BUSINESS AFFAIRS

A Movie and TV Producer's Guide to Acquiring and Earning Income from Soundtrack Music (Part 1)

by Lionel S. Sobel

In the Spring of 1984, Paramount Pictures released an unpretentious little film about conflict between the generations in a small, rural town. Entitled "Footloose," the movie was produced by industry-veteran Daniel Melnick, who earlier had produced "That's Entertainment," a compilation of clips from popular MGM films made during the golden age of the Hollywood musical.

"Footloose" too is a musical, though not one in the golden-age style. Instead, "Footloose" is a 1980s-style musical, one whose lineage can be traced to such movies as "Saturday Night Fever," "Grease," "Fame" and "Flashdance." "Footloose," in other words, features a rock-'n-roll score, the soundtrack album from which propelled the movie to boxoffice success. That success reminded the industry that there is a commercial, as well as artistic, relationship between a movie and its score - and in doing so, "Footloose" inspired what Newsweek later characterized as "an unprecedented number of rock-ribbed films" that went into production soon thereafter.

The production of "Footloose" illustrates another business reality as well. The movie business is a deal-intensive and document-intensive industry. And the music part of the movie business can be the most deal-and-document intensive part of all. Forty-seven separate agreements had to be made to acquire and exploit the rights to the nine songs that are in the "Flashdance" soundtrack - on average, more than five deals per song.

And creating the "Flashdance" score was not as legally complicated as it could have been, because all nine of its songs were written and recorded expressly for the movie. Had any of them been preexisting songs or recordings, even more deals would have been required, assuming they could have been made. (Sometimes, they can't. Last year, Bruce Springsteen gave Peter Bogdanovich permission to use three Springsteen songs in the movie "Mask" which Bogdanovich was then directing for Universal Pictures. But Springsteen had recorded those songs for CBS Records, and CBS and Universal could not come to terms. As a result, before the movie was released, Springsteen's songs were replaced with other songs recorded by Bob Seger, over Bogdanovich's objections.)

From a business affairs point of view, movie music deals are based on principles that involve a fascinating hodgepodge of copyright, labor, antitrust and contract law. Movie music agreements are necessarily influenced by this legal hodgepodge, and seem complicated for that very reason. There is of course a logical foundation beneath the array of deals that must be made, and the purpose of this article is to explain that foundation.

Acquiring Music

When musicians classify music, they distinguish between classical, jazz, rock-'n-roll, country-and-western, and other musical styles. Movie and television producers make similar distinctions. But musical style classifications have no legal significance. So when lawyers classify music, they distinguish between "specially ordered or commissioned music" on the one hand, and "preexisting music" on the other.

"Specially ordered or commissioned music" is music which is written especially for a particular movie or TV program, at the producer's request. The rock-'n-roll songs in "Footloose" are examples of such music, and so is the orchestral score written by Bruce Broughton for the movie "Silverado."

"Preexisting music" is music which was written and published before a producer decided to use it in a soundtrack. The songs in "The Big Chill" are examples of this type of music.

Lawyers distinguish between "specially ordered" and "preexisting" music, because the movie and television rights to each are acquired in different ways, and because the income earned by each is (by custom and law) split in different ways as well.

Specially Ordered Music

Producers obtain specially ordered or commissioned music by hiring a composer or a songwriter to create it.

Sometimes, a composer and several songwriters are hired to work on a single project. The score for "Ghostbusters," for example, was created by composer Elmer Bernstein and several songwriters including Ray Parker Jr. Bernstein composed the movie's main tide theme and dramatic underscoring, while Parker wrote (and performed) the title song.

When hiring composers and songwriters, producers use written agreements. There are, however, no industry-wide "standard" forms, nor even "customary" deals. Terms vary enormously from project to project, and depend on such things as whether the film is a theatrical motion picture or television program, the film's total budget, and the composer/songwriter's reputation, experience and credits. (For an excellent overview and a provision-by-provision analysis of one form of film composer agreement, see Film Composing Agreements:

Business and Legal Concerns by Mark Halloran, 5 Loyola Entertainment Law Journal 1 (1985).)

Composers' Agreements

A composer's agreement (as distinguished from a songwriter's agreement) typically requires the composer to write, arrange, and orchestrate all of the dramatic underscoring and theme music in a film, and to conduct the musicians who perform that music during the soundtrack recording session. If the film is a big-budget theatrical motion picture, an established composer may earn a fixed fee of $75,000 to $150,000 for these services.

Such agreements almost always provide that the music written by the composer is a "work made for hire," so that under the Copyright Act, the copyright to the music automatically belongs to the production company rather than to the composer. (See, e.g., Sobel, A Practical

Guide to Copyright Ownership and Transfer: The Differences Between Licenses, Assignments and Works Made for Hire ... and Suggestions for Analyzing Which One is "Best" for a Particular Transaction, ELR 5:9:3 (1984).) Although the copyright almost always belongs to the producer, it is customary for composers' agreements to provide that in addition to the composer's fixed compensation, the composer shall be entitled to agreed-upon publishing royalties from specified non-theatrical uses of the music (such as its use in record albums, non-theatrical public performances, and sheet music sales).

In addition to a fixed fee and a publishing royalty, an established composer may receive an artist's royalty in connection with the sale of soundtrack albums (for performing services rendered as a conductor), and perhaps an additional royalty as the soundtrack album producer.

In a deal of this sort, the expenses of recording the movie soundtrack (for such things as musicians' salaries and studio rental fees) are paid by the production company. The composer does not pay them, nor are such expenses deducted from the composer's fixed fee or royalties. On the other hand, costs attributable to producing a soundtrack album may be treated as "advances" against the album royalties earned by the composer as a performing artist, just as they would be in agreements customarily entered into between singers and record companies.

Composers' agreements used in connection with low-budget theatrical movies differ substantially from those used for big-budget productions. The composer may not have an established reputation in the movie business, and may even be looking for his or her first movie scoring credit. The fixed fee is much smaller, in some cases as little as $10,000 or $15,000.

Moreover, the agreement may require the composer to do much more than simply write, arrange, orchestrate and conduct the music. The composer may be required to perform as a musician during the soundtrack recording sessions. And the composer may even be required to produce and deliver - at the composer's own expense - a master tape recording of the music score.

In a low-budget deal of this sort, the composer may be entitled to publishing royalties, plus soundtrack album "artist" and "producer" royalties, just as an established composer would be in a big-budget picture agreement. Nevertheless, the deal is inherently different, if the composer is required to produce a master recording at his or her own expense, because those expenses may be as much as the composer's entire fixed fee. Indeed, if the composer's fixed fee is in the $10,000 to $15,000 range, the agreement necessarily (even if not expressly) contemplates the use of a non-union musician combo or an electronic synthesizer, rather than an orchestra. Even when the composer's fee is in the $25,000 to $50,000 range, there is a likelihood that recording expenses will exceed the composer's fee if a union orchestra of any size is used. Nevertheless, composers have been known to make such deals, in the belief that a motion picture scoring credit may be worth enough in the development of their careers to justify doing such projects even at a deficit.

Composers' agreements used in connection with network, prime-time television programs have elements in common with those used for big-budget theatrical productions as well as those used for low-budget theatricals. On the one hand, the soundtrack recording expenses for a network, prime-time television program would be paid by the program's producer, not by the composer, just as they would in a big-budget theatrical movie deal. On the other hand, the composer's fixed fee is likely to be as small, and perhaps smaller, than it would be for a low-budget theatrical (though the composer's publishing royalties from a network television program are likely to be much greater than they would be from a low-budget theatrical, for reasons that will be explained in a later part of this article).

Composers' agreements used in connection with daytime and non-network television programs are similar to lowbudget theatricals. Fixed fees will be relatively small. And the composer may be required to produce and deliver a master recording of the score, at the producer's own expense, using a combo or electronic synthesizer rather than an orchestra.

Union Status of Composers

One reason there is so much variation, and such an enormous financial spread, in the terms used to hire motion picture and television composers is that composers are not represented by a guild or union for collective bargaining purposes. From 1955 to 1972, movie and TV composers were represented by the Composers and Lyricists Guild of America. In 1972, however, after a two-month-old strike failed to persuade production companies to share ownership of soundtrack score copyrights with composers, Guild composers filed an antitrust suit, known as the Bernstein case, against the members of the Association of Motion Picture and Television Producers. Under federal labor and antitrust law, in order to win their case, the composers had to establish that they were independent contractors rather than employees. Since only employees-and not independent contractors-are eligible (under federal labor law) to form unions, the Guild relinquished its union status.

The composers' case was finally settled in 1979. Though the settlement did not give composers an ownership interest in the copyrights to the music scores they create, the settlement does give composers certain rights to exploit that music, if producers do not, within specified time periods. (These rights will be outlined in a later part of this article. For further detail, see, Havlicek and Kelso, The Rights of Composers and Lyricists: Before and After Bernstein, 8 Columbia Art & the Law 439 (1984).)

After the composers settled their antitrust suit in 1979, the Composers and Lyricists Guild began to revitalize itself and to rebuild its membership rolls. But despite some success in doing so, it was an informal professional organization, not a labor union.

Then in 1981 or so, CBS began seeking options to acquire, directly from composers and music publishers, public performance rights for the soundtrack music in the programs that CBS produced or acquired for network broadcast. (See, Sobel, CBS Tests its Clout, ELR 5:1:4 (1983).) CBS had always held blanket licenses from ASCAP and BMI, making such options unnecessary, unless CBS intended to let those blanket licenses expire. It thus appeared that CBS did intend to let its blanket licenses expire, or at least was giving serious consideration to not renewing them.

Moreover, the specter of the end of blanket licensing was magnified in 1982 when, in a case known as the Buffalo Broadcasting case, a Federal District Court decided that the blanket licenses issued by ASCAP and BMI to local television stations violated federal antitrust law. (ELR 4:9:1, 4:19:2.)

Suddenly, composers found it extremely important to be represented by a formal union once again, especially in conjunction with television scoring work. In order to avoid being saddled with tactical positions taken by the old Composers and Lyricists Guild in the Bernstein case, composers formed a new union known as the Society of Composers and Lyricists. Production companies refused to recognize or bargain with the new Society, however. And when the Society petitioned the National Labor Relations Board for certification as a formal labor union, the NLRB's Regional Director ruled that film and TV composers are not eligible to be represented by a formal union, because they are "independent contractors" rather than true "employees." (ELR 6:10:7)

Shortly before the NLRB ruled that film and TV composers do not have the right to form a union, a Federal Court of Appeals reversed the Buffalo Broadcasting decision and held that the blanket licenses issued to local television stations by ASCAP and BMI do not violate the antitrust laws. (ELR 6:5:3) Thus, part of the reason composers felt they needed a new union was eliminated. And as matters stand at this time, they do not have a union.

Although composers are not represented by a union, the American Federation of Musicians represents orchestrators and conductors (as well as musicians) in collective bargaining with production companies that are members of the Alliance of Motion Picture and Television Producers. Since composers' agreements usually require composers to orchestrate and conduct their film and TV scores, composers are represented by the AFofM in those capacities. Under the AFofM collective bargaining agreement with the AMPTP, orchestrators and conductors must be paid a specified minimum wage. As a result, it is common for a composer's agreement to split the composer's fixed fee into two parts: a specified amount for orchestrating and conducting services rendered as an AFofM member, and a separate specified amount for composing services. Agreements that do not split the fixed fee into two parts often accomplish the same objective by providing that the specified fixed fee includes compensation at AFofM "scale" for any services rendered by the composer which come under the jurisdiction of the AFofM.

Songwriters' Agreements

When producers hire songwriters to write songs especially for a movie or television program, two types of agreements are commonly used. Some production companies use their composer's agreement form, and simply modify it slightly to indicate that the songwriter is to write a certain number of songs rather than an entire score. This works well, so long as the modifications are done carefully and completely. For example, language concerning "orchestrations" and "conducting" is likely to be irrelevant where rock'n-roll songs are being written, and should be removed to avoid later confusion.

The second type of agreement commonly used by producers to hire songwriters is the same sort of agreement that music publishing companies use to hire songwriters. When this sort of an agreement is used, the producer -

or its music publishing subsidiary - becomes the song's "publisher." There is no "standard" songwriter's agreement - in the movie business or the music publishing business. Even in music publishing, there are at least two broad categories of songwriters' agreements: single song agreements (covering a particular, named song), and term agreements (covering all songs that are written during a specified time period). Movie and television producers are more likely to use the single song version, and will specify both the number of songs to be written and their movie or TV-use purpose.

The producer will want the agreement to provide that the songs are "works made for hire," so the copyrights to those songs belong, automatically, to the producer. (Such a pro vision is customary when composers are hired to write dramatic scores.) The songwriter, on the other hand, may own his or her own music publishing company, and may want to enter into a "co-publishing" agreement pursuant to which ownership of the copyright is shared by the producer and the writer's own publishing company. Where there are such conflicting desires, the outcome of negotiations depends on the relative bargaining powers of the parties. The outcome also is likely to be influenced by how much the producer is willing to pay the songwriter as a fixed fee for the use of the song: the less the fixed fee, the greater the likelihood that the songwriter will insist on a co-publishing arrangement.

Oftentimes, songwriters do not have their own music publishing companies, but are signed exclusively to an established published company (such as Almo/Irving Music, CBS Songs or Warner Bros. Music). If a producer wishes to hire such a songwriter, the producer must deal not only with the songwriter, but with the writer's exclusive publishing company as well. A co-publishing agreementbetween the producer and the songwriter's exclusive publishing company-is a possible and logical way to accommodate the interests and legal rights of all three panies.

Union Status of Songwriters

Songwriters, like composers, do not have a union to represent them in collective bargaining with producers. Many songwriters do belong to the American Guild of Authors and Composers, which is also known as The Songwriters Guild. And the Guild has developed a widely-circulated, printed form agreement known as the "Popular Songwriters Contract." However, the Guild is not a labor union, and the Popular Songwriters Contract is not a collective bargaining agreement. It is a model form that contains provisions that are favorable to songwriters. And songwriters (and their lawyers) use it as a guide in negotiations with music publishing companies (few if any of which use it themselves).

Although songwriters are not represented by a union, virtually all songwriters also are musicians and play the piano, guitar or some other instrument themselves. Thus songwriters may belong to the AFofM which represents musicians, including those who play soundtrack recording sessions for producers who are members of the AMPTP. Songwriters often play an instrument at the sessions where their own songs are being recorded, and when they do, songwriters are paid AFofM scale as musicians. If this possibility is not anticipated when the songwriter is hired, it can give rise to later disputes.

For example, if a composer's agreement form has been used to hire the songwriter, the agreement may provide that the songwriter's fixed fee includes payment for services rendered as an AFofM member, Such a provision would conform to industry custom for hiring a composer to create an entire dramatic score and to conduct the orchestra that performs that score in the soundtrack recording session. it is not customary, however, for a songwriter's fixed fee to include the amount that a songwriter may earn as an instrument player at the soundtrack recording session. indeed, if the songwriter were hired to create a song for a television program - even a prime-time, network program - the songwriter's fixed fee for songwriting may not be much greater (if any greater at all) than his or her salary, at AFofM scale, for performing as a musician at the recording session.

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[ELR 7:5:3]

RECENT CASES

"Indiana Jones" foils copyright infringement action brought by author of screenplay about archaeologist-adventurer; lack of substantial similarity between screenplay and the film "Raiders of the Lost Ark" results in Federal District Court granting summary judgment to Paramount Pictures

While it may not rival the risk of searching for treasure in remote jungles or deserts, granting summary judgment in a copyright infringement action calls for a certain "espirit" and bravado. Federal District Court Judge Joseph M. McLaughlin was called upon to demonstrate these qualities in considering Gary L. Zambito's action against Paramount Pictures, Gulf & Western, Lucas-Film, Ltd., George Lucas, and Steven Spielberg, among others, alleging that Paramount's film "Raiders of the

Lost Ark" infringed copyrightable material contained in Zambito's screenplay entitled "Black Rainbow."

The Paramount parties conceded, for purposes of the summary judgment motion, the validity of Zambito's copyright and Paramount's access to the Black Rainbow work. The court then found that the two works were not sufficiently similar to raise a genuine issue of fact as to copyright infringement and granted summary judgment to Paramount.

After recalling the principles that a copyright protects only an author's original expression of an idea, not the idea itself, and that a copyright affords no protection to "scenes a faire," Judge McLaughlin turned to Zambito's claim that there existed actionable similarities in the "characters, devices and action" used to express the unprotectible idea of an archaeologist searching for artifacts.

Black Rainbow was the story of archaeologist Zeke Banarro's expedition to Peru to search for pre-Columbian gold artifacts, and his encounters with Indian natives, anaconda snakes and other antagonists. As described by the court, Raiders was the "swashbuckling adventure story" of archaeologist Indiana Jones and his mission to discover the lost Ark of the Covenant.

Judge McLaughlin found that the mood and "feel" of the two works was completely different - Rainbow was a "somber, vulgar script replete with overt sexual scenes, cocaine smuggling and cold-blooded killing;" Raiders was a "tongue-in-cheek, Jack Armstrong, all-American adventure story." Furthermore, the settings of the two works differed, as did the "villains;" the female players and the time frame.

Zambito's other claims of similarity were categorized by the court primarily as unprotectible scenes a faire, all of which also contained distinguishing features and which warranted the order granting summary judgment to the Paramount parties.

Zambito v. Paramount Pictures Corp., Case No. 83 CV 4809 (E.D.N.Y., July 22, 1985) [ELR 7:5:7]

Woody Allen obtains injunctive relief in Lanham Act claim involving video rental chain's use of "look-alike" performer in advertisements; Federal District Court rejects New York Civil Rights law claim because ads did not use Allen's portrait or picture

During the past two years, Woody Allen, the writer-director responsible for "la-de-dah, la-de-dah," the orgasmatron and the revelation that Los Angeles' cultural life consists of the rule permitting a right turn on a red light, has been involved in an uncharacteristically dramatic confrontation with a nationally franchised video rental chain (see ELR 6:2:19).

National Video placed advertisements to promote its video rental services in the March 1984 and April 1984 issues of Video Review. The advertisements contained a photograph of Phil Boroff, a Woody Allen "look-alike," whose services were provided by Ron Smith's Celebrity Look-Alikes. Boroff was presented as a customer in a National Video store; it was not disputed that Boroffs physical features and his pose in the photograph were suggestive of Woody Allen. Furthermore, the setting of the photograph included a counter display of videotape cassettes of the films "Annie Hall" and "Bananas," two of Allen's most well-known works. Boroff was shown holding up a National Video V. 1. P. card, and the headline of the advertisement proclaimed: "Become a V.I.P. at National Video. We'll Make You Feel Like a Star."

The same photograph and headline also were used on countercards distributed to National Video's franchisees.

Allen claimed that the advertisement violated his right to privacy, right of publicity and the Lanham Act due to the use of his picture or portrait for commercial purposes without his permission and due to the likelihood of consumer confusion as to Allen's endorsement of National Video's services.

Federal District Court Chief Judge Motley first determined that a common law cause of action to "vindicate" the right of publicity does not exist in New York apart from sections 50/51 of the state's Civil Rights Law, citing Stephano v. News Group Publications, Inc. (ELR 6:1:11). However, the statute was not available to Allen because the National Video advertisement did not contain the requisite "portrait or picture" of the writer-director.

Allen argued that Boroffs physical resemblance to him, when viewed in conjunction with the attempt to invoke Allen's image, made the advertising photograph a portrait or picture of Allen. It was further argued that Allen was identifiable from the photograph even if everyone viewing the photograph might not actually identify him.

Judge Motley, who ultimately declared it unnecessary to resolve Allen's section 50/51 claim, nevertheless conducted a lengthy discussion of the "almost metaphysical question of when one person's face, presented in a certain context, becomes, as a matter of law, the face of another." The court adverted to cases holding that any recognizable likeness, not just an actual photograph, may qualify as a portrait or picture. But the use of a look-alike was more "problematic" for the court than the use of a painting, drawing or manikin since Boroff had a right to exploit his own face for commercial gain.

In the recent look-alike case involving Jacqueline Kennedy Onassis, a New York court did issue an injunction barring the use of an advertisement featuring a model who was made up to look like Mrs. Onassis (ELR 5: 10:10). The court found a violation of Mrs. Onassis' rights under sections 50/51 since the overall impression created was that Mrs. Onassis actually had appeared in the advertisement. Judge Motley stated that the holding in Onassis was consistent with section 50/51's requirement that there be an unauthorized commercial use of a portrait or picture, given the "realistic tone" of the advertisement, including the juxtaposition of well-known personalities with certain "counterfeit" figures. The unusual setting of the Dior advertisements and the strong suggestion of the actual presence of Mrs. Onassis, meant, according to Judge Motley, that the use of the look-alike model was, as a matter of law, a portrait of Mrs. Onassis.

Judge Motley declined to find that the National Video advertisement similarly created the illusion of Woody Allen's actual presence in the advertisement. The photograph contained several distinguishing features which led the court to state that no reasonable jury could find that some individual might not recognize that the advertisement contained a look-alike. In all, the advertisement's reference to Allen was not sufficient to render the photograph a portrait or picture of the writer-director.

Before concluding its discussion of sections 50/51, the court, in a footnote, suggested that the New York State Legislature might be called upon to devise a remedy "to protect the pecuniary interest of celebrities in the market value of their identities and to protect the public from the false implication of endorsement ... For a broader statute modeled on the Lanham Act might provide fuller protection for the interests threatened when a celebrity's endorsement is implied without the use of an actual 'portrait or picture.'"

The court then granted Allen's motion for summary judgment on his claim under section 43(a) of the Lanham Act, which prohibits the false description of products or their origins. The court pointed out that the Act has been held to apply to situations that would not qualify formally as trademark infringement, but that involve unfair competitive practices resulting in actual or potential deception. Allen possessed "standing" under the Lanham Act due to his commercial investment in the "drawing power" of his name and face in endorsing products and in marketing a career. Furthermore, applying the Lanham Act in this case would serve the public's interest in being free from deception when relying on a public figure's product endorsement.

Judge Motley cited Cher v. Forum International (ELR 4:13:1) in which Cher brought a Lanham Act claim when Forum magazine published, without authorization, an interview with the actress and falsely implied, in the magazine's advertising, that Cher read and endorsed the publication and had granted an exclusive interview. The Cher court held that the Lanham Act extended to misrepresentations in advertising as well as to the labeling of products and services and that no finding of an actual trademark was required.

Judge Motley embarked upon an evaluation of the oftapplied likelihood of confusion standard and found that: Allen's name and likeness were unique, positive and wellknown to the public; and that the resemblance between Allen and Boroff was strong and not disputed. Furthermore, Allen is involved in producing and distributing his films and is strongly identified with movies by the public. Thus, the audience toward which the National Video advertisement was aimed was the same audience to which Allen's own commercial efforts were directed-it was not required that Allen actually compete with National Video. The court chose not to rely on a consumer survey conducted by Allen on the issue of consumer confusion. Rather, the court noted that although the relevant consuming public was likely to be "comparatively sophisticated" about movies, this sophistication did not eliminate all likelihood of confusion which might arise from the advertisement, particularly upon a "cursory glance."

In turning to the final factor in the likelihood of confusion evaluation - the good or bad faith of National Video, Boroff and Ron Smith's Celebrity Look-Alikes - it was pointed out that the advertisement was designed intentionally to evoke an association with Woody Allen. As stated by the court, National Video "may not have intended to imply that Allen actually endorsed their product, but they happily risked creating that impression in an attempt to gain commercial advantage through reference to Allen's public image."

In addition, National Video faded to include a disclaimer on all but one of the company's uses of the photograph. The "inescapable conclusion," for the court was that the use of Boroffs photograph created a likelihood of confusion over Allen's endorsement of National Video's services. In reaching this conclusion, the court again pointed out that the erroneous endorsement standard was broader than the portrait or picture standard of sections 50/51, was easier to satisfy in this case, and was a standard the court might apply, as opposed to the question of identifiability under sections 50/51, which is generally a question of fact for the jury.

The court disagreed with Smith and Boroffs claim that their proposed disclaimer would have avoided consumer confusion. One advertisement containing the Boroff photograph did include the disclaimer - a not-likely-to-be-noticed line in tiny print at the bottom of the page. And the disclaimer stated only that a celebrity double was being used. This was insufficient as a matter of law, "in and of itself," stated Judge Motley to dispel the impression that Allen was involved with National Video's services. The court suggested that an effective disclaimer would have to make a clear and bold announcement of the celebrity's lack of endorsement.

Allen was granted injunctive relief preventing National Video, Smith and Boroff from presenting Boroff as Allen in advertising which would create the likelihood that a reasonable person might believe that Boroff really was Allen or that Allen had approved of Boroffs appearance. This carefully delineated injunction was required so as not to restrict totally Boroffs look-alike activities in settings where it would be clear that Boroff indeed was a look-alike - a clarification achieved by the use of a bold and unequivocal disclaimer, the staging of a photograph or the accompanying advertising copy.

Various claims by Smith and Boroff against National Video also were decided by the court, including a claim by Boroff against National Video for the violation of his rights under sections 50151. Judge Motley granted summary judgment to Boroff on this claim due to the absence of a valid release agreement.

Allen v. National Video, Inc., 226 U.S.P.Q. 483 (S.D.N.Y. 1985) [ELR 7:5:7]

Arbitrator rules that director's post-production rights in the film "Made in Hawaii" did not vest because 90 percent of principal photography was not completed prior to director's termination

Arbitrator Sara Adler has ruled that director Tommy Lee Wallace was not entitled to certain post-production rights on the film "Made in Hawaii" because Wallace directed less than 90 percent of the scheduled principal photography on the film.

Wallace directed first unit shooting in Hawaii for 35 days in August-September 1984. In March 1985, the film's producer notified the Directors Guild that Wallace had been fired. Subsequently, additional previously, scheduled shooting took place in Hawaii and in Los Angeles; a substitute director was hired to complete principal photography.

The Directors Guild and Wallace claimed that Hanauma Bay Productions, the producer of "Made in Hawaii'" had violated several provisions of the 1984 DGA Basic Agreement by failing to grant Wallace his director's cut, "cutting behind" Wallace, failing to consult with Wallace during post-production, failing to advise

Wallace of a preview, and hiring producer Mike Greco as a substitute director for certain filming.

After an expedited hearing, Arbitrator Adler first stated that the measure of Wallace's contribution to "scheduled principal photography" would be determined on the basis of the number of days of filming. The three first units scenes filmed in Los Angeles after September 1984 were originally intended to be shot and therefore were included as principal photography, notwithstanding the Directors Guild argument that principal photography referred only to originally scheduled continuous filming days. No reference to continuous filming appeared in the bargaining agreement, noted the arbitrator. Furthermore, there was no ground for finding that the additional photography was undertaken for the express purpose of defeating the intent of Section 7-503's vesting-of-rights provision.

Assuming that the measurement of a director's participation was to be made only with reference to first unit photography, Wallace directed 35 of 40 filming days, or 87.5 percent of the scheduled principal photography, according to the arbitrator, who then denied Wallace's claims seeking: to be reinstated as the director of the film; an injunction against the use of the principal photography shot by the substitute director; and an order allowing Wallace to complete a director's cut.

Hanauma Bay was fined the equivalent of five days salary and benefits for the work performed by Mike Greco in supervising the additional filming in Hawaii prior to the hiring of the substitute director.

In the Matter of the Arbitration between Directors Guild of America, Inc., and Hanauma Bay Productions, Inc., Expedited Opinion and Award (July 7, 1985) [ELR 7:5:9]

Manufacturer of bootleg Elvis Presley albums was not subject to prosecution under National Stolen Property Act, rules United States Supreme Court, because copyrighted musical works contained on the albums were not "stolen, converted or taken by fraud"

The United States Supreme Court has rules that the National Stolen Property Act may not be used to prosecute individuals charged with the interstate transportation of bootleg records when the complained-of conduct is the failure to obtain the consent of the copyright holders of the musical compositions performed on the records.

(Bootleg records are records containing an unauthorized copy of a commercially unreleased performance;

pirated records, on the other hand, contain unauthorized copies of performances already commercially released.)

Justice Blackmun described the extensive bootleg record operation conducted by Paul Edmond Dowling involving the manufacture and distribution of records featuring Elvis Presley. In the late 1970s, Dowling was mailing out several hundred packages a week to customers and arranging for large shipments of albums from Los Angeles to Richard Minor in Miami, Florida; Minor then would resell the albums. (Minor's conviction for his part in the bootleg operation is discussed separately below.)

Dowling eventually was convicted on one count of conspiracy to transport stolen property in interstate commerce; eight counts of interstate transportation of stolen property Act; nine counts of copyright infringement; and three counts of mail fraud. Dowling appealed from all of the convictions except those for copyright infringement;

a Federal Court of Appeals in California affirmed the convictions (ELR 6:9:9), relying on the decision in United States v. Belmont (ELR 6:9:9) where the court had held that the interstate transportation of videotape cassettes containing unauthorized copies of copyrighted motion pictures involved stolen goods within the meaning of the statute. As described by Justice Blackmun, the Court Of Appeals reasoned that the rights of copyright owners in their property were "indistinguishable" from ownership interests in other types of property and were equally deserving of protection under the statute. This view, however, was in conflict with the decision of another Federal Court of Appeals.

In resolving the conflict over the application of the statute, Justice Blackmun relied on a narrow interpretation of section 2314. Dowling did not contest his responsibility for shipping the records in interstate commerce, or that the shipments were of sufficient value to meet the statutory requisite of $5,000. But Dowling did argue that the property at issue was not "stolen, converted or taken by fraud."

The government argued that the shipments of albums were within the reach of section 2314 because the records physically embodied performances of musical compositions which Dowling had no legal right to distribute, and that this unauthorized use rendered the albums "stolen, converted or taken by fraud."

Justice Blackmun ruled, however, that records "that included the performance of copyrighted musical compositions for the use of which no authorization has been sought nor royalties paid" were not within the reach of the statute. In Justice Blackmun's view, the statute requires a "physical identity" between the items unlawfully obtained and those eventually transported, i.e., some prior physical taking of the subject goods. The government's theory would make theft, conversion or fraud "equivalent to wrongful appropriation of statutorily protected rights in copyright." But Justice Blackmun refused to equate a copyright holder's "carefully delimited interests" to the possessory interest of owners of "'simple' goods, wares (or) merchandise."

There was no dispute that Dowling's use of performances of copyrighted compositions constituted infringement of those copyrights. The significant distinction for the Court was that an infringer's invasion of a copyright holder's interests does not involve physical control over the copyright and does not wholly deprive the owner of the use of the copyright.

The history and purpose of section 2314, in addition to its "ill-fitting" language, did not suggest a congressional intent to have the statute reach the interstate shipment of copyright-infringing goods. The section originally was enacted as an extension of the National Motor Vehicle Theft Act in order to supplement state efforts to control automobile theft. But Congress always has had an explicit constitutional grant of authority to regulate the distribution of items that infringe copyrights, whether or not those items affect interstate commerce.

Justice Blackmun observed that the enactment of criminal penalties for copyright infringement would not prevent Congress from choosing to criminalize, as well, the interstate shipment of infringing goods. But Congress has not as yet found it necessary to distinguish between intrastate and interstate activity in this area, stated the Court.

The history of copyright infringement provisions also revealed to Justice Blackmun that Congress has acted with "exceeding caution" in rendering criminal certain forms of copyright infringement. Even in the comprehensive revision of the Copyright Act, Congress declined to provide felony penalties for the infringement of recordings and motion pictures. It was not until the 1982

Piracy and Counterfeiting Amendments Act that felony penalties were imposed for the bootlegging and piracy of records, tapes and films, under carefully specified circumstances.

A "final and dispositive" factor against reading section 2314 in the manner suggested by the government was the consequences of such a reading. If the court adopted the premise suggested in United States v. Gottesman (ELR 6:4:9) - that the intangible idea protected by copyright is effectively made tangible by its embodiment upon tapes or records - then it might be found that the intangible idea protected by a patent was made tangible in a manufactured article. And section 2314 then might be applied, without congressional provision, to the interstate shipment of patent-infringing goods.

In all, Justice Blackmun found it best to leave to Congress the definition of criminal conduct under section 2314 and the formulation of appropriate penalties since the statute did not "plainly and unmistakably" cover Dowling's conduct. The judgment of the Court of Appeals therefore was reversed.

In dissent, Justice Powell, joined by Justices Burger and White, stated his belief that the language of section 2314 fairly covers the interstate transportation of goods containing copyrighted material used without authorization. The bootleg Elvis Presley records were goods, wares or merchandise, observed Justice Powell; Dowling had no right to reproduce and distribute the compositions performed on the records; and "Virtually every court that has considered the question has concluded that section 2314 is broad enough to cover activities such as Dowling's." A copyright holder, notwithstanding his/her "carefully delimited interests"' does possess the right to publish, distribute and copy the copyrighted work; it was not clear to Justice Powell why Dowling's interference with these rights was so "different" from the physical removal of tangible objects as to preclude the application of section 2314.

The statute does not distinguish between tangible and intangible property; the purpose of the statute would not be served by declaring the existence of this distinction; and the court's difficulty in finding a theft, conversion or fraudulent taking had "more to do with its views on the relative evil of copyright infringement versus other kinds of thievery, than it [did] with interpretation of statutory language," stated Justice Powell.

Furthermore, Dowling's unauthorized commercial exploitation of the copyrighted performances on the albums amounted to the theft of the performances; his acts were cognizable as conversion; and section 2314, while broad in its coverage, could not have caused Dowling any doubt "that he was committing a theft as well as defrauding the copyright owner."

The government was entitled to select the statute under which it would prosecute Dowling, concluded Justice Powell, who again pointed out that the vast majority of courts that have considered the question have rejected the claim that section 2314 does not reach the unlawful use of performances of copyrighted material.

Dowling v. United States, Case No. 84-589 (U.S.Sup.Ct., June 28, 1985) [ELR 7:5:9]

Federal Court of Appeals upholds conviction of individual charged with interstate distribution of bootleg Elvis Presley records

A "first sale" defense was not available to William Richard Minor in a criminal copyright infringement action involving the unauthorized manufacture and sale of bootleg Elvis Presley records, a Federal Court of Appeals in California has ruled. The court affirmed Minor's conviction in a Federal District Court on charges of copyright infringement, interstate transportation of stolen property, and conspiracy to commit those offenses.

The first sale doctrine of section 109 of the Copyright Act provides that when a copyright owner "parts with title" to a particular copy of a copyrighted work, the owner divests him/herself of the exclusive right to vend that copy and cannot restrict subsequent sales or transfers of the copy. However, in c copyright infringement cases, if the government were required to show, with respect to each record at issue, that the alleged infringer knew that no license had been obtained from, or appropriate royalties paid to, the copyright owner, this might amount to an almost impossible burden of proof. Rather, the government was entitled to use circumstantial evidence as the basis of an inference that the alleged infringer knew that a particular copy of a copyrighted work was not sold first by the copyright owner.

In this case, declared the court, after citing the relevant circumstantial evidence, a jury could find beyond a reasonable doubt that Minor knew that the Elvis Presley records had not been the subject of a valid first sale and therefore were infringing or stolen; and that Minor was a wilful infringer.

The court next rejected Minor's claim that the National Stolen Property Act did not reach intangibles such as copyrighted musical compositions. (This case was decided just three months prior to the United States Supreme Court decision in Dowling v. United States, reported at ELR 7:5:9).

Also rejected was Minor's argument that the transported goods had a value less than the jurisdictional minimum of $5,000. According to Minor, the musical compositions contained in the records, rather than the records themselves were stolen. Since the maximum statutory amount a copyright owner may claim for the use of a composition would be $.O275 per composition, Minor calculated that the value of the goods would be $3,244.88.

The court agreed with the government that the statute fixing the royalty rate which must be paid to a copyright holder for a compulsory license was not the appropriate measure of value in a stolen property action, for what Minor stole "was not the value of a compulsory license, but the right of the copyright holders to control reproduction of their works' " And the value of this right is reflected in the market price of records and tapes. Thus, the market value of the infringing records was ruled a proper measure of value.

The court concluded by denying Minor's claims concerning the admissibility of co-conspirator hearsay; and concerning the allegedly improper seizure of records.

However, the court did suggest that the District Court might consider reducing Minor's sentence to a cumulative prison term of eight and one-half years with probation for five years and a $90,000 fine, since Minor's codefendant Paul Edmond Dowling, who apparently operated on a much larger scale, had been sentenced to a cumulative prison term of 18 months with probation for five years on the condition that he pay a $5,000 fine and perform 1500 hours of community service (a sentence which is likely to be revised in view of the Supreme Court decision in Dowling's case).

United States v. Minor, 756 F.2d (9th Cir. 1985) [ELR 7:5:11]

Federal District Court grants summary judgment to three San Francisco television stations and their program suppliers in antitrust action brought by competing broadcaster; exclusive program licenses were not an unreasonable restraint of trade

The exclusive licensing agreements entered into by three San Francisco area television stations with their program suppliers did not constitute an unreasonable restraint of trade, a Federal District Court in California has ruled. The owner of television station KICU claimed that the exclusive licenses violated section 1 of the Sherman Act because the licenses were overbroad in their geographic coverage, were of unreasonably long duration, and incorporated unreasonable rights of first refusal.

The licenses granted to the stations program exclusivity in the "San Francisco market area," an area including

San Francisco, Oakland, San Jose, and adjacent communities. KICU argued that its market was the "South Bay," an area apparently covering San Jose and sections of Santa Clara County. KICU claimed that it could bid for quality programming in this geographic market at a price level lower than the "San Francisco" market price.

Federal District Court Judge Conti, however, held, on the basis of clear "commercial realities" (including Federal Communications Commission policy, rating service practices and signal and viewer overlap), that the relevant geographic market according to the court, KICU had not presented evidence of any injury to competition in the relevant market - there was no showing that the exclusive licenses prevented the station from obtaining quality programming, that prices were fixed, or that program offerings were detrimentally affected. There also was no evidence showing that any one television station party had the power "to significantly affect prices, available programming or any other important market component."

Judge Conti therefore granted summary judgment to the television station parties. He then considered several other arguments raised by KICU as follows: there was "overwhelming" evidence that the stations were in substantial competition (under either relevant market definition); no reasonable jury would find that the complained-of exclusivity practices were unreasonable under the circumstances of the case (exclusivity being a practice which, in Judge Conti's view, encourages the promotion and development of programming, maximizes the number of available programs and program value, and prevents audience fragmentation); and there was no evidence showing that the term of the licenses and the purported rights of first refusal were unreasonable.

Summary judgment also was granted to the television station parties on KICU's claim that there existed a per se horizontal conspiracy among the stations to enforce exclusivity against KICU; and to one of the television stations which was charged by KICU with conspiring with the Independent Television News Association to exclude KICU from membership in that organization.

Ralph C Wilson Industries, Inc. v. American Broadcasting Companies, Inc., 598 F.Supp. 694 (N.D.Ca. 1984) [ELR 7:5:11]

Federal District Court grants summary judgment to CBS in Anthony Herbert's libel action, except for claims based upon two of the eleven allegedly defamatory statements in "60 Minutes" broadcast; court also grants summary judgment to Atlantic Monthly due to magazine's lack of actual malice

On February 4, 1973, the CBS program "60 Minutes" broadcast a segment on retired Army officer Anthony Herbert. Herbert had received widespread media attention when he accused his superior officers in Vietnam of covering up reports of atrocities and other war crimes, and of relieving Herbert of his combat command when he continued filing such reports. The "60 Minutes" segment, entitled "The Selling of Colonel Herbert," was researched and produced by Barry Lando and edited, in part, and narrated by Mike Wallace. Lando also wrote an article about Herbert which was published in the May 1973 issue of the Atlantic Monthly.

Herbert claimed that the "60 Minutes" segment and the Atlantic Monthly article were defamatory because they presented him as a liar with respect to his charges of war crimes and command cover-up.

Upon the completion of a lengthy and litigious discovery process, the CBS parties moved for summary judgment. Federal District Court Judge Charles S. Haight, Jr., in a 54 page opinion granted the magazine's motion for summary judgment and also granted CBS' motion except as to the defamation claims based upon two of the challenged eleven statements in the broadcast.

Judge Haight first described the contents of the "60 Minutes" segment, noting one interview subject's reference to the lack of documentation for Herbert's charges, other interviews with Army personnel to whom Herbert allegedly presented his claims, and comments made by soldiers who had served under Herbert in Vietnam. The court then carefully analyzed each of the eleven statements which Herbert contended were actionable and concluded that only with respect to two statements could a jury find, with the requisite degree of certainty, that the statements were made deliberately and with knowledge of actual falsity.

Judge Haight pointed out that dividing the statements into actionable/nonactionable categories would effect Herbert's rights to compensatory damages if he prevailed as to one or both of the statements. Without ruling on the issue, the court noted that there exists authority for the proposition that compensation would be available only for damages resulting from actionable statements; thus an allocation of damages between the two categories of statements in Herbert's action would he required.

CBS had suggested the following alternative defenses which were not reached by the court: that the program and the article constituted either protected reporting of a public controversy involving a public figure, or an expression of opinion; and that the selection of information for inclusion in the program was a matter of editorial judgment.

Atlantic Monthly was granted summary judgment on the basis of the court's finding that the magazine had no prepublication notice of the actual or probable falsity of Lando's article. It was observed that there was no support for Herbert's argument that the magazine had an obligation to conduct an independent investigation into the facts set forth in an author's unsolicited manuscript. Atlantic's "contributions" to the article - an introductory "streamer" and graphics-were editorial techniques and did not amount to an "endorsement" of Lando's views. Even if the magazine's contributions were so characterized, there was no proof that Atlantic Monthly's editors knew of the actual or probable falsity of any material in the article.

In February 1985, Judge Haight rejected petitions for reargument which had been filed by Herbert and by the CBS parties. Herbert argued that the court should not have directed its attention to the eleven allegedly defamatory statements, but rather should have considered his summary judgment motion on the basis of the "general tone or thrust" of the full text of the "60 Minutes" segment. After reviewing relevant case law, and noting the massive discovery efforts in the case, the court found that this "less demanding approach" did not meet constitutional standards and ordered the trial to go forward.

Herbert v. Lando, 596 F.Supp. 1178 (S.D.N.Y. 1984); 603 F.Supp. 983 (S.D.N.Y. 1985) [ELR 7:5:12]

Time magazine's motion for summary judgment in libel action brought by General Ariel Sharon is denied

A Federal District Court ruling issued in November 1984 in General Ariel Sharon's libel action against Time, Inc. has been published.

General Sharon, a former Israeli defense minister, claimed that an article entitled "The Verdict is Guilty," in the February 21, 1983 issue of Time magazine was defamatory because one paragraph of the article suggested that Sharon "instigated, encouraged, or condoned" the massacre of 700 Palestinians at two refugee centers in Beirut, and that Israel's Kahan Commission "had secret evidence or found secretly that he had lied when he testified that he had not known in advance that a massacre would occur" (for further information concerning Sharon's claims, see ELR 6:4:14).

Federal District Court Judge Sofaer, in a 50 page opinion, denied Time's motion for summary judgment and made the following findings: Sharon's claim was justifiable and was not barred by the act of state doctrine;

Time did not possess absolute immunity as to statements concerning the official conduct of high government officers; and Time was not denied due process in its efforts to obtain access to information in the case.

Most significantly, Judge Sofaer concluded, after an extensive review of the origin of the challenged statements that a jury could reasonably find that although Time's correspondents, writers, researchers and editors conceded that they had no support for an allegation that Sharon encouraged or condoned the Sabra-Shatilla massacre, Time nevertheless published an article which was likely to convey this impression to its readers. A jury also might determine that one Time employee, when checking source information, acted "to prevent a reliable, informed source from denying his story." In all, declared the court, the record contained sufficient admissible evidence of actual malice to preclude summary judgment, and to allow a jury to infer that Sharon's reputation was actually injured as a result of the article, thereby warranting an award of damages to Sharon.

Judge Sofaer cautioned that while Time may have been "seriously misled" by some of its employees, the magazine had "a responsibility to exercise its own power with larger goals in mind than the end of deterring libel actions. . ."

In early 1985, a Federal District Court jury concluded that Time did not act with actual malice in publishing the challenged article (ELR 6:9:20). In a series of findings, the jury determined that the paragraph at issue was false and that it defamed Sharon. But in the jury's view, Time's employees apparently believed that the information in the article was true and did not report, edit or publish the piece maliciously or recklessly; this finding meant that Sharon did not recover any of the $50 million in damages he had sought.

Sharon v. Time, Inc., 599 F.Supp. 538 (S.D.N.Y. 1984) [ELR 7:5:12]

Federal Court of Appeals grants summary judgment to columnists Evans and Novak in libel action brought by political science professor because statements about professor's academic "status" and political beliefs were constitutionally protected expressions of opinion

Rowland Evans and Robert Novak, the writers of a nationally syndicated newspaper column, wrote a column in May 1978 in which they discussed the academic background and political beliefs of Bertell Ollman, a professor of political science. Ollman had been nominated for a departmental chairmanship at the University of Maryland. The Evans and Novak article described

Ollman as a "Marxist," and quoted an unidentified political scientist's view that "Ollman has no status within the profession, but is a pure and simple activist." The president of the University of Maryland ultimately refused to approve Ollman's appointment.

When Ollman sued Evans and Novak for libel, a Federal District Court ruled that the allegedly defamatory statements in the column were constitutionally protected expressions of opinion (ELR 1:21:5). After various appeals, the order granting summary judgment to Evans and Novak has been affirmed by a Federal Court of Appeals in Washington, D.C.

Federal Court of Appeals Judge Starr thoroughly examined the critical distinction between assertions of fact and expressions of opinion. According to Judge Starr, this distinction should be made after an analysis of the "totality of circumstances" in which a statement was made. Evaluating the totality of circumstances will require courts to consider the following four factors: the common usage or meaning of the specific language of the challenged statement itself; the statement's verifiability; the full context of the statement (the entire article or column in which the statement appears); and the broader context or setting of the statement.

After determining that a statement is opinion rather than fact, stated Judge Starr, many courts also have considered whether the opinion implies the existence of undisclosed facts upon which the opinion is based. However, the four factor evaluation will render superfluous this "undisclosed facts" test, according to Judge Starr.

The court's evaluation of the Evans and Novak column revealed: that the column usually appeared on newspaper Op-Ed pages, meaning that readers would not likely expect the column to contain "hard news;" that the authors used imprecise and indefinite language in referring to Ollman; that the "thrust" of the column, as a whole, was to raise questions, not to state conclusions, about Ollman's scholarship; and that the "breathing space" essential to freedom of the press required the affirmance of the District Court judgment.

Federal Court of Appeals Judge Bork, in a lengthy concurring opinion (the concurring and dissenting opinion totalled 70 pages in all), questioned whether a "blunt distinction" between opinion and fact would be adequate to protect First Amendment values. Briefly, Judge Bork viewed the allegedly defamatory statements as "rhetorical hyperbole" common to political argument and concluded that such statements could not provide the basis for a libel claim. Senior Court of Appeals Judge MacKinnon also wrote a concurring opinion in which he stated that Evans and Novak's reference to Ollman's lack of professional status, in the context of the debate surrounding the professor's appointment, would have been taken by readers of the statement as a political opinion. The meaning of "status" was variable, unverifiable, controversial, a matter of opinion, whom you listen to, and whose side you are on. . ." Judge MacKinnon emphasized that Judge Starr's four factor evaluation should be used in conjunction with an analysis of the circumstances of a particular case.

In dissent, Judge Robinson declared that there remained material issues of fact as to whether several Evans-Novak statements were protected expressions of opinion. An absolute opinion privilege, stated Judge Robinson should be available to "hybrid" statements, i.e., statements seeming to contain a mixture of fact and opinion, only when those statements are accompanied by a "reasonably full and accurate" report of the facts pertinent to the author's conclusion, so that the reader may fairly judge the conclusion. Other dissenting judges raised questions concerning, among other factors, the possibility of judicial subjectivity in evaluating Ollman's academic "status."

Ollman v. Evans, 750 F.2d 970 (D.C.Cir. 1984) [ELR 7:5:13]

NBC obtains dismissal of antitrust action brought by former broadcaster of Citrus Bowl

In November 1980, the Florida Citrus Sports Association (the successor corporation of the Tangerine Sports Association) entered into a contract with Mizlou Television Network whereby Mizlou secured the exclusive broadcast television rights to the 1980-1983 Tangerine/Citrus Bowl games. The contract provided that the Association could offer to competing broadcasters the right to exhibit the 1984-1986 bowl games, but granted Mizlou the opportunity to match or increase such offers.

In 1983, the Association informed Mizlou of several offers made to the Association for future television coverage of the Citrus Bowl. About one year later, Mizlou elected to exercise its option to renew the broadcast contract on the same terms and conditions offered to the Association by NBC. The Association, however, stated that Mizlou's contractually specified response time had elapsed; the Association granted NBC the right to broadcast the 1984 Citrus Bowl game and options to renew its broadcast rights in 1985 and 1986.

Mizlou brought an action against the Association and NBC alleging the breach of Mizlou's option to renew and claiming that the NBC-Association contract resulted from NBC's dominance in the market for broadcast rights to college football bowl games.

A Federal District Court in Washington, D.C. dismissed Mizlou's claims against the Association and related parties on the ground that these parties had no business contacts within the District of Columbia "of a continuous and systematic nature" sufficient to subject them to the jurisdiction of the court.

Federal District Court Judge Green then ruled that Mizlou failed to state a claim against NBC under Sections 1 or 2 of the Sherman Act or Section 3 of the Clayton Act. The court found that Mizlou did not present evidence to show that NBC's conduct would have a specific impact on competition in any particular market (Mizlou's own loss of business with the Association did not demonstrate the requisite market effect); that NBC possessed an actual, imminent or intended concentration of market power relative to other television broadcasters; or that the NBC-Association contract would decrease competition in the market for the right to broadcast Citrus Bowl football games.

Mizlou's pendent state law claims against NBC also were dismissed.

Mizlou Television Network, Inc. v. National Broadcasting Company, 603 F.Supp. 677 (D.C.Cir. 1984) [ELR 7:5:14]

Photo agency recovers damages of $59,000 for magazine's unauthorized use of photograph of Raquel Welch

A Federal District Court in New York has awarded about $59,000 to Sygma Photo News in the company's copyright infringement action against High Society Magazine, Drake Publishers, and Dorjam Publications, the publisher of "Superstars of Celebrity Skin, the Definitive Collector's Edition from High Society, Special No. 6." Sygma claimed that the cover of Superstars displayed, without authorization, a copyrighted photograph of "an unadorned Raquel Welch."

Federal District Court Judge Sweet initially denied Sygma's motion for summary judgment on the ground that the publishers had raised a factual question concerning the ownership of the photograph. However, Sygma submitted to the court an affidavit which was found sufficient to establish Sygma's interest in the copyright, and the company's renewed motion for summary judgment was granted.

The court then found that Drake, the successor in interest to High Society, was liable as a contributory infringer of the copyrighted photograph because Drake employees had handled administrative functions for

Superstars, including obtaining the photographs used in the magazine.

In his separate opinion on the damages issue, Judge Sweet allowed the deduction of all printing and related expenses from Dorjam's gross revenue of about $340,000 resulting from the sale of 52 % of the printed copies of Superstars. "Separation" costs also were ruled deductible, as were Dorjam's payments to Drake for type, stats, art supplies and royalties. But the court refused to allow deductions from Drake's gross revenue of the amount spent for purchasing the photographs used in the work, or of the cost of "retouching" the photographs.

Judge Sweet concluded that 75% of the sales of Superstars was attributable to the cover photograph "based on the nature of the photograph, the reputation and fame of Ms. Welch, the absence of any established readership for the publication and its intermittent publication schedule." When the reputation of magazine plays only a small role in promoting circulation, as in this case, the "impulse nature" of a purchase is particularly significant, observed the court in entering judgment for Sygma in the amount of $59,283.

Sygma Photo News, Inc. v. High Society Magazine, Inc., 603 F.Supp. 829 (S.D.N.Y. 1985); 596 F.Supp. 28 (S.D.N.Y. 1984) [ELR 7:5:14]

Concert promoter's failure to show injury caused by competing promoter's alleged antitrust violations results in Federal Court of Appeals decision affirming summary judgment order

From 1972 through 1976, Electric Factory Concerts was the exclusive promoter of rock concerts at the Spectrum, the largest indoor concert facility in

Philadelphia. And, according to Out Front Productions, a former promoter of rock concerts, Electric Factory included in its contracts with performers a "Standard Addendum" giving the company certain exclusive rights to the performers' services in the Philadelphia area for a 75 day period, and providing Electric Factory a six month right of first refusal with respect to the performers' services.

Out Front claimed that Electric Factory's use of the Standard Addendum and the promoter's allegedly unreasonable refusal to allow Out Front access to the Spectrum after the contractual term of exclusivity ended, constituted an unlawful conspiracy to eliminate competition and restrain trade in violation of section 1 of the Sherman Act and a monopoly or attempted monopoly of the promotion Of white-oriented rock music concerts in the Philadelphia metropolitan area in violation of section 2 of the Sherman Act.

Out Front contended that it would have become a successful promoter of rock concerts in Philadelphia if Electric Factory had made the Spectrum available for Out Front's concerts. But a Federal District Court granted summary judgment to Electric Factory on the ground that there was no evidence that Out Front had demanded access to the Spectrum.

A Federal Court of Appeals, while affirming the order granting summary judgment to Electric Factory, questioned the District Court's analysis of the denial of access issue. Judge Sloviter assumed, for purposes of the appeal, that Electric Factory violated sections 1 and 2 of the Sherman Act as alleged. But, given this assumption, Out Front did not establish a causal relationship between the alleged antitrust violations and the company's financial difficulties. The District Court apparently concluded that Out Front's failure to adequately show a demand for access to the Spectrum precluded further consideration of the company's claims. But even though a refused demand might have been the best evidence of the requisite causality, Out Front was entitled to establish, by other evidence, the causal connection between the alleged antitrust violation and the claimed injury, stated the court.

In this case, Out Front's evidence on the access issue was vague, according to Judge Sloviter. Out Front did not state that it presented Electric Factory with a definite proposal regarding the scheduling of a concert, or to whom or on whose behalf an inquiry may have been made. In all, even if Out Front's evidence as to its demand for access were accepted as true, the evidence was not sufficient to show any serious effort by the company to obtain access to the Spectrum during the years 1977 to 1981.

Out Front's additional claim that Electric Factory exercised control over performers and agents through unreasonably restrictive contracts also was rejected since there was no evidence that Out Front "sought to contract for the services of any performers covered by the Standard Addendum and that such performers refused to perform for it as a result."

It should be noted that in 1983 a Federal Court of Appeals did reinstate a jury award of $5,500 to Danny Kresky Enterprises in Kresky's antitrust action against Electric Factory (ELR 5:10:13). Kresky, a Pittsburgh-based concert promoter, claimed that Electric Factory had unlawfully restrained trade in connection with the promotion of blackoriented concerts in the Pittsburgh market through blockbooking. The Court of Appeals found that Kresky had presented adequate evidence of injury proximately caused by Electric Factory's activities.

Out Front Productions, Inc. v. Magid, 748 F.2d 166 (3d Cir. 1984) [ELR 7:5:15]

Anheuser-Busch obtains injunctive relief preventing competitor from using the term "LA" in connection with a low alcohol beer

A Federal District Court ruling that "LA" is a protectible trademark for a low alcohol beer product has been affirmed. Federal Court of Appeals Judge John R. Gibson determined that Anheuser-Busch was the first company to use the LA mark and upheld the District Court's order enjoining Stroh Brewery's use of the term LA in connection with Stroh's low alcohol beer.

Stroh argued that the initials of a generic term such as "low alcohol" were not entitled to trademark protection. But the District Court, stated Judge Gibson, properly held that "if some operation of the imagination is required to connect the initials with the product, the initials cannot be equated with the generic phrase, but are suggestive in nature, thereby rendering them protectible."

And the District Court did not err as a matter of law in relying upon consumer perceptions when classifying the term LA; the court found that the consumer survey used by Anheuser-Busch was fairly and scientifically conducted by qualified experts.

Judge Gibson then ruled that the District Court also was not clearly in error in its evaluation of the consumer survey or in finding that LA was not generic or descriptive. The litigation cited by Stroh involving Miller Brewing Company's marketing of "Lite" beer was inapposite, stated the court, since "light" had been ruled a generic or descriptive term.

The injunction issued by the District Court was properly drawn to prevent the future infringement of AnheuserBusch's trademark, concluded Judge Gibson.

In a dissenting opinion, Judge Bright stated that he would have denied trademark protection to Anheuser-Busch because the company's claim to the mark LA reflected "a preemptive and anticompetitive intent" to capture the market for low alcohol beer. According to Judge Bright, Anheuser-Busch had failed to establish the unregistered mark LA as a trademark. A survey of wholly uninformed consumers was legally irrelevant and otherwise insufficient to provide a valid basis for the finding that LA was suggestive, rather than generic or descriptive of low alcohol beers, declared Judge Bright. Furthermore, Anheuser-Busch was not entitled to a trademark in LA, in Judge Bright's view, because the initials did not sufficiently distinguish Anheuser-Busch's brand from the beer product - consumers, after a few months of "heavy advertising," most likely would associate LA with low alcohol rather than as a reference to the origin of the product.

Judge Bright deplored the semantic distinctions and "unwarranted rigid categorizations" which threaten to obscure the underlying equities of trademark, claims, and concluded that granting trademark status to LA would frustrate the fundamental intent of trademark protection. Resolving trademark issues requires considering, on a case by case basis, the relationship between the mark, the nature of the product, and a party's objectives in seeking registration. In this case, stated Judge Bright, granting trademark protection to Anheuser-Busch, for a name apparently adopted in order to pre-empt the low alcohol beer market, rather than to indicate the ownership and source of goods, was inconsistent with the objectives of the trademark laws, an unfair restriction of competition, and an unwarranted attempt to appropriate, for Anheuser-Busch's product, a term that "inherently belongs to the public, including its competitors."

Anheuser-Busch, Inc. v. Stroh Brewery Co., 750 F.2d 631 (8th Cir. 1984) [ELR 7:5:15]

Briefly Noted:

Trade Name.

William Kazmaier's claim to the exclusive right to call himself "the World's Strongest Man" has been dealt a stunning blow by a Federal Court of Appeals. The court upheld the ruling of a Federal District Court in Massachusetts (ELR 7:3:15) granting summary judgment to the parties who produced a Ford Motor Company television commercial, The commercial referred to John Wooten as "the World's Strongest Man," and portrayed him unsuccessfully attempting to hold back an accelerating

Ford Tempo. Chief Judge Campbell agreed with the District Court that, assuming the descriptive character of the phrase and a prior secondary meaning, the commercial effectively distinguished Wooten from Kazmaier by stating Wooten's name and presenting his recognizable likeness on-screen. Furthermore, the public was not likely to be misled, as Kazmaier argued, by the singularity of the title, "given its inherent implausibility." Since there was no genuine issue of material fact as to trade name infringement under Massachusetts law, the Ford parties were entitled to summary judgment, held the court, which also dismissed Kazmaier's claims of unfair or deceptive trade practices, interference with business expectations, and an unfair competition claim based on alleged "palming off."

Kazmier v. Wooten, 761 F.2d 46 (1st Cir. 1985) [ELR 7:5:16]

Musical Group Name.

A Federal District Court in New York has ruled that a preliminary injunction issued in an action brought against three musical performers would be inapplicable to Columbia Pictures Inc., a non-party to the action, with respect to Columbia's distribution of the motion picture "The Karate Kid." Columbia had entered into a license agreement with the performers on March 22, 1984 obtaining the right to use the name "The Flirts" in connection with the film. On December 3, 1984, the District Court issued an injunction prohibiting any entertainment service or product-related usage of the name "The Flirts" by the performers, or anyone acting under their authority or license. When Columbia moved to suspend or modify the order, the court found that even if

Columbia had notice of the injunction, such notice could not bind a nonparty unless there had been "active concert or participation" with the performers. In this case, although the licensing agreement was entered into after the agreement was anything but an arm's length transaction, and no allegation that the performers themselves had violated the injunction. Finally, the language of the injunction was ruled overbroad, and must be modified accordingly.

O & L Associates v. Del Conte, 601 F.Supp. 1463 (S.D.N.Y. 1985) [ELR 7:5:16]

Trademark Infringement.

A Federal District Court ruling (ELR 7:2:17) granting summary judgment to American Greetings Corp. in a trademark infringement action involving stuffed teddy bears adorned with red hearts has been affirmed. The Court of Appeals concluded that there was no basis upon which a trier of fact could determine that the red hearts which Colleen Wiley placed on her stuffed bears were "inherently distinctive" so as to warrant protection as a common law trademark without a showing of secondary meaning. Chief Judge Levin H. Campbell noted that Wiley's red heart was a "common" basic shape, similar to a geometrical design. A plain heart shape carries "no distinctive message of origin to the consumer, and could not carry such a message" absent the requisite showing of secondary meaning, particularly since the shape is widely used as a decoration on a variety of products. The use of a red heart as an ornament on stuffed animals was "far from unique or unusual," stated Judge Wiley began using the decoration in 1980.

Wiley v. American Greetings Corp., 762 F.2d 139 (1st Cir. 1985) [ELR 7:5:16]

Service Mark Infringement.

Data-Max, Inc., doing business as St. Andrews Systems, markets small computers that are programmed to calculate a golfer's handicap based on a formula developed by the United States Golf Association. A Federal Court of Appeals in New Jersey has refused to grant the Golf Association's request for an injunction barring Data-Max's use of the formula. The court, in affirming a District Court ruling granting summary judgment to Data-Max, found that the Golf Association formula was a functional aspect of its handicap system and was not subject to protection under federal or state law as a service mark. Furthermore, Data-Max's use of the formula was not a false designation of origin under section 43(a) of the Lanham Act, and did not constitute "misappropriation under New Jersey law since Data-Max was not in direct competition with the Golf Association. The handicap formula was characterized as the "industry standard" for the golfing public. Preventing other handicap providers from using the formula would effectively give the Golfing Association a "national monopoly on the golf handicapping business," declared the court and such a monopoly not only might harm the golfing public, but was unnecessary to protect the "basic incentive" for maintaining the handicap formula.

United States Golf Association v. St. Andrews Systems, 749 F.2d 1028 (3d Cir. 1984) [ELR 7:5:16]

Copyright.

A Federal District Court in North Carolina has granted summary judgment to the owner of the Plaza Roller Dome Putt-Putt miniature golf course in a copyright infringement action brought by ASCAP on behalf of Bruce Springsteen and nine other ASCAP members. Plaza Roller Dome allegedly was engaged in the unauthorized transmission of copyrighted musical compositions over a system consisting of a radio receiver wired to six separate speakers mounted on light poles located on the outdoor course. The court noted that the system was audible without distortion only at close proximity and thus did not rise to the level of minimum quality requisite for a commercial sound system. The court rejected ASCAP's argument that the system was comparable to sound systems adjudged as exceeding the exemption provided by section 110(5) of the Copyright

Act, noting that the size of the allegedly offending facility and number of speakers are not the sole or even principal factors to be considered. Significant additional factors, stated the court, would be: the physical arrangement of the speakers; the noise level of the area; and the extent to which the receiving apparatus was altered or augmented. The court further noted that the golf course was open for about six months a year and earned about $1,000 per month, and therefore was not of sufficient size to justify a subscription to a commercial background music service.

Springsteen v. Plaza Roller Dome, Inc., 602 F.Supp. 1113 (M.D.N.C. 1985) [ELR 7:5:17]

Copyright.

The "Bits and Pieces" section of the August 1981 issue of Hustler magazine reproduced a portion of a postcard created by James Brewer, appropriately entitled "You Drive Me Crazy," which sported a photographic simulation of Brewer shooting himself through the head. Brewer copyrighted the photograph in May 1982 and then filed an action against Hustler alleging the violation of his rights of privacy and publicity and copyright infringement. In April 1980, Brewer had entered into a commercial sale agreement for the postcard and in 1975, he had incorporated the photograph on his own business cards. A Federal District Court dismissed the state law claims prior to trial, but entered judgment on a jury verdict in Brewer's favor for $14,500 on the copyright claim. A Federal Court of Appeals has upheld the jury verdict, finding that Brewer's use of the photograph constituted only a limited publication which did not divest Brewer of his common law copyright. Furthermore a jury reasonably could have concluded that Hustler's use of the photograph was not a fair use within the meaning of section 107 of the Copyright Act - the photograph was not used merely as a social commentary, was not informational or newsworthy, and was of a commercial nature.

Brewer v. Hustler Magazine, Inc., 749 F.2d 527 (9th Cir. 1984) [ELR 7:5:17]

Copyright.

Walt Disney Productions has failed in its attempt to restrain Christie, Manson & Woods International from auctioning a collection of copyrighted animated artwork in the possession of John Basmajian, a former Disney employee. Disney failed to show irreparable injury; and injunctive relief was inappropriate because Disney sought only money damages, a Federal District Court in New York ruled. Basmajian worked in the animation department at Disney for three years. During that period, Disney had some 20 million pieces of artwork which it later systematically destroyed or sold until fifty pieces remained in the archives. Basmajian was given permission to take home some of the artwork; he preserved the artwork for many years until he decided to sell part of his collection through Christie. The court found the record established that Basmajian had lawful possession of the artwork and that Disney had notice of his possession. Therefore, the court concluded that the "first sale doctrine" applied because Disney had transferred the artwork as a gift to Basmajian who then had the right to consign the artwork.

Walt Disney Productions v. Basmajian, 600 F.Supp. 439 (S.D.N.Y. 1984) [ELR 7:5:17]

Copyright Infringement.

A Federal District Court in Tennessee has granted summary judgment to Acuff-Rose Publication and to several songwriters in a copyright infringement action brought by Howard Leslie Pendleton. Pendleton claimed that Acuff-Rose and the songwriters infringed the lyrics to three of his copyrighted compositions"Just a Blue Box," "Dear Dolly," and "Angel." The court, after comparing the lyrics of Pendleton's songs with the allegedly infringing works, found that any similarities in the songs derived solely from the underlying themes or ideas and that there was no substantial similarity in the manner in which the themes or ideas were expressed. Furthermore, it was observed that "a finite number of themes surface in country music songs" and that the common phrases and "cliched language" attendant to such noncopyrightable themes also were not subject to copyright protection.

Pendleton v. Acuff-Rose Publications, Inc., 605 F.Supp. 477 (M.D.Tenn. 1984) [ELR 7:5:17]

First Amendment.

A Washington statute prohibited conducting exit polls or public opinion polls with voters on election day at or within 300 feet of the entrance to a polling place. A Federal District Court granted summary judgment in favor of the State of Washington in an action challenging the constitutionality of the 1983 statute. However, a Federal Court of Appeals, in an expedited opinion, reversed the District Court order on the ground that several material issues of fact remained to be resolved, including the definition of an exit poll; the primary purpose of the statute; and whether the regulation presented the least intrusion upon First Amendment activities. The court found that the evidence did not establish that the state was not motivated by an intent to suppress "constitutionally protected ideas" and that the statute was necessary to protect "the peace, order and decorum." The matter, accordingly, was remanded to the District Court. In a concurring/dissenting opinion, Judge Norris stated that he would have directed the entry of summary judgment on remand on behalf of the media parties challenging the statute.

Daily Herald Company v. Munro, 747 F.2d 1251 (9th Cir. 1984) [ELR 7:5:18]

First Amendment.

A Federal District Court in Mississippi has enjoined the enforcement of an obscenity ordinance enacted by the City of Hattiesburg on the ground that Videophile, Inc., a seller of video tapes, had established a substantial likelihood of prevailing on the merits of its claim that the ordinance was preempted by a state statute regulating the same material. The court further found that where the city's ordinance conflicted with the state obscenity statutes, the ordinance exceeded the city's statutory authority; that the ordinance failed to address whether material taken as a whole lacked serious literary, artistic, political or scientific value and therefore was constitutionally infirm; that because the ordinance did not include a severability provision, the remainder of the ordinance could not be preserved; that Videophile had demonstrated irreparable injury in having to refrain from selling material arguably protected by the First Amendment; and that the public interest would be served by issuing the preliminary injunction.

Videophile, Inc. v. City of Hattiesburg, 601 F.Supp. 552 (S.D.Miss. 1985) [ELR 7:5:18]

Securities Law.

A Federal District Court in New York has found that Champion Sports Management and its president Richard Hirschfeld, violated the antifraud provisions of the federal securities laws in connection with the company's proposed public stock offering. The court enjoined Hirschfeld from committing further violations of the applicable securities laws. Champion was not so enjoined since the company was in the process of being dissolved. Champion had been organized to engage in the recruitment, training and promotion of professional boxers. The company's board of directors included several boxing personalities, including Muhammed Ali; the board members apparently were unaware of Champion's financial liabilities and had no part in preparing the offending prospectus.

Securities and Exchange Commission v. Champion Sports Management, Inc., 599 F.Supp. 527 (S.D.N.Y. 1984) [ELR 7:5:18]

Libel.

A Federal Court of Appeals has affirmed a District Court order granting summary judgment to CBS, Inc. in a libel action brought by Redco Corporation, a manufacturer of multi-use tire rims. Redco's action followed the airing of a CBS "60 Minutes" segment, entitled "Killer Wheels," in which the use and safety of such rims was discussed. In affirming the District Court, the Court of Appeals found that each statement made during the "60 Minutes" segment, which did not mention Redco by name, was either true, or non-actionable as a statement of opinion; that the issues discussed were matters of public concern; and that the factual bases for all opinions were adequately disclosed. Judge Sloviter rejected Redco's argument that assertions made about the rims were untrue because at the time of the broadcast no one had died from injuries sustained in a Redco tire rim accident, noting that since the broadcast, such deaths had occurred. Nor were the statements rendered untrue because CBS could have, but chose not to, include information that was more favorable to tire rim manufacturers.

Redco Corp. v. CBS, Inc., 758 F.2d 970 (3d Cir. 1985) [ELR 7:5:18]

University Athletics.

A Federal District Court in Michigan has ruled that the Eleventh Amendment precludes the award of a monetary judgment in a class action sex discrimination claim brought on behalf of women basketball players at Michigan State University. The women athletes based their claim, in part, on the difference between the funds provided to the male and female basketball teams for lodging and meal allowances while on the road. It was argued that any monetary award would not be paid by the treasury of the State of Michigan since the University's athletic department purportedly maintained an unbudgeted discretionary account containing funds from private donations and from investment earnings. The court however, declared that it was "not convinced" that the discretionary account was not made up of state funds, because the athletic director was accountable for expenditures made from the account; the expenditures had to be in accordance with University policy; an annual report of the status of the fund was provided to the University's Board of Trustees' and if the unbudgeted account was depleted, the University could rely on its general fund (containing state appropriations) to replenish the athletic department's funds. The fact that the money in the unbudgeted account arrived at the

University from sources other than the state did not mean that the money was not a state fund for Eleventh Amendment purposes, and that any judgment against that fund would create a liability payable from the state treasury, concluded the court.

Hutchins v. Board of Trustees of Michigan State University, 595 F.Supp. 862 (W.D.Mich. 1984) [ELR 7:5:18]

New York Civil Rights Law.

The New York Court of Appeals has upheld an appellate court order denying summary judgment to Herbal Concepts, Inc. and to two publishers in an action alleging violations of sections 50151 of the New York Civil Rights Law. Susan Cohen claimed that Herbal Concepts used, for advertising purposes and without consent, a photograph of Cohen and her four year old daughter. The photograph showed the bodies of the nude mother and child full length as viewed from a position behind and to the right of them; it did not show their faces. A trial court dismissed the action because the identities of the individuals could not be determined from the photograph. The appellate court reversed this ruling on various grounds and the Court of Appeals agreed that summary judgment was precluded since a material question Of fact was raised as to whether the photograph revealed sufficiently identifiable likenesses of the Cohens.

Cohen v. Herbal Concepts, Inc., 482 N.Y.S.2d 457 (N.Y. 1984) [ELR 7:5:19]

New York Civil Rights Law.

A Federal District Court in New York has granted summary judgment to Alper Industries in a breach of contract action brought by Alper's licensor, Anabas Export, Ltd. relating to the manufacture and sale of stickers containing the portrait of singer Michael Jackson. The court affirmed Alper's argument that the contract violated section 50 of the New York Civil Rights Law because Anabas never had obtained Jackson's written consent. Judge Pollock acknowledged that a court might enforce some contracts made in violation of section 50 if the wrong committed did not endanger the health or morals of the public, but determined that this exception was not applicable in this case. The court also rejected Anabas' argument that the contract was enforceable because the parties did not intend to engage in an unlawful act, noting that if a contract is opposed to the interests of the public, the agreement is void, notwithstanding the intent of the parties.

Anabas Export Ltd. v. Alper Industries, Inc., 603 F.Supp. 1275 (S.D.N.Y. 1985) [ELR 7:5:19]

Insurance.

Regardless of whether certain claims brought by a franchisee in an action against the American Contract Bridge League were groundless, false or fraudulent, a Federal Court of Appeals has ruled that the League's insurer was obligated under the policy to defend its insured in the action. The failure to defend, held the court, made the insurer liable for the cost of hiring substitute counsel plus other defense costs. The action by the League against its insurer arose from disciplinary action taken by the League against a franchisee, who, in turn, sued the League claiming unfair competition and defamation. The court found that: the insurance policy expressly covered libel and slander claims; that members of the League's Conduct and Ethics Committee were acting as officers of the League in the disciplinary proceedings, and therefore potentially qualified as insured parties; and that the insurer was obligated under Pennsylvania law to pay for the defense of the unfair competition claim.

American Contract Bridge League v. Nationwide Mutual Fire Insurance Co., 752 F.2d 71 (3d Cir. 1985) [ELR 7:5:19]

Previously Reported:

Several rulings arising from General William C. Westmoreland's now-withdrawn libel action against CBS (see ELR 6:10:20) have been published. The "answers" given by Federal District Court Judge Leval, reported here in "Karnak" fashion, were: denied (with reluctance) denied; and granted. The "questions": Cable News Network's request for permission to record and distribute live comprehensive televised coverage of the trial, Westmoreland v. CBS Inc., 596 F.Supp. 1166 (S.D.N.Y. 1984; ELR 6:6:21); CBS' motion for summary judgment on the grounds of: truth, absolute immunity from a libel action brought by a public official challenging comments on the performance of his duties; absolute privilege for the expression of "opinion," and Westmoreland's failure to raise triable questions of knowing or reckless falsity, 596 F.Supp. 1170

(S.D.N.Y. 1984; ELR 6:6:21) and CBS' motion to exclude from evidence, as largely irrelevant and substantially hearsay, the "Benjamin Report" the report of an internal investigation conducted by a CBS News executive on the preparation of the Westmoreland broadcast (the court's order specified, however, that CBS would prepare a formal admission of certain undisputed facts contained in the Report), 601 F.Supp. 66 (S.D.N.Y. 1984).

A Federal Court of Appeals' opinion affirming the denial of Cable News Network's petition also has been published, Westmoreland v. Columbia Broadcasting System, Inc., 752 F.2d 16 (2d Cir. 1984; see ELR 6:8:20; 6:7:21). The Court of Appeals, while noting the considerable importance of the issues raised in the case, refused to take the "leap" suggested by Cable News Network and to rule that the public had a First Amendment right of access to the Westmoreland trial via television cameras, which right was sufficient to override the court rule prohibiting the presence of television cameras in courtrooms.

The following cases, which were reported in previous issues of the Entertainment Law Reporter, have been published: Bell v. Streetwise Records, Ltd., 761 F.2d 67 (7:1:9); Capano Music v. Myers Music, Inc., 605 F.Supp. 692 (7:2:9); Overman v. Universal City Studios, Inc., 605 F.Supp.350 (6:4:3).[ELR 7:5:19]

IN THE NEWS

Warner Communications agrees to $8.5 million settlement in price-fixing action brought by record wholesalers; Federal District Court drops charges against United Artists Corp.

Warner Communications has agreed to pay $8.5 million to settle an antitrust action filed by Chicago-area record wholesalers and retailers. The 1982 action charged that the company was part of a conspiracy by several major record companies to illegally fix the prices of records and tapes.

According to news reports, Warner and three of its music subsidiaries will pay $5 million in cash and $3.5 million in advertising assistance to the record merchants. The settlement did not constitute an admission by Warner of wrongdoing or liability with respect to the charges.

Several other record companies, including CBS Inc., MCA Records and Capitol-EMI previously reached settlements with the wholesalers (ELR 6:12:18), for a combined total of $26.2 million.

Federal District Court Judge Nicholas Bua agreed to dismiss the action against United Artists Corp., the only remaining defendant, on the ground that United Artists Corp., the former parent of United Artists Records, could not be held liable for the alleged price-fixing by a subsidiary that was sold in 1978. Apparently, the separate corporate identities of United Artists Corp. and United Artists Records were carefully maintained, and there was no evidence that the record company was a "puppet" of, or conducted business solely for the benefit of, United Artists Corp. [Oct. 1985] [ELR 7:5:20]

Los Angeles Superior Court refuses to issue injunction preventing Dionne Warwick from hosting "Solid Gold"

Los Angeles Superior Court Judge Irving Shimer has refused to grant an injunction sought by Edenroy Ltd., a television production company, which would have prevented singer Dionne Warwick from hosting the television show "Solid Gold." Edenroy claimed that Warwick had entered into a contract with the company whereby the singer was to appear on, and provide a guest star for, the pilot of a television program entitled "Dionne Warwick and Her Legendary Friends' "

Judge Shimer, who did not issue a written decision, stated that it will remain for a trial court to determine whether the Edenroy contract required Warwick to supply guest stars, legendary or otherwise, for the program. [Oct. 1985] [ELR 7:5:20]

Rhino Records executives agree to pay $22,000 in fines for sales of bootleg recordings; New Yorker is convicted of 26 counts of making unauthorized recordings

Rhino Records executives Richard Foos and Robert Marin have agreed to pay $22,600 in fines and penalties for the 1982 sales of bootleg recordings by artists such as the Beatles and Black Sabbath. Rhino Records, which has received national media attention for its successful efforts in compiling albums of old rock music, and Sounds Good Import Company, a record importer, also were named as defendants in the Los Angeles Municipal Court action. Charges against both corporations were dropped following Foos and Marin's no contest pleas to two misdemeanor counts of selling the bootleg recordings. A spokesman from the City Attorney's office stated that the fine may be the largest ever imposed in California for these charges.

According to the Recording Industry Association of America, New Yorker Michael Rascio has been found guilty of 21 felony and 5 misdemeanor counts alleging the unauthorized duplication of sound recordings by the

Beatles, the Rolling Stones, Bob Dylan and Elvis PresleyRascio previously was convicted on a felony charge involving the manufacture of bootleg records; he faces a possible jail term of eighteen months to three years. [Oct. 1985] [ELR 7:5:20]

William J. Thomas recovers jury award of $465,000 in action involving film entitled "The Other Side of Hell"

A Los Angeles Superior Court jury has awarded William J. Thomas $26,000 in interest damages from Ronald Lyon and $39,000 in interest damages from producer and former television executive James Aubrey in an action concerning the distribution of profits from the telefilm entitled "The Other Side of Hell." The jury awarded Thomas an additional $400,000 in punitive damages from Aubrey. Thomas claimed that he was to receive 50% of the profits from the film which was based upon his experience in a mental hospital. According to Thomas, he was told that the film did not make a profit. However, Columbia Pictures Television had paid a substantial fee for the worldwide distribution rights to the film. The trial court judge previously had awarded Thomas about $125,000 in connection with the court's order dissolving the 1976 joint venture agreement between Thomas and Aubrey/Lyon Productions. [Oct. 1985] [ELR 7:5:20]

Texas judge overturns $180,000 jury award to foul ball victim

State District Judge Robert Montgomery has overturned a jury award of $180,000 to Karen Friedman of

Houston, who was injured when struck by a foul ball at a 1978 Houston Astros game. Friedman apparently was the first foul ball victim to obtain a jury verdict against a major league baseball club. Judge Montgomery (who announced his decision in a letter to the attorneys in the case), most likely relied on the ground that the Astros had no legal duty to warn Friedman of the hazards of foul balls, according to news reports of the matter. [Oct. 1985] [ELR 7:5:21]

WASHINGTON MONITOR

United States Department of Justice ends investigation of beer makers' exclusive television advertising contracts

Several major beer makers, including Anheuser-Busch Co. and Miller Brewing Co., have been the target of a recently-closed investigation by the Antitrust Division of the Department of Justice. The investigation sought to determine whether the contracts whereby the television networks granted the larger beer makers the exclusive right to advertise on a series of televised sports events or to sponsor an entire season of a specific sport, unreasonably restrained the ability of competing beer makers to present their advertising.

The Department of Justice declined to take any action in the matter because the exclusive advertising contracts apparently did not have an anticompetitive effect, and, according to a spokesman, "probably reflected healthy competition." Also, the investigation found no evidence of collusion between any of the larger beer companies to exclude smaller competitors from advertising on network sports programs. [Oct. 1985] [ELR 7:5:21]

General Cinema Corp. will pay $750,000 fine in government antitrust action alleging product split

General Cinema Corp. has agreed to pay a fine of $750,000 in an action brought by the United States Department of Justice charging the company with participating in a product split agreement in 1982 and 1983. The govern ment claimed that a General Cinema subsidiary, GCC Theaters, along with other theater operators, agreed to split or allocate among themselves the rights to negotiate for motion picture licenses and to refrain from competitive bidding in the South Bend, Indiana area. [Oct. 1985] [ELR 7:5:21]

DEPARTMENTS

Book Note:

Covering All the Bases: A Comprehensive Research guide to Sports law by Gary A. Uberstine

In 1974, I began teaching what was then (I think) the first formal Sports Law class offered by any law school in the country. In those days, it was possible to cover, in a one-semester two-unit course, virtually every published sports law case then decided.

What a difference eleven years makes, especially in a field that has grown as quickly as the law of sports. Today, it is difficult to cover "selected issues" in sports law in a onesemester course. Reading every case on the subject would be impossible.

As the number of sports law cases grew, so did the volume of law review articles and books. Congress took an interest in the world of sports and published transcripts of its hearings, and committee reports on its findings. Continuing legal education institutions, sports lawyer organizations, and player associations began publishing handbooks to accompany their educational programs. And the flow of publications on the law of sports has not abated yet.

Lawyers and students doing sports law research now have an enormous mass of material to study. Indeed, the question for many today is how to find what they need, in this enormous mass. Covering All the Bases: A Comprehensive Research Guide to Sports Law is designed to answer this question. Authored by Gary A. Uberstine, this newlypublished book is a 224-page bibliography - a veritable "key" to the library for anyone doing professional or amateur sports law research.

The book is up-to-date through April 1985, and comprehensive in the fullest sense of the word. It covers every sort of publication available (including some that are "available" only in the largest of libraries). Citations are provided to books, symposia, ALR annotations, legislation, government publications, cases, periodicals, law review articles, and even earlier bibliographies. Each section of the book is devoted to one type of publication and is subdivided into substantive topics (such as agents, amateur athletics, antitrust, broadcasting, discrimination, labor, taxation, and so forth).

Mr. Uberstine has done more than compile and organize citations (as useful as that alone would have been). He also has provided helpful annotations to many of the entries. Cases, for example, are summarized in a sentence or two. Books are critiqued in a short paragraph and their tables of contents reproduced. And law review articles that Mr. Uberstine found worthwhile are summarized in a few sentences. Clearly, an hour or two spent with this book at the outset of a research project will save immeasurable time thereafter.

Covering All the Bases is published by William S. Hein & Co., 1285 Main Street, Buffalo, New York 14209. It is priced at $27.50 and orders should refer to its Item Number 303740. [ELR 7:5:22]

In the Law Reviews:

The Beirut Agreement: A License to Censor? by Roxanne E. Christ, 7 Loyola of Los Angeles International & Comparative Law Journal 255 (1984)

Comm/Ent, Hastings Journal of Communications and Entertainment Law, has published Volume 7, Number 2 which contains the following articles:

Of and Concerning Real People and Writers of Fiction by Dan Rosen and Charles L. Babcock, 7 Comm/Ent 221 (1985)

The Applicability of State Action Doctrine to Private Broadcasters by Ruth Walden, 7 Comm/Ent 265 (1985)

Carson v. Here's Johnny Portable Toilets, Inc.: Plumbing the Depths of the Right of Publicity by Carrie Goldstein, 7 Comm/Ent 319 (1985)

Communications and the Law, Volume 7, Number 4, has been published by Meckler Publishing, 11 Ferry Lane West, Westport, CT 06880. It contains the following articles:

The Irrelevant First Amendment by Steve Bachman, 7 Communications and the Law 3 (1985)

Libel and the Long Reach of Out-Of-State Courts by Donna Lee Dickerson, 7 Communications and the Law 27 (1985)

1984 Entertainment, Publishing and the Arts Handbook reviewed Patricia J. Murphy, 7 Communications and the Law 53 (1985)
[ELR 7:5:22]