BUSINESS AFFAIRS

A Movie and TV Producer's Guide to Acquiring and Earning Income from Soundtrack Music (Part 2)

by Lionel S. Sobel

"The Big Chill" and "American Graffiti" share one very important characteristic: soundtrack music was one of the most prominent features of both movies. Moreover, the music in both of these boxoffice successes consisted of songs that already existed, and were already popular, long before the movies were produced. Indeed, one purpose of both soundtracks was to evoke audience recollection of the years when those songs were popular.

Part 1 of this article (ELR 7:5:3) described the producer's acquisition of "specially ordered or commissioned music." The article resumes here with a description of the acquisition of "preexisting music" such as that used in "The Big Chill" and "American Graffiti."

Pre-Existing Music

When pre-existing music is to be used in a soundtrack, it is essential to distinguish between the musical composition itself and any recording that already has been made of that composition. In the eyes of the Copyright Act, two distinct works are embodied in a recording: one is the underlying song (which exists in sheet music or demo-tape form, separate from the recorded performance of the song); and the second is the recorded performance of the song. These two separate works are protected by two separate copyrights which may be (and usually are) owned by two separate companies.

Typically, the copyright to a preexisting song is owned by a music publisher; and the copyright to a recording of that song is owned by a record company. As a result, two separate sets of licenses may be necessary.

The Pre-Existing Musical Work Itself

In order to use pre-existing music in a movie or TV soundtrack, as many as three licenses may be necessary (just to use the underlying music - not a recording of it). A "synchronization license" is necessary to record the music on the movie or TV program's soundtrack. In the case of theatrical motion pictures, a "performance license" is necessary to permit movie theaters to publicly perform the music by exhibiting the movie to theater patrons. And if a soundtrack album is to be released, a "mechanical license" is necessary to permit the music to be recorded and released in album form.

In order to obtain these licenses, a producer may negotiate directly with the song's publisher. There are, however, several thousand music publishers in the United States, and not all of them are easy to locate. Some 3,500 publishers have retained the Harry Fox Agency in New York City to represent them in connection with negotiating and issuing synchronization and mechanical licenses. Thus, producers often deal with the Fox Agency, rather than with music publishers directly. Many producers find it useful to be represented themselves, and retain firms such as The Clearing House, Ltd., in Hollywood, which are experienced in music license negotiations, and which have enormous data banks of copyright ownership information concerning millions of songs.

A commercial television synchronization license is relatively inexpensive-perhaps $250 to $500 per song. This is because television broadcasts of a song generate additional "public performance" royalties that are paid by television networks, local stations, cable programming services (such as HBO and Showtime), and cable systems. In effect, then, television synchronization licenses are offered by music publishers at "loss leader" prices, in the hopes of earning significant performance royalties from the program's broadcast.

Synchronization licenses for theatrical motion pictures are more expensive than television synchronization licenses. A popular song may cost a movie producer as much as $25,000. But in exchange, the producer obtains not only a synchronization license, but a performance license as well. Although movie theaters perform soundtrack music when they exhibit movies, movie theaters do not obtain performance licenses from ASCAP or BMI. Instead, American movie theaters obtain their performance licenses from movie distributors, which obtain them from producers, who obtain them from music publishers (either directly, or through the Harry Fox Agency).

Since publishers do not receive public performance royalties from American movie theaters, publishers naturally charge movie producers more than they charge television producers. In all likelihood, producers pass this cost on to distributors, which in turn pass it along to theaters in the form of greater exhibition license fees. The difficulty with this procedure is that it requires music publishers and movie producers to guess, at the time of their negotiations, how popular a movie will be many months later, because synchronization/performance licenses are granted in exchange for a flat fee, rather than a royalty or profit participation.

Movie Theater Performance Licenses

Movie theaters are the only places in the United States where music is publicly performed that do not pay performance fees to ASCAP and BMI. Concert halls, amphitheaters, nightclubs, restaurants, bars, and even universities obtain public performance licenses from ASCAP and BMI. And prior to 1948, American movie theaters did as well. In fact, movie theaters first began obtaining licenses from ASCAP in 1923, when movies were still silent, and the music performed by theaters was played by live pianists or orchestras. Even after "talkies" became common, and music became part of the movie soundtrack, it was still the case that producers recorded the soundtrack music but did not perform it, while movie theaters did perform it even though they did not record it. As a result, ASCAP continued to issue performance licenses to movie theaters which were jointly represented in their negotiations with ASCAP by movie theater trade associations.

Although the rates paid by theaters were later described by a federal district judge as "very reasonable" and "fair and reasonable," theater owners thought otherwise and filed an antitrust suit against ASCAP alleging that its blanket license illegally restrained trade in violation of the Sherman Act. The same judge who found that ASCAP's rates had been "reasonable" also agreed with the theaters that ASCAP's blanket license (as it existed prior to 1948) violated federal antitrust law. As a result, ASCAP was prohibited from issuing any further licenses to movie theaters, and ASCAP members were ordered to grant performance licenses to producers at the same time that synchronization licenses were issued. Alden-Rochelle v. ASCAP, 80 F.Supp. 888, 900 (S.D.N.Y. 1948).

Ironically, European movie theaters still do obtain performance licenses from their local performing rights societies. Thus, when American movies are exhibited in

Europe, American publishers and composers receive performance royalties on account of the European movie theater performances of their music, even though they do not receive performance royalties from American movie theater performances of their music.

Homevideo Licenses

Although it always has been customary for music publishers to grant synchronization and performance licenses to producers on a flat fee basis, the law does not prohibit the use of royalties or profit participations. Old customs die hard however. This became apparent when the homevideo industry was born, and producers began to release videocassettes of theatrical motion pictures.

Producers view homevideo as nothing more than another way to exhibit movies. Thus, producers instinctively offer publishers the customary flat fee for the right to use music in homevideo versions of motion pictures. Music publishers, on the other hand, view videocassettes as another form of recording, like an ordinary record or tape that just happens to have pictures. As a result, music publishers instinctively ask producers for a royalty based on the number of videocassettes sold, because such a royalty is similar to the "mechanical" royalty that is customarily used in the record business. Movie producers recoil from the suggestion that music publishers should be paid a royalty on videocassette sales, because such a royalty looks to producers like a gross profits participation - something which is given only to superstar actors, directors and writers.

Thus far, no industry "norm" has emerged with respect to the payment of fees for the right to use pre-existing music in homevideo versions of theatrical motion pictures. Producers continue to offer flat fees; and publishers continue to ask for per-unit-sold royalties. The outcome of negotiations in each case depends - as it always does in the movie business - on how important the deal is to each party.

Obtaining a Recording of the Music

Acquiring the right to use a pre-existing musical work is only the first step in getting the work into a movie's soundtrack. The second step is obtaining a recording of the music. This is done in one of two ways. A new, custom-made recording of the music can be produced; or a preexisting recording of the music can be obtained.

In order to produce a new, custom-made recording of a pre-existing song, it is necessary to use musicians and a recording studio (or an electronic synthesizer) and vocalists. The minimum terms of employment for musicians are set forth in the AFofM collective bargaining agreement. The minimum terms of employment for background or chorus vocalists are set forth in the SAG and AFTRA collective bargaining agreements.

As might be expected, lead vocalists who are recording artists in their own right require more legal attention. The minimum terms of their employment are set forth in the SAG and AFTRA agreements, but recording artists also receive royalties on the sale of soundtrack albums containing songs they have performed.

Moreover, if a recording artist is signed to a record company other than the record company that will be releasing the soundtrack album, a further legal complication will be created by the "exclusivity clause" that is likely to be part of the artist's contract with his or her own record company. In these cases, the artist's own company must consent to the use of the artist's performance on the soundtrack album. This is frequently done and results in an on-screen and onalbum credit indicating that the artist appeared through the "courtesy" of the record company to which the artist was exclusively signed. The financial terms on which such "courtesies" are granted vary from movie to movie. Sometimes, for example, the artist's own company is given the right to release a single of any song performed by that artist, even though the soundtrack album is to be released by another company.

Master Recording Licenses

When producers use preexisting music, they often want to use a particular pre-existing recording of that music as well. Since the copyright in a recording is separate and distinct from the copyright in the underlying music, a separate license is necessary to use a pre-existing recording. Such a license is known as a "master recording license" and is obtained from the record company that owns the copyright to the recording itself.

Naturally, the fee for a master recording license depends on the popularity of the recording. Where the recording is to be used in a theatrical motion picture, the fee might be $25,000 or more. In 1984, for example, it was reported that Universal offered CBS Records $200,000 for a license to use three Bruce Springsteen recordings ("Badlands," "Thunder Road" and "The Promised Land") in Peter Bogdanovich's movie "Mask." Despite the enormity of this sum, no deal was made, reportedly because CBS Records also demanded a royalty on sales of videocassette versions of "Mask"-a demand which Universal was said to have rejected as a matter of principle.

Sound-alike Recordings

When producers are able to make a satisfactory deal for a pre-existing song with a music publisher, but are unable to make a satisfactory deal with a record company to use a pre-existing recording of that song, the law gives producers an option which is useful in some cases. That option is to produce a new "sound-alike" recording of the song using musicians and vocalists who-with the aid of modern recording equipment and engineers-are frequently able to duplicate the original artists' sound and style exactly. This option is available, as a matter of law, because under the Copyright Act (section 114), the exclusive right to reproduce a sound recording is limited to the right to "recapture" and re-record the actual sounds created by playing the very recording that is protected by copyright. Independently recreating those sounds, using musicians and vocalists, and then recording those newly created sounds, does not infringe the copyright to the original recording, "even though such sounds imitate or simulate those in the copyrighted sound recording."

It thus would have been legally permissible for Bogdanovich and Universal to have obtained synchronization and performance licenses from the publisher of the three Springsteen songs that Bogdanovich wanted to use, and then to make a new recording of those songs for the "Mask" soundtrack, using another singer who-with the aid of electronics, if necessary-could have been made to sound just like Springsteen. This was not done. Bob Seger recordings were used in the "Mask" soundtrack instead. But in other cases, producers have created "sound-alike" recordings for movie soundtracks, and have been entirely satisfied with the results.

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[ELR 7:7:3]

RECENT CASES

MGM/UA Entertainment did not obtain motion picture sequel rights to the novel "Gone With the Wind," rules Federal Court of Appeals in affirming judgment on behalf of author Margaret Mitchell's heirs

The sequel rights to the novel "Gone With the Wind," written by Margaret Mitchell, belong to Mitchell's heirs, a Federal Court of Appeals has ruled, in affirming the ruling of a Federal District Court in Georgia (ELR 6:11:6).

In an action for declaratory relief brought by Mitchell's heirs, the District Court concluded that neither the 1936 contract between Margaret Mitchell and Selznick International Pictures (MGM's predecessor in interest) nor a 1961 contract concerning the renewal copyright in the motion picture granted to MGM the right to use characters from "Gone With the Wind" in new and entirely different stories.

On appeal, MGM argued that the District Court erred in finding that the 1961 agreement was not intended to transfer sequel rights. According to MGM, the company was granted sequel rights subject only to the restriction that a sequel would not carry the story or lives of the characters beyond the end of the novel.

Federal Court of Appeals Judge Hill, however, declared that the District Court had not clearly erred in rejecting MGM's interpretation of the extrinsic evidence presented as to sequel rights and in refusing to hold that "a clause expressly prohibiting sequels in which the lives of the characters are carried beyond the time of the ending of the novel amounted to a grant of sequel rights for other time periods." Judge Hill further observed that the parties, at least until 1975, used the word "sequel" to mean the continuation of a story; that MGM's participation in 1975 negotiations with Stephens Mitchell and Universal Studios concerning a possible sequel did not constitute an acknowledgement that MGM indeed possessed sequel rights; and that the erroneous attribution to an MGM attorney of certain statements about the ownership of sequel rights did not provide a sufficient basis for setting aside a decision otherwise adequately supported by the record.

Trust Company Bank v. MGM/UA Entertainment Company, 772 F.2d 740 (11th Cir. 1985) [ELR 7:7:6]

Author of novel "Looking for Mr. Goodbar" is unsuccessful in claim against CBS alleging improper use of the word "Goodbar" in title of television movie; Federal District Court also rules that CBS'

movie was not a sequel to Paramount film based on the novel, but orders CBS to include disclaimer in movie's credits

The 1975 novel "Looking for Mr. Goodbar" by Judith Rossner was a fictional account of the brutal murder in 1973 of school teacher Roseann Quinn by a man Quinn had met in a singles bar. The novel was well-received by critics and the public. Rossner soon entered an agreement granting Paramount Pictures the exclusive right to use the Goodbar novel, its title and any similar title "in the making of motion picture photoplays" based upon the novel. In 1977, Paramount released the movie entitled "Looking for Mr. Goodbar."

The 1973 Quinn murder also generated several articles by New York Times reporter Lacey Fosburgh. Fosburgh's "Finding Mr. Goodbar" was published in October 1975 in New Times, and "Finding the Real Mr.

Goodbar" was published in Cosmopolitan magazine in June 1976. In 1977, Delacorte Press published Fosburgh's novel entitled "Closing Time: The True Story of the 'Goodbar' Murder."

The tracks converged in 1981 when Grosso-Jacobson Productions produced a two hour made-for-television movie based on the investigation of Quinn's murder. The movie, "Trackdown: Finding the Goodbar Killer," was broadcast on CBS on October 15, 1983. Prior to the broadcast and in response to Rossner's objections to the use of the word Goodbar in the title of the television movie, CBS, Grosso-Jacobson and Paramount entered an agreement whereby Paramount waived its right to object to the use of Goodbar in the tide of the "Trackdown" work provided that: the word would not be emphasized in the title; the movie would not be a factual account of the Quinn murder; and the advertising would not refer to the movie as a sequel or as derived from Rossner's novel or Paramount's film.

Notwithstanding the agreement, Rossner sought a preliminary injunction which would have prevented the exhibition of Trackdown, alleging unfair competition and false designation of origin. The proceeding in a Federal District Court in New York resulted in the issuance of a consent order pursuant to which CBS agreed to display, in connection with its broadcast of Trackdown, la disclaimer reading: The following broadcast is based on fact. It is not related to the Judith Rossner novel "Looking for Mr. Goodbar," and Miss Rossner has no connection with it. Apparently the consent order "implicitly incorporated" the parties' agreement that the disclaimer would appear with the beginning and closing credits of Trackdown. However, when Trackdown was broadcast, the disclaimer appeared among commercials shown at the beginning and the closing of the program.

After a trial without a jury, Federal District Court Judge MacMahon issued an opinion in which he first clarified the author's cause of action as a claim that the CBS parties' use of Goodbar in the title of the Trackdown work traded on Rossner's reputation as the author of the Goodbar novel, in violation of section 43a of the Lanham Act and New York's antidilution statute, and constituted unfair competition.

CBS argued that Rossner lacked standing to assert a misappropriation of title claim because the author had assigned the right to use the title "Looking for Mr. Goodbar" to Paramount. But Judge MacMahon declared that Rossner retained a "small but protectable interest" giving the author standing to prevent the unauthorized use of the title in motion pictures such as Trackdown which were not based on her novel.

In turning to the Lanham Act claim, Judge MacMahon noted the principle that the test for secondary meaning for literacy titles is whether "in the minds of a significant number of the public, the title is associated with a single source of the literary work." In this case, there was a showing that Goodbar (the only word in Rossner's title which was used by the CBS parties) was associated with Rossner when her novel first appeared. But the strength of the word as a trademark was diminished by the subsequent use of the mark to identify other sources, stated the court. For example, Goodbar became associated with Paramount and its movie. And Fosburgh's book and articles, along with many other media reports, referred to the Quinn murder as the Goodbar murder. The word also frequently has been used "in the vernacular" to describe the singles bar milieu. In all, although Rossner was not required to proceed against every alleged infringement of the Goodbar mark, the author's failure to "police" the mark caused Goodbar to lose its primary significance as the denoter of a source, i.e., Rossner. Thus the requisite secondary meaning was not demonstrated.

Furthermore, there was no evidence that the public was misled into believing that Rossner sponsored or was in any way involved in the production of Trackdown. The possibility that newspaper articles may have associated Trackdown with the Goodbar novel was not sufficient to show a likelihood of confusion. The disclaimer also was an adequate means of reducing viewer confusion, if appropriately placed with the program credits.

Rossner's common law unfair competition and statutory antidilution claims were dismissed because of the failure to establish deception or confusion as to the origin of Trackdown, or to present evidence that Trackdown "blurred or tarnished" the Goodbar mark.

An alternate claim raised by Rossner was that Trackdown was a sequel to the Goodbar movie and that Paramount was contractually obligated to pay Rossner

$75,000. Judge MacMahon determined that Paramount's agreement not to sue CBS or Grosso-Jacobson for the use of Goodbar in the title of the television movie "had the practical effect of a license" of Paramount's sequel rights. But Trackdown was not a sequel to Paramount's movie, ruled the court. Under the Rossner-Paramount agreement, a sequel was defined as a film "in which the principal characters of the first feature length, theatrical motion picture produced hereunder participate in an entirely new and different story. . ." As described by the court, Trackdown began where the Goodbar movie ended - with the murder of a young woman - and went on to tell an "entirely new and different story" of the actual police search for Quinn's killer. However, the primary focus of Trackdown was on the detective who led the murder investigation. And even if the three characters who appeared both in the Goodbar movie and the Trackdown movie were considered principal characters in Trackdown, they were not taken from Rossner's fictionalized characters, but from the individuals involved in the Quinn murder. Thus, the similarities between the characters in Trackdown and those in Rossner's novel (as presented in the Goodbar movie) derived from the catalyst of the actual event, and not because Trackdown was a sequel to the Goodbar movie. Rossner could not create a story and characters around a "historical" incident and then claim the exclusive right to the use of the incident, emphasized Judge MacMahon, who, in dismissing Rossner's action did enjoin the broadcast of Trackdown unless the program presented a simultaneous display of the consent order disclaimer with the opening and closing credits of the movie.

Rossner v. CBS, Inc., 612 F.Supp. 334 (S.D.N.Y. 1985) [ELR 7:7:6]

Author's action against Warner Bros. and NBC alleging misappropriation of rights to characters in play "Everybody Comes to Rick's" is dismissed by New York trial court

In what is likely to be the end of a fine (albeit hypothetical) friendship, Murray Burnett and Joan Alison, the authors of the unproduced play "Everybody Comes to Rick's" have been denied summary judgment in an action against Warner Bros. Pictures and the National Broadcasting Company.

Burnett and Alison alleged that the Warner-produced 1983 television series entitled "Casablanca," which was aired on NBC, misappropriated the authors' rights to the characters in the play. Burnett and Alison, also arguing that Warner breached its 1942 contract with the authors (pursuant to which the company paid $20,000 to acquire the play), sought damages for the allegedly unauthorized use of character rights and sequel rights.

A New York trial court ruled that the authors' claims were "equivalent to rights protected under federal law," and were preempted under the Copyright Act of 1976. The court noted that while purporting to state a claim for breach of contract, the authors actually were arguing that Warner and NBC infringed rights which had not been included in the 1942 contract. The fact that Warner and NBC may raise a defense to an infringement claim by citing the assignment of rights clause of the contract did not serve to confer jurisdiction on the state court. In dismissing the complaint without prejudice, the court noted that Burnett and Alison may "play it again" in federal court.

Burnett v. Warner Bros. Pictures, Inc., 486 N.Y.S.2d 613 (N.Y. Cnty. 1985) [ELR 7:7:7]

Tennessee Williams did not possess descendible right of publicity under Florida law, rules New York Court of Appeals in reversing ruling as to proposed renaming of Broadway theater

The New York Court of Appeals has reversed an appellate court ruling (ELR 7:1:9) which would have prevented the owners of a Broadway theater from renaming the theater the "Tennessee Williams."

The representative of the estate of the late playwright had alleged that the unauthorized renaming of the theater violated Williams' descendible right of publicity.

In reversing the lower court order granting the representative's motion for a preliminary injunction, the Court of Appeals declared that the dispute should have been decided under Florida law, rather than New York law.

Williams was a Florida domiciliary at the time of his death. Both Florida and New York follow the choice of law principle that questions concerning personal property rights are to be determined by reference to the substantive law of the decedent's domicile; for choice of law purposes, the right of publicity constitutes personalty.

Under Florida law, stated the court, "only one to whom a license has been issued during decedent's lifetime and the decedent's surviving spouse and children possess a descendible right of publicity. . ." Tennessee Williams did not have a surviving spouse or child and did not issue the requisite license during his lifetime; he therefore possessed no enforceable property right. The court took the time to mention that, in light of its holding, it would not consider the question of whether a common law descendible right of publicity exists in New York.

Southeast Bank v. Lawrence, Case No. 536 (N.Y., Nov. 26, 1985) [ELR 7:7:8]

Choreographer George Balanchine's estate is denied injunctive relief in copyright infringement action against author and publisher of book containing photographs of New York City Ballet's production of "The Nutcracker"

Numerous photographs of the New York City Ballet's production of "The Nutcracker" were used in a book entitled "The Nutcracker: A Story & A Ballet," written by Ellen Switzer. The production was choreographed by George Balanchine, and Balanchine's estate holds the copyright in the choreography. The estate filed a lawsuit against Switzer and Macmillan Publishing Company, alleging that the inclusion of the photographs in the book infringed the copyrighted ballet choreography.

Federal District Court Judge Owen first observed that "choreography has to do with the flow of the steps in a ballet." But the photographs in the Nutcracker book portrayed dancers "in various attitudes at specific instants of time." A performance of the ballet could not be recreated by using the photographs, stated the court, adding (in a footnote) "just as a Beethoven symphony could not be recreated from a document containing only every twenty-fifth chord of the symphony." Judge Owen therefore jeted to the conclusion that the photographs in the Nutcracker book did not infringe Mr. Balanchine's copyright.

The Nutcracker book also did not violate Mr. Balanchine's right of publicity since the author's discussion of the choreography of the ballet served to convey information to the public; the court did not find that the book's extensive references to Balanchine or the publication of the photographs was for trade or advertising purposes. Apparently, the court was of the opinion that "any other view of this situation would make the writing of an unauthorized biography actionable."

In denying injunctive relief to the Balanchine estate, Judge Owen also cited the estate's undue and unexplained delay in seeking to restrain the publication of the Nutcracker book, given that the estate may have learned of the proposed publication as early as April 1985.

Horgan v. Macmillan, Case No. 85 Civ. 8028 (S.D.N.Y., Nov. 19, 1985) [ELR 7:7:8]

City of Oakland's eminent domain authority did not extend to National Football League's Raider team franchise, rules California appellate court

The playoff round is underway in the City of Oakland's marathon matchup against the former Oakland (now Los Angeles) Raiders of the National Football League.

Oakland kicked off in 1980 in an action seeking to acquire by eminent domain the Raiders' NFL franchise. A playby-play description of the ensuing events would have to include the following highlights: an Alameda County Superior Court issued a preliminary injunction prohibiting the transfer of the franchise from Oakland; the case was transferred to Monterey County where summary judgment was entered on behalf of the Raiders; the California Supreme Court reversed the ruling in favor of the Raiders on the ground that since the state's eminent domain statute allowed the condemnation of intangible property, Oakland should have had an opportunity to show that its exercise of eminent domain over the Raiders franchise would achieve an appropriate municipal function; and the California Court of Appeal granted a peremptory writ of mandate directing the trial court to hold a hearing on Oakland's application for the reinstatement of the initial trial court order granting a preliminary injunction to the city (for further details, see ELR 4:17:4).

Even as the Raiders home games were being played in Los Angeles, the Monterey County Superior Court reinstated the injunction against the transfer of the team's franchise. Thus, all 1982 season Raider home games were to be played in Oakland unless the Raiders obtained a favorable judgment after trial prior to the beginning of the 1983 season. After a trial in May 1983, the court entered judgment against Oakland.

With their goal in sight, the Raiders still had to contend with an appellate court ruling which once again sent the team back to the trial court to consider several as-yet unresolved questions in the eminent domain action. On remand, the trial court again entered judgment for the Raiders on the grounds that Oakland's stated purpose in asserting eminent domain was not a valid public use and that the city's action was invalid under federal antitrust law and under the commerce clause of the federal constitution.

California Court of Appeal Judge Sabraw first noted that the Constitution grants Congress the power to regulate commerce "among the several States . . ." Judge Sabraw rejected Oakland's arguments that the law of the case precluded the consideration of the commerce clause claim; that the city was a market participant rather than a regulator of commerce; and that the exercise of eminent domain power never has been ruled a violation of the commerce clause. The Raiders argued that professional football is a nationwide business so completely involved in interstate commerce that the acquisition of a franchise by a government entity through eminent domain would impermissibly burden interstate commerce.

The court agreed with the Raiders and cited in support of its position the case of Partee v. San Diego Chargers Football Co. (ELR 5:12:14). In Partee, the California Supreme Court held that the National Football League required standard nationwide regulation and that state antitrust laws applied to a League franchise in California would unreasonably burden interstate commerce.

In the instant case, the trial court had noted the interdependent character of the National Football League. For example, each member team is substantially dependent for its income on every other team and League television contract proceeds are divided equally and gate receipts nearly equally. Therefore, the capacity and quality of each stadium is a significant component of the League's financial success.

Furthermore, each NFL franchise owner, according to the evidence presented to the trial court, "has an important interest in the identity, personality, financial stability, commitment and good faith of each other owner." If a municipality obtained control of a franchise by the exercise of its eminent domain power, the League might have to accommodate the local government's public interest obligations in connection with setting ticket prices, awarding concessions, and resolving lease terms and schedule conflicts. And the threat of eminent domain acquisitions by municipalities would likely "seriously disrupt the balance of economic bargaining for stadium leases throughout the nation," stated the court.

Judge Sabraw emphasized that Oakland's action was not an indirect or incidental burden on interstate commerce, characterizing the city's conduct as "the precise brand of parochial meddling with the national economy that the commerce clause was designed to prohibit." If the relocation of a sports franchise involves disproportionate harm to a local government, any necessary regulation should come from Congress, suggested the court, in order to achieve a uniform accommodation of the interests involved. But Oakland's asserted interest in this case is promoting public recreation and social welfare and in obtaining certain economic benefits and the best utilization of its stadium were not sufficient to outweigh the burden which would be imposed on interstate commerce by the exercise of the city's statutory eminent domain authority over the Raider franchise.

City of Oakland v. The Oakland Raiders, Case No. A029031 (Ca.App., Nov. 15, 1985) [ELR 7:7:8]

"The Colts are gone," declares Federal District Court in Maryland in rejeting City of Baltimores condemnation action seeking to prevent the relocation to Indianapolis of the NFL football team

When the Colts bolted from Baltimore during the fateful night of March 28, 1984, the team outpaced the city's roundup effort, a Federal District Court in Maryland has ruled.

On March 27, the Colts and Indianapolis officials entered into a 20 year lease for the Hoosier Dome. During the night of March 28-29, the learn's physical possessions were loaded on moving vans and by the morning of the 29th, the vans were on their way to Indianapolis. On March 30, the City of Baltimore, under the authority of freshly-enacted state and city legislation, filed a condemnation petition in a Baltimore court seeking to acquire the Colts franchise by eminent domain and to enjoin the team from doing anything to further the transfer of the franchise. The court issued an injunction "purporting to prohibit the Colts from relocating outside Maryland."

When the proceeding arrived before Federal District Court Judge Walter E. Black, Jr., Judge Black first stated as "beyond dispute" that intangible property, i.e., the NFL team franchise, was properly the subject of condemnation proceedings. The Colts argued, however, that Maryland law requires that property subject to condemnation must be located within the state of Maryland at the time that the condemnation judgment is paid. The city claimed that March 30, the date when the condemnation petition was filed, was the appropriate date for determining the situs of the franchise.

Judge Black agreed with the Colts on the threshold issue of the appropriate date for determining the location of the franchise, calling it "untenable" that the mere filing of a condemnation action (in the absence of a statutory exception) might restrict an owner's use of his/her property. And since the Colts will not be located in Maryland at the time of judgment, if the case were to go to trial, the "inescapable conclusion" for the court was that the franchise was beyond the jurisdictional reach of Baltimore. It was pointed out that even if the court did rely on the March 30 date, the city did not have the power to condemn the franchise on that date because the Colts already had left Maryland.

The city next asserted that the Colts maintained sufficient contacts with the state of Maryland after March 30 for the court to assert jurisdiction over the franchise in the condemnation proceeding. But the court stated that the minimum contacts required for personal jurisdiction were inadequate to support jurisdiction in an eminent domain proceeding, since the established and only workable rule is that only one sovereign may properly condemn a particular piece of property, whether tangible or intangible.

The case of City of Oakland v. Oakland Raiders (ELR 4:17:4) was distinguished by the court because, in that case, Oakland had brought its eminent domain proceeding while the team still was located in the city. But Judge Black cited a California Supreme Court opinion in the case which, in remanding the matter for a trial, noted that the following factors would be relevant in locating the site of the Raiders franchise: Oakland was the principal place of business of the team entity and was the NFL-authorized site for the team's home games; the city also was the primary locale of the team's tangible personality.

Applying these factors to the Colts' situation provided ftirther support for the court's conclusion that the Colts' principal place of business on March 30 was not in Maryland. On that date, the team's essential tangible property - its corporate books and records, financial records and files, office furniture and supplies, coaching materials and film files - were located in Indianapolis. The court previously had found that no further day-to-day business was being conducted in Maryland after March 28. In all, under the Raider test for determining the site of a franchise, under certain escheat precedents described by the court, or under the "principal place of business - tangible personal property site - intent of the owner to relocate" parlay, the unavoidable conclusion was "the Colts are gone."

The Colts' motion for summary judgment was granted accordingly.

Mayor and City Council of Baltimore v. Baltimore Football Club, Case No. B-84-1294 (D.Md., Dec. 9, 1985) [ELR 7:7:9]

Federal District Court dismisses claim alleging violation of federal and state securities laws in connection with sale of art work while allowing buyer to proceed with breach of contract claim against art promoters and negligence claim against art appraisers

Artful pleading did not assist Robert Saks Mechigian in asserting that federal and state securities laws were violated when he purchased a lithographic plate from several art promoters. Mechigian, in June 1978, purchased "Track Relay" by Harry J. Schaare for $137,000. "Track Relay" had been purchased from Schaare for $3,000 by the promoters. When Mechigian was closing his purchase, two appraisers hired by the promoters stated that the fair market value of the art work was between $165,000 and $175,000; Mechigian also may have been advised by the sellers that prints could be made from the original and sold for a profit.

In his lawsuit, Mechigian alleged that he was the victim of a deliberate conspiracy by the relay team to fraudulently induce him to purchase the Schaare work, whose actual value was substantially less than $137,000.

Federal District Court Judge Kevin Thomas Duffy has ruled that the purchase of "Track Relay" was not an investment contract and did not constitute the purchase of a security. Judge Duffy reviewed the elements necessary for establishing the existence of an investment contract and concluded that Mechigian's transaction with the promoters was not an investment in a common enterprise under the applicable "vertical commonality" test. Mechigian argued that payment through a nonrecourse note, with the balance of the purchase price to be paid from a percentage of the sales generated by the promoters' efforts, amounted to profit-sharing. But Judge Duffy rejected this position and stated that even if the purchase price for the Schaare work was artificially inflated, as alleged, all Mechigian had was "a bad deal possibly resulting from a fraudulent scheme by [the promoters]." The court cautioned that "the expansion of the scope of the securities laws sought ... seems ... to be unwarranted and even perhaps detrimental to the common good. In our mercantile economy, we should not try to turn every 'thing' which might be purchased and sold into a 'security.'"

Mechigian's causes of action for civil conspiracy, breach of fiduciary duty, fraud and negligence were dismissed, except as to the negligence claim against the two appraisers. The appraisers may have assumed a duty of care as to Mechigian since it could have been anticipated that he would rely "at least to some extent" on their evaluations.

Judge Duffy next stated that Mechigian provided no support for the proposition that the alleged expertise of the promoters created a fiduciary relationship in this case. However, the court refused to dismiss Mechigian's breach of contract cause of action in which the buyer alleged, in part, that the promoters breached their contract "to sell an investment in accordance with reasonable and accepted standards ... to provide expert and competent investment advice ... to provide a good and valuable investment which had a fair market value equal to or greater than the purchase price and a realistic potential for reasonable profits, and to deal competently and fairly in good faith."

Mechigian's request for an order certifying that his action might proceed as a class action was denied.

Mechigian v. Art Capital Corp., Case No. 84 Civ. 4617 (S.D.N.Y., June 25, 1985) [ELR 7:7:10]

California Supreme Court reverses conviction of distributors of equipment used to intercept unencoded microwave transmissions of subscription television programming

The California Supreme Court has reversed the convictions of Harold John Babylon and Douglas Arthur Hyatt on charges of violating California Penal Code section 593e (the California Court of Appeal decision upholding the conviction was reported at ELR 6:1:17).

As enacted in 1980, the statute made it a misdemeanor to manufacture, distribute or sell devices which facilitate the interception or decoding of over-the-air transmissions by subscription television services. Babylon and Hyatt were accused of selling equipment to be used for the unauthorized reception of unencoded over-the-air signals, including signals carrying Home Box Office programming, transmitted by Sacramento Microband, a licensed multipoint distribution service.

California Supreme Court Justice Kaus first pointed out that Babylon and Hyatt were not accused of selling signal decoders or descramblers; rather, the receiving equipment at issue consisted of microwave antennae, standard amateur tuneable down converters, and power supply devices. Section 593e was amended in 1984 to proscribe the sale of devices designed to make intelligible "any encoded, scrambled, or other nonstandard signal" transmitted by subscription television systems. The amended statute was available to Babylon and Hyatt since it was enacted during the pendency of their appeal, stated Justice Kaus. Thus, even if their activities constituted a violation of former section 593e, the amended statute did not cover Babylon and Hyatt's conduct since the transmission at issue was neither encoded nor scrambled, ruled the court. And the microwave antennae and down converters sold by Babylon and Hyatt were lawfully manufactured multipurpose devices.

Justice Kaus also rejected the argument that the MDS transmission was distorted because it could not be received in intelligible form by a standard television set. Both the plain and technical meanings of the word distorted implied, for the court, that "something must be done to the signal." Justice Kaus therefore concluded that section 593e does not prohibit the sale of equipment "designed merely to receive in intelligible form unencoded microwave transmissions broadcast by a multipoint distribution system."

Justice Kaus declared that the court's interpretation of the statute would comport with federal policy as reflected in the Cable Communications Policy Act of 1984, which, in the court's view, affords a lesser degree of protection to unencoded transmissions than is available to encoded transmissions. But the court refrained from considering the question of whether HBO's exclusive agreement with Sacramento-area franchisee, California Satellite Systems, constituted a licensing or authorization program under section 705a (former section 605) of the Communications Act. At the time of the court's decision, there had been no federal judicial construction of the section under which the maintenance of a licensing plan may serve to impose liability on satellite dish owners who would otherwise be exempt from liability in connection with their reception of unencoded signals.

People v. Babylon, 216 Cal.Rptr. 123 (Cal. 1985) [ELR 7:7:10]

California appellate court affirms order granting preliminary injunction to subscription television service barring sale of equipment capable of intercepting microwave signals

In an opinion issued just one month prior to the California Supreme Court's decision in People v. Babylon (ELR 7:7:10), a California appellate court upheld a trial court order granting California Satellite Systems' request for a preliminary injunction to prevent Ralph Nichols and two other individuals from manufacturing, selling and installing microwave antennas, down converters and power supplies. The equipment at issue enabled Sacramento area residents to receive, inter alia, HBO television programming without paying a subscription fee to California Satellite, HBO's exclusive licensee in the area. The trial court concluded that California Satellite had shown a reasonable probability that it would prevail on the claim that Nichols was violating section 605 of the Communications Act of 1934 (the preliminary injunction was issued before the 1984 amendment of the Act).

California Court of Appeal Presiding Judge Paglia stated that a private right of action was available in the state's courts under section 605; that the 1984 amendment of section 605 was intended to preserve the statute's broad protection against the unauthorized reception of subscription television signals, multipoint distribution system transmissions, and satellite communications; and that the MDS transmissions in this case were not excluded from the protection of the statute.

The court rejected Nichols' arguments that the issuance of the preliminary injunction amounted to a private condemnation of the property of Sacramento homeowners without just compensation in violation of the Fifth Amendment -Nichols did not have standing to assert the rights of individual homeowners and there was no governmental "taking" for a public use in this case. And a First Amendment claim was not available to Nichols since proscribed conduct, rather than speech, was involved. The terms of the injunction, which restrained the sale of specified equipment with the knowledge that it might be used by the purchaser to intercept and receive California Satellite's programming, were not impermissibly vague, concluded the court.

California Satellite Systems, Inc. v. Nichols, 216 Cal.Rptr. 180 (Cal.App. 1985) [ELR 7:7:11]

California subscription television service obtains preliminary injunction preventing the installation of receiving equipment to intercept programming

California Satellite Systems, a Sacramento area subscription television service, was entitled to a preliminary injunction prohibiting certain individuals from installing rooftop receiving equipment to intercept the company's high frequency microwave signal transmissions, a Federal Court of Appeals has ruled.

A Federal District Court had found that the interception and use of California Satellite's signals without the payment of subscription fees violated section 705 (former section 605) of the Communications Act.

In affirming the District Court's ruling, Federal Court of Appeals Judge Ferguson rejected the viewing parties' argument that the unauthorized use of the signal did not amount to the statutorily required "publication of intercepted radio signals." The court cited National Subscription Television v. S&H TV (ELR 3:2:6) in finding that the unauthorized viewing of intercepted television programming amounted to the proscribed disclosure of the content of the transmitting party's signal. Furthermore, and of particular significance, in view of the decision in People v. Babylon, the court declared that "The presence or absence of scrambling devices was correctly dismissed as irrelevant by the district court. .." According to Judge Ferguson, the viewing parties failed to present any case law to support the position that signals transmitted via a multipoint distribution system should be treated any differently under section 705 than subscription service signals transmitted over normal television frequencies.

The claim that the injunction violated the viewing parties' First Amendment right of access to public radio signals also was rejected since it was found that the sole and exclusive use of the equipment was the unlawful pirating of California Satellite's signals. And the injunction was sufficiently limited in scope to prohibit only infringing uses of the receiving equipment.

California Satellite Systems, Inc. v. Seimon, 767 F.2d 1364 (9th Cir. 1985) [ELR 7:7:14]

Distributor of earth station satellite dish antennae did not violate Communications Act in absence of encrypted programming, rules Federal District Court in Kansas

A Federal District Court in Kansas has ruled that section 705 (former section 605) of the Communications Act precluded an action by two cable television companies against a distributor of earth station satellite dish antennae.

In granting partial summary judgment to Starlink Communications Group, the court noted that conduct such as the manufacture, sale or distribution of earth station satellite dishes for home use was exempted from the prohibitions of the Communications Act when the Act was amended in 1984. The cable television companies did not claim that their programming was encrypted or that there existed an "established marketing system" such that the statutory exemption was unavailable to Starlink.

Federal District Court Judge Kelly noted that the cable companies "may have an exclusive right to retransmit via MDS the specially programming to multiple users for profit, but the cable company can have only a collateral right to receive television signals directly from the satellite ... the users of the earth station satellite dishes were not intercepting a transmission originated by or retransmitted by the cable company."

The court refused to dismiss Starlink's counterclaims charging the cable television companies with monopolization or attempted monopolization in violation of the

Sherman Act. Judge Kelly concluded that Starlink adequately alleged a relevant product market (consisting of providing the facilities for home use viewing of satellite-transmitted television signals) and the presence of an antitrust injury (consisting of the litigation against Starlink and alleged threats of litigation against Starlink's customers and prospective customers).

Air Capital Cablevision, Inc. v. Starlink Communications Group, Inc., 601 F.Supp. 1568 (D.Kan. 1985) [ELR 7:7:14]

Briefly Noted:

Defamation.

Dallas Parks, a former major league baseball umpire, may proceed with his defamation action against the New York Yankees, Inc. and against George Steinbrenner, the general partner of the New York Yankees Partnership, a New York appellate court has ruled. Parks claimed that Steinbrenner made the allegedly defamatory statements concerning the umpire's officiating after an August 1982 series of games between the Yankees and the Toronto Blue Jays. Steinbrenner moved for summary judgment on the ground of improper service of process. The trial court ruled that it possessed in personam jurisdiction over Steinbrenner, and the appellate court, in upholding the trial court, held that Parks properly effectuated substituted service. The pleadings had been sent to Steinbrenner at the Tampa, Florida address given in the Yankee's certificate of doing business; if Steinbrenner changed his address, he was required to file an amendment to the certificate. The Yankee owner's claim that the representations contained in the business certificate were incorrect was not sufficient to avoid the assertion of the court's jurisdiction.

Parks v. Steinbrenner, New York Law Journal, p.7, col. 6 (N.Y.App., Dec. 16, 1985) [ELR 7:7:14]
Breach of Contract.

A New York appellate court has affirmed the dismissal of a breach of contract claim against John Travolta arising from the alleged use of Eugene "Tony" Robinson's life story for the movie "Saturday Night Fever." Travolta was merely fulfilling his contractual obligations as an actor and was not unjustly enriched by the use of Robinson's life story. The court also affirmed the dismissal of a breach of contract claim against Robert Stigwood. Stigwood presented evidence that all transactions regarding the use of Robinson's life story were not completed by Stigwood as an individual, but rather, by corporations in which Stigwood had an interest.

Robinson v. Paramount Pictures Corp., 491 N.Y.S.2d 694 (N.Y. App. 1985) [ELR 7:7:15]

School Athletics.

A student, his father and the father's company unsuccessfully challenged an NCAA ruling determining that the student was ineligible to play amateur hockey because he had played, without compensation, for a professional Canadian team. A Federal District Court in Michigan held that the student's father and his company could not join the lawsuit, and rejected the father's claim that the NCAA ruling violated his constitutional right to direct his son's upbringing. In rejecting the student's constitutional claim, the court stated that the NCAA ruling had not deprived the student of any property or liberty interests.

Karmanos v. Baker, 617 F.Supp. 809 (E.D.Mich. 1985) [ELR 7:7:15]

School Athletics.

A Federal Court of Appeals has affirmed the dismissal of a Texas high school football player's civil rights action against the University Interscholastic League. Todd Maroney claimed that the League's five year rule was impermissibly vague under the Fourteenth Amendment. The court reiterated its holding in an earlier case that "a Fourteenth Amendment attack on a state board's rulings concerning eligibility for high school athletics does not raise a substantial federal question." The District Court's ruling remanding the state law claims also was affirmed.

Maroney v. University Interscholastic League, 764 F.2d 403 (5th Cir. 1985) [ELR 7:7:15]

Copyright Infringement.

A Federal District Court in New York granted several copyright owners summary judgment against the owner of the Len's Tom Jones Tavern. The court found that since the owner was the manager of the daily activities of the tavern, he was individually liable for the unauthorized public performances of copyrighted musical works, including "Ride Like the Wind," and "Too Much Time on My Hands." The copyright owners successfully established, under section 504(c)(2) of the Copyright

Act, that the infringements were committed willfully. Although entitled to a statutory maximum of $50,000 in damages for each infringement, the copyright owners requested $2,000. However, in addition to permanently enjoining the tavern owner from further permitting the infringement of copyrighted works through public performance or in any other fashion (such as juke box performances), the court awarded the copyright owners $750 per infringement for a total of $3000 plus costs and attorneys fees.

Wow & Flutter Music v. Len's Tom Jones Tavern, 606 F.Supp. 554 (W.D.N.Y. 1985). [ELR 7:7:15]

Copyright Infringement.

A Federal District Court in California granted summary judgment to a music publishing company against a small grocery store chain for copyright infringement. The stores did not qualify for a statutory exemption from liability because the sound systems they used had several ceiling-mounted speakers which were not of the type commonly used in homes. Also, the size of the stores (between 10,000 and 14,500 square feet) sufficiently justified the use of a commercial background music system. The court held that the principal officer and shareholder of the stores was jointly and severally liable for the infringement because he had a direct financial interest in and a right to supervise, the corporation's activities.

Laminations Music v. P & X Markets, Inc., CCH Copyright Law Reports, para. 25,790 (N.D.Ca. 1985) [ELR 7:7:15]

Copyright Infringement.

A Federal District Court in Massachusetts granted a music publisher summary judgment against a night club owner for copyright infringement. The club owner conceded liability, but argued that it was only minimal since he reasonably relied upon a jukebox owner to obtain the necessary licenses from ASCAP. The court rejected the club owner's argument, finding the facts demonstrated the owner knowingly infringed the copyrights. The publisher requested attorney's fees and the court found the club owner's conduct sufficiently "blameworthy" to justify awarding them. However, the court did not award the $4,500 requested by the publisher; instead, the court found $2,800 to be fair and reasonable in light of the simplicity of the action.

Rare Blue Music, Inc. v. Guttadauro, 616 F.Supp. 1528 (D.Mass. 1985) [ELR 7:7:15]

Copyright.

A Federal District Court in New York has denied a motion to suppress evidence and to dismiss indictments in a criminal copyright infringement action brought against Steerwell Leisure Corp., Inc. in which it was alleged that Steerwell had distributed video games substantially similar to such popular games as "Donkey-Kong", "Galaxian", "Pac-Man", "Frogger" and "Amidar". In denying Steerwell's motion to dismiss, the court held that the indictment had properly alleged "distribution" of the infringing items; that the "first sale" doctrine was not applicable to copies unlawfully made; that copyrights may be the basis of prosecution for unlawful interstate transportation of stolen goods; and that, although the alleged violations had taken place prior to a 1982 decision holding video games subject to copyright protection, Steerwell was on sufficient notice that its conduct was illegal. The court refused to suppress evidence seized by the government, noting that the lack of a showing in the affidavits that a lay person had examined the games and determined them to be "substantially similar" did not prevent a finding of probable cause where the government had demonstrated that copying circuit boards was easy; that agents had observed at least one game at each of businesses listed in the warrant which they reasonably believed to be illegal; and that several games displayed no copyright information.

United States v. Steerwell Leisure Corp., Inc., 598 F. Supp. 171 (W.D.N.Y. 1984) [ELR 7:7:15]

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Trade Name.

The Arkansas Supreme Court affirmed an injunction preventing another orchestra from using the same name as the Fort Smith Symphony Orchestra. The court found that the name had been used in such close association with the original orchestra that use of the name by the second orchestra could lead to confusion by the public and result in injury to the original orchestra.

Fort Smith Symphony Orchestra, Inc. v. Fort Smith Symphony Association, Inc., 686 S.W.2d 418 (Ark.1985) [ELR 7:7:16]

Trivial Pursuit Infringement.

Selchow & Righter, the exclusive holder of the United States right to distribute the game Trivial Pursuit, has obtained a permanent injunction barring Goldex Corp. from importing and selling Canadianmanufactured Trivial Pursuit games in the United States. A Federal District Court in Florida found that Selchow & Righter showed that there was a substantial likelihood of confusion between Trivial Pursuit games originating from the United States manufacturer and Trivial Pursuit games originating from the Canadian manufacturer, Horn Abbot, and that Selchow & Righter had proved its statutory trademark infringement claim as well as claims for common law trademark infringement and patent and copyright infringement. The court rejected Goldex' contention that disputed questions of fact existed as to various issues, including joint liability. Also rejected was Goldex' argument that Selchow & Righter's exclusive license agreement wasper se illegal as a territorial restriction on patent rights or as a tying arrangement or price-fixing scheme. Goldex further argued, unsuccessfully, that the exclusive licensee of a trademark cannot prevent the importation and sale in the United States of identical goods ("parallel goods") originating outside the United States from the foreign licensor. The court pointed out that the Trivial Pursuit games imported from Canada differed in minor ways from the games distributed in the United States, and that the imported games might irreparably damage Selchow & Righter's image and reputation since United States consumers associate the Trivial Pursuit trademark with Selchow & Righter.

Selchow & Righter Company v. Goldex Corporation, 612 F.Supp. 19 (S.D. Fla. 1985) [ELR 7:7:16]

First Amendment/Subway Poster.

A Federal Court of Appeals in Washington, D.C. has reversed a District Court ruling on behalf of the Washington Metropolitan Area Transit Authority. The transit authority had refused to lease display space in its subway stations to Michael A. Lebron. Lebron, an artist, sought to rent space to display a poster containing a photomontage juxtaposing pictures of President Ronald Reagan and genial administration officials with pictures of less fortunate members of American society; the caption on the poster read "Tired of the JELLYBEAN REPUBLIC?" and the accompanying text was critical of Reagan administration policies. The transit authority turned down Lebron's request on the ground that the photomontage was distorted and deceptive. Federal Court of Appeals Judge Bork concluded that the transit authority violated Lebron's first amendment right of free speech in that the refusal to accept the poster for display because of its content was a "clear-cut prior restraint." Lebron was prevented by official action from using a public forum to present his "metaphorical political statement." The transit authority's asserted interest in preventing deception was not served because, given its text and context, the poster would not cause a reasonable person to believe that an actual meeting between the two groups was portrayed, or that the poster was presenting a message which was "dispassionately informative." Judge Bork emphasized that "prior administrative restraint of distinctively political messages on the basis of their alleged deceptiveness is unheard ofand deservedly so." The transit authority was not administering a permissible and reasonable time, place and manner regulation, but rather was exercising its discretion and subjective judgment in violation of Lebron's constitutional rights, concluded the court.

Lebron v. Washington Metropolitan Area Transit Authority, 749 F.2d 893 (D.C.Cir. 1984) [ELR 7:7:16]

Trade Name Infringement.

A Federal District Court in New York granted a temporary restraining order to Crazy Eddie, Inc. in connection with the airing of a television commercial produced by Lois Pitts Gershon, Inc., an advertising agency, for Lafayette Stores, Circuit City Stores, Inc. Crazy Eddie, Inc. was the owner of a registered trademark "Crazy Eddie" as applied to retail and distributorship services for audio and video electronic equipment. The company claimed that the Crazy Eddie service mark and trade name were used in several of Lafayette's television commercials and that this use constituted trademark infringement, false description, false designation of origin and false and confusing advertising. It was further alleged that the television commercials included a number of statements which were "false, misleading, disparaging, derogatory, and defamatory, and which constituted trade disparagement and unfair competition." The court declined to issue a temporary restraining order with respect to the exhibition of nine of the ten allegedly infringing commercials, but temporarily barred the distribution of the commercial entitled "The Confessions of Crazy Eddie." According to the court, Crazy Eddie had shown that a significant number of individuals viewing the commercial, which was set in a confessional booth, might wrongly believe that Crazy Eddie was exploiting the confessional booth for commercial purposes. Thus, the requisite showing of irreparable harm and the likelihood of success on the merits was met as to this commercial.

Crazy Eddie, Inc. v. Lois Pitts Gershon, Inc., 600 F.Supp. 537 (S.D.N.Y. 1984) [ELR 7:7:16]

Tax.

The California State Board of Equalization has ruled that a professional baseball player and his wife were residents of California, notwithstanding the fact that the athlete maintained homes in Houston and in Cincinnati during his playing days with the Astros and the Reds, respectively. The baseball player was living in California when he began his professional career in 1963.

However, from 1963 until 1972 the couple lived in Houston. And from 1972 until 1977, they rented an apartment in Cincinnati while keeping a home in Houston. The ball player and his family spent substantial portions of the off-season in California. From 1977 through 1979, the taxable years in issue, the athlete owned a home in Oakland, California, on which he claimed a homeowner's exemption; held a California driver's license; used a California address on federal tax returns which were filed with the IRS office in California; and utilized California schools-these factors resulted in the Board's ruling that the ball player and his wife had not changed their domicile from California.

Appeal of Morgan, California State Board of Equalization, No. 81A-1446 (1985) [ELR 7:7:16]

Sports League.

A Federal Court of Appeals has vacated a District Court order granting a preliminary injunction to a basketball player who challenged the decision of the Basketball Federation of the Commonwealth of Puerto Rico to revoke his right to play in a private basketball league. League rules required each player to establish Puerto Rican affiliation prior to any tournament. In establishing and in arbitrarily enforcing such rules against him, the player claimed, the Federation had violated his rights under the Fourteenth Amendment and section 1983 of the Civil Rights Act. The Court of Appeals ruled that the private decision by the Federal did not appear to be fairly attributable to the state as required under Section 1983, and on this basis, the player was unlikely to succeed on the merits of his case. The player had failed to establish a sufficient financial or regulatory nexus between the Federation and the Government of Puerto Rico, noted the court, where no evidence was presented that the government had encouraged or affirmatively induced the Federation's conduct. The player had also failed to establish the assumption by the Federation of a traditionally public function. And a contractual relationship granting the government control of the League's stadiums was not the equivalent of a joint economic venture.

Ponce v. Basketball Federation of the Commonwealth of Puerto Rico, 760 F.2d 375 (1st Cir.1985) [ELR 7:7:17]

Sports Fan Injury.

A California appellate court has reversed the entry of a jury verdict in favor of a baseball fan who sued the Los

Angeles Dodgers for injuries which the fan and his wife suffered during a fight in the stadium parking lot following a game. The court found that the fan failed to present evidence of any reasonable steps the Dodgers could have taken to prevent the incident, or that the Dodgers' inaction caused the injuries. Furthermore, the jury had found the fan to be primarily responsible for the injuries he suffered.

Noble v. Los Angeles Dodgers, Inc., 214 Cal.Rptr. 396 (Cal.App. 1985) [ELR 7:7:17]

Athletic Club.

When the Board of Governors of the New York Athletic Club recommended the conversion of Squash Court

1 to a handball or racquetball court, an association of disgruntled members who were particularly fond of the court brought an action seeking to enjoin the alterations. The association, formally known as The Squash Club, complained that the court slated for conversion was the only double squash court at the Athletic Club clubhouse. A New York trial court has denied injunctive relief to the Squash Club, finding no merit to its arguments that the Board of Governors had failed to follow club procedures by not presenting its plans to internal committees for review, or alternatively, that the determination was arbitrary, capricious and an abuse of discretion. Prior to the decision, the Board had appointed a special committee to study the fate of the court. The resulting report indicated that the demand by Club members for an additional handball/racquetball court outweighed the demand for the continued use of the court as a squash court. In addition, noted Justice Saxe, courts properly

hesitate to become involved in the internal affairs of private clubs, absent viable allegations of fraud or bad faith.

The Squash Club v. The New York Athletic Club of the City of New York, N.Y. Law Journal, p.11, col. 7 (N.Y. Cnty., Sept. 20, 1985) [ELR 7:7:17]

Street Musicians.

A Federal District Court of Appeals has upheld the ruling of a Federal District Court in Virginia declaring unconstitutional a city of Alexandria ordinance prohibiting performances and exhibitions on the sidewalks, walkways or other public property of the central business district of Alexandria. The ordinance set forth a scheme requiring city permits prior to performances in eight local parks and plazas. Lee Davenport, a bagpipe player, contended that the restrictions were unconstitutional. After conducting an extensive factual review, the District Court concluded that the total ban on street performances was broader than necessary to meet the city's asserted interest in public safety; that no safety interest was substantial enough to outweigh Davenport's First Amendment rights; and that the challenged part of the ordinance was unconstitutional as impermissibly overbroad, particularly given the lack of acceptable alternative forums for bagpipe expression. The Court of Appeals concluded that the District Court committed no reversible error in declaring the ordinance unconstitutional.

Davenport v. City of Alexandria, 748 F.2d 208 (4th Cir. 1984) [ELR 7:7:17]

Imported Recordings.

In August 1984, Pennsylvania Record Outlet signed a consent decree whereby the company was enjoined from importing and selling copyrighted recordings from Canada. A Federal District Court in Pennsylvania, in response to an action brought by CBS Inc. and several other record companies, has found the record retailer in civil contempt for its multiple violations of the consent decree and has ordered the retailer to pay the record companies a total of $57,000 plus reasonable attorneys fees and costs incurred in connection with the enforcement of the consent decree. The court assessed the retailer $8300 for recordings sold after the entry of the consent decree, $20,000 for the willful violation of the decree and additional sums in accordance with a specified formula for recordings which were seized after the signing of the decree. Pennsylvania Record Outlet also will be subject to a coercive fine payable to the court of $1000 per recording in the event of subsequent violations of the decree.

CBS Inc. v. Pennsylvania Record Outlet, Inc., 598 F.Supp. 1549 (W.D.Pa. 1984) [ELR 7:7:17]

Cable Television.

In 1972, American Television & Communications Corporation was assigned the cable television franchise rights for the City of Montevideo. Pursuant to the Cable Communications policy Act of 1984, section 623(e)(1), American Television in January 1985 attempted to increase. its basic rates by five percent. Montevideo then passed a resolution that the existing rates were to remain in effect for two years or until the City Council approved an increase. The Cable Act allows a cable operator to increase its rates unless the franchising authority specifies a fixed rate for basic cable service for a specified period. A Federal District Court in Minnesota agreed with American Television's argument that the City's resolution did not set a fixed rate for a specific period. The court reasoned that since the City Council could consider adjustments to the rates, there were no set rates. Therefore, American Television could lawfully implement its five percent basic rate increase.

American Television & Communications Corp. v. City of Montevideo, 603 F.Supp. 1376 (D. Minn. 1985) [ELR 7:7:18]

License Agreement.

A Federal District Court in New York has denied preliminary injunctive relief to Stanley-Fizer Associates in its breach of contract action against Sport-Billy Productions. Stanley had sought to enjoin Sport-Billy from terminating an agency agreement which granted to Stanley non-exclusive rights to license copyrighted works and trademarks owned by Sport-Billy. The court, in denying relief to Stanley, noted that the agreement provided for unilateral termination by Sport-Billy in the event of a breach by Stanley. By failing to turn over funds received on behalf of Sport-Billy pursuant to the agreement, despite Sport-Billy's numerous requests, Stanley had provided justification for such termination. Allegations raised by Stanley of improper activity by Sport-Billy did not relate to Stanley's default in remitting the funds, the court held, and therefore, did not justify the nonpayment. Stanley also had failed to show that the agreement prohibited Sport-Billy from employing any other agent to procure license agreements, or from entering into direct licensing agreements without the participation of Stanley. Therefore, even though termination of the agreement by Sport-Billy might destroy Stanley, the court concluded that injunctive relief would be improper where the evidence presented by Stanley was insufficient to establish either a likelihood of its success, the existence of substantial grounds for litigation, or a balance of hardship in its favor.

Stanley-Fizer Associates, Inc. v. Sport-Billy Productions Rolf Deyhle, 608 F. Supp. 1033 (S.D.N.Y. 1985) [ELR 7:7:18]

Intentional Tort.

A North Carolina appellate court has dismissed an emotional distress complaint by the parents of a deceased man who was the subject of an article written by their son's friend and published by the Sun Publishing Company. The court held that although the article was not flattering, it could not be regarded as extreme or outrageous. The court also dismissed the parents' third party claim of emotional distress because third party recovery was limited to extreme cases of violent attack, and no evidence of such violence existed.

Briggs v. Rosenthal, 327 S.E.2d 3O8 (N.C.App. 1985) [ELR 7:7:18]

Libel.

During the course of an armed robbery in New York, a female perpetrator forced her male victim to undress and to remain in a closet until she made her getaway. The New York Daily News apparently found the circumstances humorous and included in its account of the event, a cartoon depicting the scene of the crime. The victim, however, did not find the cartoon so humorous and filed an action against the newspaper alleging libel, invasion of privacy and prime facie tort. A New York trial court granted summary judgment to the newspaper on the libel action finding that the article, when viewed as a whole and read in the spirit in which it was written, was intended to convey humor in light of the unusual circumstances. In addition, the court noted, the victim had failed to plead special damages and had failed to demonstrate that the publication was made with knowledge of falsity or reckless disregard for the truth. The court dismissed the invasion of privacy action, finding that the picture was used to illustrate an article which was a matter of public interest, and therefore, was not used for advertisement or trade purposes. In dismissing the prima facie tort action, the court noted that there was no allegation of pecuniary damages, but that, in any event, the article was not defamatory. And since the depiction of the victim was not one that would adversely affect his reputation, and thereby expose him to public hatred, contempt or unbearable ridicule, the constitutional rights of the newspaper, in this case, outweighed those of the victim.

Schwartz v. New York News, Inc., N.Y. Law Journal, p. 14, col. 3 (Nassau Cnty., Sept. 6, 1985) [ELR 7:7:18]

Invasion of Privacy.

A Georgia appellate court granted a television station's motion for summary judgment against a prison inmate's invasion of privacy claim. Because of the legitimate public interest of a report regarding abuses by prison officials, the television station was not liable when the inmate incidentally appeared in the background of the news broadcast. The court also rejected the inmate's theories of intrusion upon his seclusion, casting him in a false light, and commercial misappropriation because the court found that the inmate lacked evidence to support any of these claims.

Cox Communications, Inc. v. Lowe, 328 S.E.2d 384 (Ga.App. 1985) [ELR 7:7:18]

Obscenity Statute.

Several bookstore owners and bookstore trade associations successfully challenged the constitutionality of an amendment to Virginia's obscenity statute which prohibited the display of books deemed "harmful to juveniles." A Federal District Court held that the amendment was overbroad because, although it attempted to prevent minors from examining the protected materials, the law severely limited the ability of adults to examine the books. The court also found that the law could not be saved by narrowing its construction and therefore, permanently enjoined its enforcement.

American Booksellers Association v. Strobel, 617 F.Supp. 699 (E.D.Va. 1985) [ELR 7:7:18]

IN THE NEWS

Los Angeles jury finds that Dolly Parton's song "9 to 5" did not infringe song entitled "Money World"

A Federal District Court jury in Los Angeles has rejected songwriters Neil and Jan Goldberg's claim that entertainer Dolly Parton's title song for the 1981 movie "9 to 5" was copied from the Goldberg's song "Money World." The jury apparently did not credit the Goldberg's assertion that Jane Fonda, to whom the songwriters had sent albums containing their songs, may have provided Parton with access to the Goldberg's work when Fonda and Parton worked together on the movie. [Dec. 1985] [ELR 7:7:19]

Producers of "Mary" series agree to rename newspaper depicted on new television show starring Mary Tyler Moore

In response to a trademark infringement lawsuit filed in a Federal District Court in Chicago by Richard F. Mell, who owns a neighborhood newspaper named the "Chicago Post," MTM Productions has agreed not to use that name for the newspaper depicted on the new CBS television series "Mary." The show, which features Mary Tyler Moore in the role of a consumer help columnist, henceforth will be set at the fictitious Chicago Eagle. [Dec. 1985] [ELR 7:7:19]

CBS' use in news show of film clip from movie "48 HRS." was protected by First Amendment, rules Los Angeles judge in overturning small claims court award to actor Sonny Landham

Los Angeles Superior Court Judge Leonard S. Wolf has reversed a small claims court decision awarding character actor Sonny Landham $506 in connection with CBS' use of a scene from the movie "48 HRS." in which Landham appeared. CBS used the film clip in a news segment entitled "Visions of Violence;" Judge Wolf ruled that this use was protected by the First Amendment.

CBS also had argued that Landham was required to submit his claim to arbitration with the Screen Actors Guild. However, at present, there is no signed contract between the Guild and the Alliance for Motion Picture and Television Producers, which represents television networks. It has been reported that while Judge Wolf acknowledged that oral collective bargaining agreements have been held valid under the National Labor Relations Act, he also noted, in denying CBS' request, that California law requires arbitration agreements to be in writing. [Dec. 1985] [ELR 7:7:19]

Rainbow Service Co. settles breach of contract and antitrust action against MGM/UA Entertainment and Turner Broadcasting

In October 1985, Rainbow Service Co. agreed to settle a lawsuit against MGM/UA Entertainment Co. and Turner Broadcasting System concerning the basic cable rights to MGM's substantial film library. The film library, which has been valued at $700 million, includes such classics as "Casablanca," "Gone With the Wind," and "Dr. Zhivago."

In mid-1985, Rainbow and MGM/UA entered into a ten year contract whereby Rainbow paid $45 million to obtain cable rights to many of the films in the MGM library. When Turner Broadcasting announced its plan to acquire MGM, Rainbow apparently sought a preliminary injunction against Turner and MGM in connection with claims alleging breach of contract and antitrust violations.

The terms of the settlement were not disclosed, but according to news reports, Rainbow is likely to receive a large cash payment; the company's contract with MGM terminates as of December 31, 1985. [Dec. 1985] [ELR 7:7:19]

Federal District Court in New York orders unauthorized duplicator of audiocassette tapes to pay $100,000 in damages to four record companies

A Federal District Court of New York has ordered All-Fast Systems, Inc., the operator of a photocopy store, to pay $100,000 in damages plus attorneys fees to RCA Records, MCA Records, Atlantic Recording Corp. and CBS Inc. for the store's unauthorized duplication of audiocassette tapes. The court previously had ruled (ELR 7:1:12) that the store, which used a "Rezound" cassette copying machine to make the tapes, was liable for copyright infringement. [Dec. 1985] [ELR 7:7:19]

WASHINGTON MONITOR

United States Supreme Court lets stand ruling barring Milwaukee area film exhibitors from engaging in motion picture split agreements

The United States Supreme Court will let stand a Federal Court of Appeals decision upholding a ruling in which a product split arrangement among Milwaukee area film exhibitors was found to be a per se violation of federal antitrust laws (ELR 7:1:11).

The United States Department of Justice had sued Capitol Service, Inc., Kohlberg Theaters Service Corporation, Marcus Theaters Corporation and United Artists Theater Service, Inc., alleging that the exhibitors unlawfully agreed to allocate particular films to specific theaters in order to eliminate competition. A Federal District Court enjoined the exhibitors "from further engaging in any motion picture split agreement, in any form and with any person, in any motion picture exhibition market throughout the United States" (ELR 5:3:8); the nation-wide injunction against the product splitting practices of the exhibitors was upheld on appeal. [Dec. 1985] [ELR 7:7:20]

Dickinson Operating Co. enters guilty plea to charge of participating in motion picture splitting arrangement

Dickinson Operating Co., the theater management firm for Kansas City-based Dickinson, Inc., has agreed to plead guilty to a United States Department of Justice charge that the company, allegedly in violation of the antitrust laws, participated in a motion picture splitting arrangement with a competitor in Quincy, Illinois. Under the terms of the plea agreement, which is subject to the approval of the Federal District Court in Illinois, Dickinson also will pay a fine of $175,000. [Dec. 1985] [ELR 7:7:20]

National Labor Relations Board rules that "Miami Vice" location managers are subject to jurisdiction of Miami teamster local

The National Labor Relations Board has ruled that Miami Teamster Local 390, and not the Directors Guild of America, possesses jurisdiction over the location managers for the television show "Miami Vice." The Board issued its ruling in a proceeding brought by Universal Television, alleging that the Guild attempted to have the company reassign location work, which the teamster local was performing under a collective bargaining agreement with Universal, to Guild members. The Directors Guild, which represents about 800 second assistant directors who perform location work, unsuccessfully argued that the Teamster agreement with Universal was invalid as the "coerced product" of a Teamster strike threat. [Dec. 1985] [ELR 7:7:20]

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