Act in 1976, the Practising Law Institute has conducted periodic programs on new developments under that law. This book was compiled in connection with PLI's 1985 copyright seminar, conducted last January in New York City. The volume is more than 800 pages in length and includes a wide variety of materials, including lecture

outlines, article reprints, appellate briefs, and Copyright Office releases. Among the topics covered are: recent subject matter issues, including protection for computer programs and chips; copyright formalities; ownership, transfer and recordation; duration, renewal and termination; infringement litigation and remedies, including the use of the Customs Service and the International Trade Commission to protect copyrighted works; copyright protection for factual works and characters; the fair use privilege; and legislative, international, and administrative developments.

The book is available for \$40 directly from the Practising Law Institute, 810 Seventh Avenue, New York, N.Y. 10019; phone (212) 765-5700. (Catalogue number G4-3760.) [ELR 7:3:19]

The New Era in CATV: The Cable Franchise Policy and Communications Act of 1984 by Gary L. Christensen (Editor)

Late last year, Congress adopted, and the President signed into law, the Cable Franchise Policy and Communications Act of 1984. The name of the law is a mouthful, and its significance is just as great. In January of this year, the Practising Law Institute offered a one-day program in New York City exploring the implications of this new law, and this 284-page book was prepared for distribution in connection with that program. The volume contains some useful materials, not all of them readily available elsewhere. In addition to the text of the Act and the House Report thereon, the book includes speaker outlines and related FCC materials. These materials analyze specific provisions of the Act

and its policy objectives; assess future issues; and explore the FCC's responsibilities under the new regime.

The book is available for \$40 directly from the Practising Law Institute, 810 Seventh Avenue, New York, N.Y. 10019; phone (212) 765-5700. (Catalogue number G4-3764.) [ELR 7:3:19]

Television Piracy by Anthony F. LoFrisko (Editor)

As readers of the Entertainment Law Reporter are aware, the unauthorized interception of television signals has become a commercially significant and frequently litigated issue. Congress attempted to deal with this matter in the Cable Communications Policy Act of 1984, adopted late last year. And in May of this year, the Practising Law Institute sponsored a one-day program in New York City covering the issues that are

involved. This book was written in connection with that program. Though its 117-page length makes it relatively slim by PLI's standards, the entire volume consists of outlines authored especially for this program. Its individual chapters cover the application of the new act to television piracy; injunctive relief, seizure orders, attachment and contempt; money damages and other remedies available under the new law; the effect of settlement agreements; and penal prosecutions under the new law.

The book is available for \$40 directly from the Practising Law Institute, 810 Seventh Avenue, New York, N.Y. 10019; phone (212) 765-5700. (Catalogue Number G4-3766.) [ELR 7:3:19]

In the Law Reviews:

The Loyola of Los Angeles Entertainment Law Journal has published Volume 5 which contains the following articles:

Film Composing Agreements: Legal and Business Concerns by Mark Halloran, 5 Loyola of Los Angeles Entertainment Law Journal 1 (1985)

Name That Tune: A Proposal for an Intrinsic Test of Musical Plagiarism by Raphael Metzger, 5 Loyola of Los Angeles Entertainment Law Journal 61 (1985)

Redefining the Rights and Obligations of Publishers and Authors by Melvin Simensky, 5 Loyola of Los Angeles Entertainment Law Journal 111 (1985)

Casenotes Involving Video Games, Right of Publicity, Cable and Television, Film and Motion Pictures, Music, Sports and Books and Magazines, 5 Loyola of Los Angeles Entertainment Law Journal 129 (1985)

Entertainment Lawyers Directory, 5 Loyola of Los Angeles Entertainment Law Journal 297 (1985)

Comm/Ent, Hastings Journal of Communications and Entertainment Law, Volume 7, contains the following articles:

Changing the Rules of the Game: The New FCC Regulations on Political Debates by Erwin Chemerinsky, 7 Comm/Ent 1 (1984)

The Prime Time Access Rule: Six Commandments for Inept Regulation by Thomas G. Krattenmaker, 7 Comm/Ent 19 (1984)

Freer Expression or Greater Repression? UNESCO and the Licensing of Journalists by Karen D. Kraemer, 7 Comm/Ent 39 (1984)

Remedies for Misappropriation of Motion Picture and Television Story Ideas by Jonathan D. Cohen, 7 Comm/Ent 85 (1984)

Writing with Light: The Metaphysics of the Copyright Process in the Betamax Cases by David C. Farmer, 7 Comm/Ent III (1984)

Protection of Character Rights by Melvin Simensky, 3/4 The Entertainment and Sports Lawyer 1 (1985)

(published by the ABA Forum Committee on the Entertainment and Sports Industries, 750 North Lake Shore Drive, Chicago, Illinois 60611)

MBPC: Requiescat in Pace, APC: Quo Vadis? by Alvin Deutsch, 3/4 The Entertainment and Sports Lawyer 3 (1985) (published by the ABA Forum Committee on the Entertainment and Sports Industries, 750 North Lake Shore Drive, Chicago, Illinois 60611)

Artists' Rights by David Drum, 8/5 The Los Angeles Lawyer 10 (1985) (published by the Los Angeles County Bar Association, P.O. Box 55020, Los Angeles, CA 90055)

Green v. Broadcasting Corp. of New Zealand Game Shows - Are They Worth the Royalties Paid? by Robyn Durie, 7/5 European Intellectual Property Review 147

(1985) (published by ESC Publishing Limited, 25 Beaumont Street, Oxford OX1 1NP, England)

Deregulating Commercial Television: Will the Marketplace Watch Out for Children? 34 The American University Law Review 141 (1985)

Section 10(j) of the National Labor Relations Act and the 1982 National League Players Strike by Ethan Lock, 1 Arizona State Law Journal 113 (1985)

Rethinking the Rule of Reason: From Professional Engineers to NCAA, 6 Duke Law Journal 1297 ((1984)

Pay TV-Piracy and the Law: It's Time to Clear Up the Confusion by Susan C. Portin, 33 Emory Law Journal 825 (1984)

Grove City College v. Bell: Restricting the Scope of Title IX by Joan M. Griffin, 8 Harvard Women's Law Journal 179 (1985)

Curtailement of Early Election Predictions: Can We Predict the Outcome?, 36 University of Florida Law Review 489 (1984)

An Attempt to Regulate Pornography Through Civil Rights Legislation: Is It Constitutional?, 16 The University of Toledo Law Review 231 (1984)

Restrictions on Press Coverage of Military Operations: The Right of Access, Grenada and "Off-the-Record Wars" by Paul G. Cassell, 73 Georgetown Law Journal 931 (1985)

Retained Rights of Authors, Artists, and Composers under French Law of Literary and Artistic Property by Van Kirk Reeves, Ronald G. Bauer and Stephane Lieser, 14/4 *The Journal of Arts Management and Law* 7 (1985) (published by Heldref Publications, 4000 Albemarle Street NW, Washington, D.C. 20016)

The Interrelationships Between Public and Private Funding of the Arts in the United States by J. Mark Davidson Schuster, 14/4 *The Journal of Arts Management and Law* 77 (1985) (published by Heldref Publications, 4000 Albemarle Street NW, Washington, D.C. 20016)

Cable Television Content Regulation After Crisp: Is There Anything Left? by John W. Witt, 17 *The Urban Lawyer* 277 (1985) (published by the American Bar Association, 750 North Lake Shore Drive, Chicago, Illinois 60611)

Personal Jurisdiction over Publishers in Defamation Actions: A Current Assessment, 30 Villanova Law Review 193 (1985)
[ELR 7:3:21]