BUSINESS AFFAIRS

A Movie and TV Producer's Guide to Acquiring and Earning Income from Soundtrack Music (Part 3)

by Lionel S. Sobel

Movies like "Saturday Night Fever," "Flashdance" and "Footloose" were financial successes - in record stores as well as movie theaters. As a result, producers realize that soundtrack music can be a significant source of "ancillary" income. Indeed, in some cases, a movie's music income exceeds its revenues from other sources, including theatrical distribution. It has been said, for example, that the theme songs from the movies "Mondo Cane" ("More") and "Endless Love" earned more than the movies themselves did.

Parts 1 and 2 of this article (ELR 7:5:3 and 7:7:3) described how producers acquire the rights that are necessary to use music in movie and TV soundtracks (and soundtrack albums), and how producers obtain master recordings of that music. This third (and concluding) part of the article describes how soundtrack music earns income for producers - even apart from the "rental" fees paid by movie theaters in exchange for exhibition rights, and apart from licensing fees paid by television networks and stations in exchange for broadcasting rights.

Soundtrack music earns income from several legally distinct sources.

Movie Theater Performances

Theatrical performances of a movie necessarily result in the public performance of the movie's soundtrack music. However (for reasons explained in Part 2 of this article), American movie theaters have not paid public performance fees for soundtrack music since 1948.

On the other hand, movie theaters in Europe do pay public performance fees to their local performing rights societies, on account of those theaters' public performances of soundtrack music (in addition to whatever rentals those theaters pay for the right to exhibit the movies themselves). Eventually, the money collected by European performing rights societies flows back to American music publishers and composers.

If a movie's soundtrack music was "specially ordered or commissioned music," the copyrights to that music will be owned by the producer's own music publishing company. Thus, the producer eventually will receive a share of those European public performance fees, in addition to whatever distribution income the producer earns from the movie itself.

Of course, if the producer had acquired pre-existing music (the copyrights to which were owned by music publishers that were unaffiliated with the producer), the European public performance fees would be received by those publishers, rather than by the producer.

Moreover, even when the producer owns the music copyrights, it is customary for composers to receive, directly from ASCAP or BMI (both of which are affiliated with their European counterparts), the "composer's share" (which is half) of the public performance fees paid by European movie theaters.

Television Broadcasts

Television broadcasts and cable transmissions constitute public performances. As a result, ASCAP and BMI issue licenses to television networks, individual television stations, pay-TV companies (such as HBO and

Showtime), and basic cable programming services (such as ESPN, CNN and MTV). The licenses issued by ASCAP and BMI are known as "blanket licenses," because they authorize the performance of all of the compositions in the ASCAP and BMI catalogs. The legality of this form of licensing has been upheld, despite antitrust challenges by CBS and by a committee of individual television stations. (CBS v. ASCAP, 620 F.2d 930 (2d Cir. 1980); Buffalo Broadcasting v. ASCAP, 744 F.2d 917 (2d Cir. 1984).)

When cable-TV systems (i.e., the companies that own the cable hardware) retransmit television programs that are broadcast by conventional television stations, cable systems publicly re-perform the soundtrack music in those programs. Cable systems, however, are not required to negotiate performance licenses with ASCAP or BMI-or even with the owners of the copyrights to the re-transmitted programs themselves.

Instead, the Copyright Act (section 111) grants cable systems a statutory, compulsory license to re-transmit programs that are broadcast by television stations. In exchange for this compulsory license, cable systems make semiannual payments to the Register of Copyrights, for each "distant" non-network signal they re-transmit. (Distant signals are those broadcast by television stations located outside of a cable system's own territory.)

The amount of the fee that cable systems must pay is periodically re-determined by the Copyright Royalty Tribunal. The Tribunal also conducts annual proceedings to determine how to allocate the collected fees among all of the copyright owners whose programs and music have been retransmitted by cable systems. ASCAP and BMI represent music publishers and composers in these proceedings, and receive from the Register of Copyrights whatever share the Tribunal decides is due them.

ASCAP and BMI then distribute the amounts they have collected from all of these sources (networks, television stations, pay-TV companies, basic cable programming services, and the Register of Copyrights). Half of these amounts are distributed by ASCAP and BMI directly to composers, and the other half directly to music publishers. Thus, when a producer's own music publishing company owns the copyrights to soundtrack music, the producer receives income from ASCAP or BMI on account of the television broadcast and cable transmission of that music, in addition to whatever licensing fee the producer may have received for the program itself.

Soundtrack Albums

Soundtrack albums may earn significant income from three different sources: album sale royalties, mechanical license fees, and performance fees (from radio play and other public performances of the album).

A Soundtrack Album Agreement between a movie (or television) producer and a record company is similar in many ways to a recording agreement between a performing artist and a record company. When a soundtrack album deal is made, the producer delivers to the record company a master recording of the soundtrack music, as well as advertising and other artwork prepared in connection with the movie, which the record company uses to manufacture albums and album covers. Typically, the movie producer promises that the movie will be released for public exhibition in accordance with a specified schedule. And the record company promises to use its best efforts to release the soundtrack album within a specified number of days after the movie's release.

Record companies pay movie producers a royalty on album sales, which is generally in the range of 14% to 18% of the album's suggested retail price. Record companies often pay producers an advance against future royalties, though the size of the advance varies enormously from one deal to another.

A producer's soundtrack album royalties do not go entirely to the producer's "bottom line," because the release of an album triggers certain financial obligations which must be paid by the movie producer, or by the record company as an advance against future royalties.

Perhaps the most significant of these financial obligations is the AFofM "re-use" fee. This is a fee which must be paid to AFofM musicians, whose performances were recorded for the movie soundtrack itself, whenever those recorded performances are used to manufacturer soundtrack albums. The "re-use" fee can be very substantial, if a large orchestra was used to record the soundtrack. (This is one reason why some soundtrack albums of orchestral scores are not the "original soundtrack version," but instead are new performances of the same music, recorded in Europe using European orchestras whose musicians are not AFofM members. Often the cost of making a new master recording of an orchestral score in Europe is less than the " re-use" fee that would have to be paid to release, in album form, an already-existing master recording that was made for a movie soundtrack.)

The release of a soundtrack album also is likely to impose royalty paying obligations on the movie producer. For example (as noted in Part 1 of this article), the producer's agreement with a composer may well have provided that the composer was to receive an artist's royalty on the sale of soundtrack albums (for services rendered by the composer as a conductor at the soundtrack recording sessions), and perhaps an additional royalty as the soundtrack album producer. Furthermore (as noted in Part 2 of this article), the producer's agreements with vocalists who are recording artists in their own right may well have provided that the vocalists were to receive artists' royalties on the sale of soundtrack albums.

In the case of an orchestral score, composed by an established composer, the composer's artist royalty may be as much as 6% of suggested retail, and the composer's producer royalty may be as much as 2%. Where vocalists have performed songs for a soundtrack, their artist royalties may be 6% of suggested retail as well. (Naturally, where several different artists contribute to a single soundtrack album, they share the royalty among them in proportion to the number of songs contributed by each.)

Since a producer may have to pay out 8% (or so) in artist and producer royalties, from the 14% to 18% in royalties received from the record company, it is very important that artist/producer royalties be calculated in precisely the same fashion as the producer's royalties. Otherwise, producers run a risk that they may have to pay out more in royalties than they receive, because even slight variations in royalty provisions may have an enormous impact on the amount of royalties that are due. (See, e.g., Sobel, Recording Artist Royalty Calculations: Why Gold Records Don't Always Yield Fortunes, ELR 6:12:3.) This potential problem is avoided by inserting a paragraph in the producer's agreements with composers and vocalists which provides that the royalties payable to composers "shall be defined, computed and paid in precisely the same manner and at the same times as the Producer's royalties are defined, computed and paid by the Record Company."

Mechanical License Fees

Record companies actually pay two separate royalties in connection with their sale of albums (soundtrack or otherwise). One of these royalties is in payment for the performance that is recorded on the album. In the case of a soundtrack album, the movie (or television) producer receives this royalty, and then pays a portion of it over to the artists whose performances were recorded.

The second royalty paid by record companies in connection with their sale of albums is a payment for the underlying musical compositions that are recorded on the album. This royalty is known as a "mechanical license fee" and is paid to the owners of the copyrights to that music. Where a soundtrack consists of "specially ordered or commissioned music," the producer will own the copyrights to it. And the mechanical license fee will be paid by the record company to the producer.

Although the composer or songwriter may have been paid a fee (or salary) for writing the music in the first place, it also is customary (as noted in Part 1 of this article) for composers and songwriters to receive "publishing royalties" from non-theatrical uses of the music. Mechanical license fees are among the customary publishing royalties that composers and songwriters receive. Usually, they receive half of the amount of the mechanical license fees received by producers from record companies.

The amount of the mechanical license fee is established by the Copyright Royalty Tribunal. (Technically, the Tribunal rate applies only to new recordings of previouslyrecorded music, and does not apply to first-time recordings of newly-composed music. In practice, however, the fees paid by record companies for first-time recordings are "pegged" in some fashion to the rate set by the Tribunal.) From July 1, 1984 to December 31, 1985, the mechanical license fee established by the Tribunal was 4.5 cents per song, or .85 cents per minute (whichever was greater), per record distributed. As of January 1, 1986, the rate has been 5 cents per song, or .95 cents per minute (whichever is greater), per record distributed.

Often, record companies will demand - and be given a mechanical license at a rate which is less than the rate set by the Tribunal. This reduced rate is usually referred to as a "controlled compositions" rate, and though its amount is subject to negotiation, it often is 75% of the Tribunal rate.

Thus, the mechanical license fees payable by a record company for a soundtrack album containing ten songs (each of which is less than 5.26 minutes) would be 50 cents per album at the current Tribunal rate, or 37.5 cents per album at a controlled compositions rate of 75% of the Tribunal rate. Assuming that all ten songs were specially ordered or commissioned for the movie, this money would be paid to the movie's producer by the record company (in addition to album sales royalties), and the producer (or the producer's own music publishing company) would (typically) pay half of it to the songwriters who created the songs.

Public Performance Fees

Soundtrack albums, and individual songs from them, frequently are publicly performed by radio broadcasts and, to a lesser extent, by record or tape play in public places. As a result, ASCAP and BMI issue performance licenses to radio stations, and public facilities that play records and tapes (other than record stores, which are exempt). ASCAP and BMI then distribute half of these license fees to the owners of the copyrights to the songs (which would be the movie producer, if the songs were specially ordered or commissioned), and the other half directly to the songwriters who created them.

Mechanical Licenses

Occasionally, music from a movie (or television program) will become so popular that other recording artists will want to record it themselves. John Williams' score for "Star Wars" has been recorded several times by several different orchestras, for example. Each time a new recording is made, the record company that releases the new recording must pay mechanical license fees to the copyright owner. If the movie producer is the copyright owner, those fees will be paid to the producer, who (typically) will pay half to the composer of the music.

Synchronization Licenses

Soundtrack music may also earn "synchronization" income, if another producer wants to use that music in a

new movie or TV program. Again, it would be customary for half of any such
synchronization income to be paid to the composer who created it.

Master Sound Recording Licenses

If another producer wanted to use not only the underlying music in a new movie or TV program, but also the very master recording made for the earlier movie, the second producer would have to obtain a master recording license to do so (in addition to a synchronization license). A portion of that income may have to be paid to the recording artists whose performances were recorded on the original soundtrack master. And a re-use fee would have to be paid to any AFofM musicians whose performances were recorded on the original master.

Sheet Music and Folio Licenses

The music from popular movies and television programs is frequently released in sheet music and folio form. Sheet music and folio publishers pay a license fee for the right to do so. And a portion of that fee is customarily paid to the composers who created it. For reasons that appear lost in unrecorded history, the customary composer's share of sheet music and folio income does not amount to half of the amount paid by sheet music and folio publishers. Instead, the composer's share is customarily specified in pennies per "regular piano copy" of sheet music, as a percentage of the selling price of other sheet music versions, and as a percentage of the selling price of folios. The amounts involved range from 6 to 10 cents per piano copy of sheet music, and 10% or so of the wholesale price of other sheet music versions and folios.

Public Performance Royalties

Finally, music from popular movies and television programs is frequently performed live by musicians in restaurants, cocktail lounges, nightclubs and other public facilities. ASCAP and BMI issue performance licenses to such places. And the fees collected are distributed by ASCAP and BMI, half to copyright owners and half to composers (in the same way that fees from the public performance of soundtrack recordings are distributed).

The Bernstein Case Settlement

As the preceding sections of this part of the article indicate, movie and television composers have a personal, financial interest in seeing that the music they create is used in as many ways as possible. This is so, because their agreements with producers customarily provide that composers are to receive publishing royalties from the non-theatrical use of their music (in addition to whatever fees they are paid for composing the music in the first place). Although producers also have a financial reason for wanting that music to be used in as many ways as possible, producers are primarily in the movie or television business, rather than the music business. As a result, composers have charged that producers do not make an adequate effort to exploit soundtrack music.

In 1971, the Composers and Lyricists Guild of America - the union which had represented movie and television composers since 1955 - demanded that its members be permitted to retain an interest in the copyrights to the music they composed for producers. In this fashion, composers themselves would have had the right to license the use of that music. And thus composers would not have had to depend on the music-licensing efforts of producers in order to earn further income. However, the producers (who were represented in those 1971 negotiations by the Association of Motion Picture and Television Producers) would not agree to share copyright ownership with composers. And a two-month strike by the composers failed to change the producers' position.

In 1972, the Composers and Lyricists Guild filed an antitrust suit, known as the Bernstein case, against the AMPTP and its members. The case was settled in 1979. And though the settlement did not give composers ownership of the copyrights to the music they create, it does give composers certain limited rights to exploit that music, if producers do not, within specified time periods. (The settlement applies to music composed for movies and television programs produced by Universal, Twentieth Century Fox, Paramount, MGM, Warner Bros., Columbia, Walt Disney, United Artists, CBS, ABC and NBC.)

The settlement agreement is difficult to summarize accurately, because it treats movie music and television music separately (though similarly), and because it creates several separate classes of music: music composed after February 2, 1978; music composed between January 1, 1960 and November 2, 1976; movie music that is not publicly performed within 18 months of the initial release of the movie for which it was composed; television music composed for series; television music composed for "nonseries" programs; and exempt television music. A rather detailed description of the settlement agreement may be found in an article entitled The Rights of Composers and Lyricists: Before and After Bernstein, by Franklin J. Havlicek and J. Clark Kelso, 8 Columbia Art and the Law 439 (1984). In general, however, the settlement agreement works as follows (for movie music composed after February 2, 1978).

The producer has the exclusive right to exploit the music for 15 months from the release of the movie. If the producer does not do so, the composer may exploit the music for 30 months. If the composer does so, both the composer and the producer have the right to exploit the music forever. But if the composer fails to exploit the music during his or her 30-month period, the exclusive right to exploit it reverts to the producer. Satisfactory exploitation is precisely defined in the agreement. The copyright to the music always remains with the producer. If the producer does exploit the music, the income is split as specified in the composer's contract. If the producer does not exploit, and the composer then does, the composer receives his or her share of the income, as specified in his or her contract, plus 75% of the producer's share of the income.

Movie and television composers' agreements do not typically incorporate or even refer to the Bernstein settlementat least as drafted by producers' legal departments. Presumably, the settlement is binding on the studios and networks that were parties to it, even though the settlement is not incorporated by reference; though cautious composers' lawyers specifically incorporate the settlement, if there is any chance at all their clients may wish to take advantage of its provisions.

Ironically, although in 1971, producers would not agree to give composers an interest in the copyrights to their music, it is conceivable that today, at least some producers-including those that were not parties to the Bernstein settlement-may want to grant composers similar music exploitation rights. If, after all, the producer has not exploited the soundtrack music (apart from its use in the movie or TV program itself) within a reasonable period of time, there seems to be little if any reason to reject the composer's assistance in doing so. The sources of income from soundtrack music are many.

And in most cases, at least a portion of that income will be profit.

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[ELR 7:8:6]

RECENT CASES

Robin Cook and Michael Crichton, authors of the novel "Coma" and its screenplay, obtain affirmance by Federal Court of Appeals of decision granting them summary judgment in copyright infringement and unfair competition action

Despite a "certain gruesome similarity," no jury could reasonably conclude that Ted Berkic's screen treatment entitled "Reincarnation, Inc." and Michael Crichton's screenplay for the movie "Coma" (based on a novel written by Robin Cook) were so substantially similar as to warrant a finding that "Coma" infringed Berkic's work, a Federal Court of Appeals has ruled.

Berkic wrote the screen treatment for Reincarnation, Inc. in 1968, and submitted the unpublished work to literary agent Marvin Moss. According to the court, Moss suggested that Berkic might collaborate on the project with Michael Crichton on a "shared-credit" basis, but Berkic declined this offer.

The movie "Coma," written and directed by Crichton, was released in 1978 by MGM/UA Entertainment Company. Subsequently, Berkic filed a lawsuit alleging that Crichton infringed his copyright in Reincarnation, and that the failure to credit his contribution to the Coma novel or movie amounted to a false designation of origin in violation of the Lanham Act. A Federal District Court dismissed the Lanham Act claim, and granted summary judgment to the Coma parties on the copyright infringement claim due to the lack of substantial similarity between the works at issue. (Berkic's various state law claims against Moss and the parties involved in the production of the Coma book and film were dismissed by a California appellate court in 1984, ELR 6:8:10).

In affirming the District Court's decision, Federal Court of Appeals Judge Sneed noted that the Coma parties, for purposes of the summary judgment motion only, stipulated as to Berkic's ownership of the copyright in Reincarnation and their access to his work, but argued that the extrinsic and intrinsic tests for substantial similarity precluded a finding of infringement.

The "extrinsic" test compares the individual features of the allegedly similar works - the "plot, themes, dialogue, mood, setting, pace, characters, and sequence of events." Reincarnation, Inc. and Coma both dealt with the detection of criminal organizations that were murdering healthy young people, and then removing and selling their vital organs to wealthy people in need of organ transplants. The similarity between the basic plots of the two works did not suffice to sustain a claim of substantial similarity since no one can own the basic idea for a story "general plot ideas are not protected by copyright law; they remain forever the common property of artistic mankind," declared Judge Sneed.

Furthermore, the concrete story elements of Reincarnation and Coma, as described by the court, also were dissimilar, as were the motivations and romantic relationships of the main characters and the settings of the works. The remaining similarities cited by Berkic involved situations and incidents which evolved from the basic plot, i.e., unprotectible scenes a faire. Several other familiar scenes and themes also were unprotectible because they were "among the very staples of modern American literature and film," with the result that the common features of Coma and Reincarnation did not allow a reasonable inference that the works were substantially similar in their ideas.

The "intrinsic test" of substantial similarity, a test focusing on the form of expression, also was correctly applied by the District Court, concluded Judge Sneed because Coma and Reincarnation were substantially dissimilar "in the mood evoked ... as a whole" and in the "total concept of and the feel of the works."

Berkic v. Crichton, 761 F.2d 1289 (9th Cir. 1985) [ELR 7:8:10]

Author William Peter Blatty may proceed with action against New York Times for intentional interference with prospective economic advantage arising from newspaper's failure to include Blatty's novel "Legion" in its best seller list

The supernatural power possessed by the New York Times Book Review's best seller list has been confirmed by the appearance of a California appellate court opinion reinstating author William Peter Blatty's cause of action against the New York Times Company for intentional interference with prospective economic advantage.

When Simon and Schuster published Blatty's novel entitled "Legion," the sequel to "The Exorcist," the New York Times Book Review did not include Legion in its best seller list. So the sequel to Legion became litigation, with Blatty seeking damages from the Times for negligent and intentional interference with prospective economic advantage, and for negligence and trade libel. The author alleged that Legion had sold more than sufficient copies to warrant inclusion in the best seller list, and the newspaper's failure to list the novel caused a loss of value in the paperback editions of the work, and in movie rights. Blatty also claimed damages in excess of $3 million through lost sales of the book and higher promotional expenses.

According to Blatty, the weekly New York Times best seller list purports to rank best selling books based on actual sales. Although the list expresses no opinion as to the merits of books, the "perceived expertise" of the New York Times on literary matters is such that many book sellers promote, and many individuals purchase, novels primarily because the novels are included in the list. Therefore, stated Blatty, the New York Times knew or should have known that its list has a major influence on the sale and promotion of books, and that the noninclusion of Legion would deprive Blatty of the prospective economic advantage which he otherwise would have obtained.

Blatty further pointed out that Simon and Schuster had provided the New York Times with information about sales of Legion and requested the inclusion of the book in the list, but that the newspaper, allegedly without cause, continued to refuse to list the novel.

After Blatty filed his lawsuit, Legion appeared in the best seller list, in last position, for one week in September 1983.

Los Angeles Superior Court Judge Laurence J. Rittenband concluded that there was no evidence that Simon and Schuster had supplied the New York Times with any sales figures for Legion. The court sustained the newspaper's demurrer to Blatty's cause of action for intentional interference with prospective economic advantage with leave to amend to allege facts showing that the newspaper violated its public duty or trust to sell or distribute its newspaper to the public containing a fair and honest r.-port of all news without bias or prejudice" and that the New York Times possessed "reports of the actual sales of Legion which would qualify the book for inclusion in the best seller list and nevertheless deliberately refused to list it."

The trial court dismissed the remaining causes of action without leave to amend on the ground that the New York Times did not have a duty to include a book in the best seller list except under the above-cited circumstances.

Blatty amended his complaint to further allege that the newspaper " expressly and impliedly" advertises and represents to authors, book sellers and the public that its best seller list is an "objective, unbiased and accurate" compilation of actual sales of books each week by 2000 bookstores in every region of the United States. However, the newspaper apparently does not use actual sales in compiling its list, but an undisclosed method of "weighting" certain sales more than others. Again, Blatty claimed that the newspaper, even under these undisclosed criteria, refused, without cause, to review the sales figures which purportedly would have qualified Legion for the best seller list. The amended complaint also contained causes of action for unfair competition and false and misleading advertising, and for the breach of a "public duty or trust to sell and distribute newspapers containing a fair and honest report of all news without bias or prejudice. . ."

The trial court sustained the New York Times' demurrer to the amended complaint on the grounds stated by the newspaper: that each cause of action was barred by the First Amendment and by the California Constitution, and that the facts pleaded failed to state a cause of action.

On appeal, Judge Mildred Lillie first upheld the trial court's initial ruling sustaining the demurrer to Blatty's cause of action for negligent interference with prospective economic advantage, negligence and trade libel, and also concluded that the amended complaint did not state a cause of action for Blatty, as a private individual, arising from the alleged violation of unfair competition and false advertising laws. And the cause of action based upon the Times' alleged obligation to report the news fairly and honestly was barred by the First Amendment.

Judge Lillie next found that Blatty's amended complaint did set forth the elements of a cause of action for intentional interference with prospective economic advantage, noting, in particular that: the inclusion of a book on the Times' best seller list may cause bookstores to display a book more prominently or discount the book, resulting in increased sales; that the New York Times knew "the falsity of its representation of the list as an objective, unbiased and accurate compilation of actual sales;" and that the newspaper "intentionally or recklessly and without cause" may have refused to include Legion on its best seller list.

The newspaper argued that Blatty had not established that he had an existing economic relationship with any specific party but only referred to a possible future relationship with potential purchasers of his book, and that the Times' alleged knowledge of the best seller list's influence on potential book purchasers did not constitute an allegation that the newspaper knew of an existing relationship subject to intentional interference. But Judge Lillie stated that the cause of action asserted by Blatty "lies for interference with relationships which are merely prospective or potential," and that the amended complaint sufficiently alleged the requisite relationship and the newspaper's knowledge of the existence of that relationship.

The court also rejected the Times' argument that the First Amendment shielded the newspaper from liability due to the fact that the best seller list was compiled in the exercise of the Times' editorial judgment and represented its opinion of which books were best sellers. According to the amended complaint, the newspaper did not consider the list as an expression of opinion, but as a compilation of best sellers based on objective criteria. The First Amendment therefore did not preclude Blatty's claim and the judgment of dismissal was reversed as to the cause of action for intentional interference with prospective economic advantage.

Blatty v. New York Times Company, Case Nos. B008737 and B010053 (Ca.Ct.App., Dec. 12, 1985) [ELR 7:8:10]

Federal District Court upholds award of $27,500 to Vanessa Redgrave in breach of contract action against Boston Symphony Orchestra, but strikes award of consequential damages

As reported in ELR 6:10:20, a Federal District Court in Massachusetts has ruled that the Boston Symphony Orchestra breached its contract with Vanessa Redgrave who was scheduled to appear as the narrator for several performances of "Oedipus Rex." According to the orchestra, the performances were canceled because of a concern for physical security and the possibility that the risk of disruption would "impair the artistic integrity of the performances."

Ms. Redgrave contended that the performances were cancelled in retaliation for her controversial political views.

A Federal District Court jury ruled in Ms. Redgrave's favor on the breach of contract claim and on behalf of the orchestra on the actresses' claim under the Massachusetts Civil Rights Act. The jury's conclusions were upheld by Federal District Court Keeton who also found that, as a matter of law, Ms. Redgrave's damages were limited to the net performance fee of $27,500.

Judge Keeton carefully considered whether Ms. Redgrave was entitled to recover damages for the alleged harm caused by the cancellation of the performances to her professional career. Ms. Redgrave asserted that the publicity arising from the cancellation caused producers and theater operators, who otherwise would have engaged the actress, not to do so. Under Massachusetts law, damages may be awarded for consequential harm "if such harm was within the contemplation of the parties and was caused 'directly' by the breach of 'indirectly' by the combined effect of the breach and foreseeable intervening causes."

The jury had awarded Ms. Redgrave $100,000 in consequential damages, and Judge Keeton stated that the evidence was sufficient to support a finding that the cancellation was a "but-for" cause of substantial harm to Ms. Redgrave's professional career for which $100,000 was reasonable compensation. However, because the communicative aspect of the orchestra's action presented, for the court, a "compelling" analogy to defamation cases, and since Ms. Redgrave did not show that any message conveyed by the cancellation was not protected expression, the court concluded that consequential damages were not available to the actress.

Redgrave v. Boston Symphony Orchestra, Inc., 602 F.Supp. 1189 (D.Mass. 1985) [ELR 7:8:11]

Judgment of over $26 million to Doris Day in fraud and malpractice action against former attorney is upheld by California appellate court

When faced with losses amounting to many millions of dollars, not even Doris Day would be expected to burst into a chorus of "Que Sera, Sera." A far more predictable response was Day's lawsuit against Jerome B. Rosenthal, the former attorney for the actress and her late husband Martin Melcher, and against Harland Green (Rosenthal's law partner) and other business entities with which Rosenthal had been affiliated.

The lawsuit resulted in a 1975 Los Angeles Superior Court judgment holding Rosenthal liable to Day for legal malpractice, breach of fiduciary duty, fraud and abuse of process and awarding Day $26,396,511, including $1 million punitive damages and ordering Rosenthal to turn over trust funds and records belonging to the Melchers. (The trial court found that Green did not personally commit "any wilful, intentional, fraudulent ... act" and was not liable in damages or otherwise to Day or to the Melcher parties.) The trial court's judgment, which also dismissed Rosenthall's counterclaims against the Melchers, has been affirmed on appeal.

Judge Goldin, in a lengthy opinion, first described the eighteen year relationship between the Melchers and Rosenthal, their attorney, accountant, business manager, investment advisor and record keeper. In 1956, the Melchers and Rosenthal, who already had represented the Melchers as an attorney for several years, signed written retainer agreements, whereby, according to the court, Rosenthal obtained a ten percent interest "in virtually everything the Melchers owned and earned." Rosenthal agreed to manage and give advice to the Melchers. However, he did not advise them to obtain an independent legal opinion with respect to the terms of the retainer agreements.

In the ensuing years, Rosenthal involved the Melchers in various ventures carried out by a Rosenthal dominated corporation, ventures which were "financial disasters" for the Melchers, but often profitable for Rosenthal. From 1956 to 1968, the Melchers lost over $4 million as a result of their investments in oil and gas enterprises promoted by Rosenthal. In all, the trial court found that Rosenthal's conduct in connection with the oil and gas drilling ventures amounted to a breach of his fiduciary and contractual duties and involved Rosenthal in "repeated conflicts of interest."

Judge Goldin then cited the following unfortunate aspects of the attorney's conduct: Rosenthal "misguided" the Melchers into a 15 year tax "morass;" engaged the Melchers in "schemes" promoted by Rosenthal's other clients without informing the Melchers of his relationships with the promoters, of his personal interest in certain transactions; and provided less than adequate representation in tax court proceedings which cost the Melchers $400,000 in taxes and interest.

Rosenthal also was found to have mismanaged two hotel deals - the attorney failed to document the Melchers' ownership of the hotels, and it was not until Melcher died that the extent of his loss - over $3 million - was known. The trial court again found that Rosenthal "breached the fiduciary and contractual duties to the Melchers in virtually every aspect of the hotel ventures, and that this misfeasance was the cause of the Melchers' losses."

The trial court's litany of Rosenthal's misdeeds continued: funds attributable to several of Rosenthal's clients were commingled under a single ledger; the Melchers never received an accounting of their trust fund account; and it appeared that funds belonging to the Melchers were distributed to the attorney's other clients and that $2.2 million of the Melchers' funds deposited in Rosenthal's trust account could not be accounted for. Even at the time of trial, over $30,000 of the Melchers' money remained in Rosenthal's trust account.

The court noted that Rosenthal also had engaged Melcher in schemes to divert Day's funds without her knowledge and that Rosenthal's advice to Melcher to act in this manner without informing Day cost Day almost $3 million.

On appeal, Rosenthal did not seek to reverse the money judgment against him but to obtain relief from the "stigmata heaped upon him" in the trial court's scathing opinion. But the appellate court declared that "the record is so replete with evidence that Rosenthal breached his obligations as an attorney that it is difficult to know which examples to choose." In view of the numerous infirmities in the 1956 retainer agreements, in the hotel investments and in the oil and gas drilling ventures, it was not necessary, as Rosenthal argued, to have expert testimony concerning the manner in which he carried out his obligations. After a thorough review of the record, Judge Goldin noted that Rosenthal's many "blatant and egregious violations of attorney responsibility were not breaches of legal technicalities for which expert testimony is required ... (he) abandoned the Melchers' best interests in deference to his own; he failed truthfully to disclose potential and actual conflicts of interest; and among other things, he failed to provide competent and independent legal advice." Rosenthal's negligence was overwhelmingly established without the aid of expert testimony and his remaining procedural allegations were without foundation, concluded the court.

Day v. Rosenthal, 207 Cal.Rptr. 89 (1985) [ELR 7:8:12]

Federal District Court dismisses Chicago promoter's copyright infringement and unfair competition claims against local television station in connection with broadcast of Christmas parade, ruling that Copyright Act did not prevent simultaneous live broadcast of parade

The holiday litigation season began early this year, when a Federal District Court in Chicago found its stocking filled with a dispute over the television rights to the 1985 McDonald's Charity Christmas Parade.

In October 1985, Production Contractors, Inc., the organizer and promoter of the parade (which was scheduled to be held on December 1, 1985) sold the exclusive

Chicago area television broadcast rights in the parade to ABC, which owns and operates television station WLS-TV. Production Contractors also sold broadcast rights in the parade to about 25 other television stations throughout the United States.

In November 1985, Chicago television station WGN-TV announced that it planned a simultaneous telecast of the parade, using its own personnel and equipment. Production Contractors soon marched into court seeking a declaratory judgment with regard to the company's claims against WGN for copyright infringement and unfair competition. The promoter alleged, in part, that it would be liable to WLS for the recoupment of advertising revenues if WLS' share of the television audience for the parade fell below a certain level due to WGN's competing telecast.

Federal District Court Judge Nicholas J. Bua ruled that WGN's telecast would not infringe Production

Contractors' copyright in the parade's production. The promoter had argued that the production of the parade amounted to a "compilation" of creative works under sections 101 and 103(a) of the Copyright Act, citing the creation of floats and the arrangement of the "flow" of the parade. The script of the narration for the parade and the decorative floats themselves were individually copyrightable, as was the telecast of the parade, according to Production Contractors.

WGN claimed a First Amendment privilege to broadcast a public parade on a public street, and also cited, as barring an infringement action, Production Contractors' failure to secure or even file for copyright registration for the parade, the narration script or the floats. WGN further argued that the parade was not a "work of authorship," and could not be "fixed in a tangible medium of expression" as required by the Copyright Act. WGN neatly tied its package with a claim that its telecast would fall within the fair use exception to liability for copyright infringement.

Judge Bua pointed out that there is no case law supporting the proposition that the promotion and production of a parade is a "work of authorship" entitled to copyright protection. The late Professor Nimmer had cited a parade as an example of an event which is not an original work of authorship. And section 102(b) of the Copyright Act does not accord copyright protection to an idea. The court stated that "the idea of a Christmas parade is a common one, relatively simple and contains no original creative authorship."

The telecast of the parade also was not entitled to copyright protection, concluded Judge Bua. The legislative history of section 101 of the Copyright Act does refer to the copyrightability of live telecasts of public events. And Judge Bua observed that there is some case law to support the proposition that a live telecast of a sporting event is copyrightable. But the instant cast was distinguishable in that WGN planned to use its own equipment, cameras and directors to create its own "work of authorship" in the parade telecast. The court held that the telecast of the parade would be "a work of authorship fixed simultaneously with its transmission only for purposes of copyright protection from videotaping, tape-delays, or secondary transmissions." The protection did not extend to preventing a simultaneous live telecast by another television or radio station. In all, WLS' live telecast was not sufficiently "fixed" to prevent WGN's simultaneous live telecast of the parade, concluded the court.

Judge Bua also pointed out that the questions concerning the registration and infringement of the narration script were irrelevant since WGN did not plan to use Production Contractors' narration; and that an infringement claim with respect to the decorative floats was barred by the promoter's failure to obtain copyright registration for the floats.

In granting WGN's motion for summary judgment on the copyright infringement claim, the court did not reach the issues of First Amendment privilege or fair use.

Production Contractors also was unsuccessful on its Lanham Act claim in which the company alleged that WGN's telecast of the parade would create the false impression that WGN was connected with Production Contractors. The promoter did not establish a secondary meaning associating Production Contractors with the parade-a "necessary basis for any public confusion."

Production Contractors' state and common law claims for unfair competition, misappropriation and unjust enrichment were dismissed for lack of pendant jurisdiction in the absence of a substantial and related claim under federal copyright and unfair trade practice laws.

Production Contractors, Inc. v. WGN Continental Broadcasting, Company, Case No. 85 C 9805 (N.D.Ill., Nov. 29, 1985) [ELR 7:8:13]

California Supreme Court orders arbitration of contract dispute between football player Fred Dryer and Los Angeles Rams

The National Football League's arbitration procedures must be evaluated according to federal standards, the California Supreme Court has ruled, in reversing an appellate court decision (ELR 6:2:13) which denied the Los Angeles Rams' petition to compel arbitration in an action brought by football player Fred Dryer.

In April 1980, Dryer and the Rams entered into an employment contract; the contract was extended to cover the 1981 football season. When the Rams removed

Dryer from the active roster, Dryer sued the team in November 1981, alleging the breach of a no-cut clause in the contract. The Rams responded that Dryer's contract only prohibited the team from terminating his employment, not from removing Dryer from the active roster, as long as the club continued to pay him the specified salary for the duration of the contract term. The Rams sought to compel arbitration pursuant to the employment contract, which provided for the arbitration of disputes in accordance with the terms of the applicable collective bargaining agreement.

Article VII of the collective bargaining agreement between the players' union and the NFL management sets forth a grievance and arbitration procedure for contract disputes. However, a Los Angeles trial court denied the Rams' petition to compel arbitration on the ground that the arbitration clause in the employment contract was a contract of adhesion and that certain arbitration procedures did not meet the "minimum levels of integrity" required under Graham v. Scissor-Tail, Inc. (ELR 1:24:3).

A California appellate court upheld the trial court ruling, focusing on the section in Article VII which provides that disputes which involve "the integrity of, or public confidence in, the game of professional football" may be ordered withdrawn from an Article VII proceeding by the NFL Commissioner (after consultation with the player-club relations committee) and processed under Article VIII. Article VIII allows the Commissioner, who is appointed and paid by the management of the member clubs, to hear both the dispute and any appeal arising from his decision.

The appellate court reasoned that since any playermanagement dispute might be characterized as a matter involving public confidence in professional football, and therefore removed from arbitration by the Commissioner at his discretion, players could be denied any opportunity for a fair and impartial arbitration hearing. While refusing to compel arbitration, the appellate court did not agree with the trial court's finding that the arbitration clause of the employment contract, which incorporated Articles VII and VIII of the collective bargaining agreement, was a contract of adhesion since the clause derived from good faith bargaining.

California Supreme Court Justice Kaus first noted that Dryer's dispute with the Rams fell within section 301(a) of the Labor Management Relations Act. The lower courts had not found any incompatibility between federal policy concerning arbitration procedures and state policy as embodied in Graham v. Scissor-Tail. But Justice Kaus encountered no federal precedent for a "Graham-type inquiry into the fairness of the arbitration machinery itself as part of the court's role in considering a motion to compel arbitration under a bona fide collective bargaining agreement." The primary judicial role in considering such a motion is to make the "threshold determination" of the arbitrability of a dispute, and possibly to consider allegations of a breach of the duty of fair representation. But Dryer did not show a lack of fair representation in connection with the handling of his claim, stated Justice Kaus. In all, applying Graham in this case, declared Justice Kaus, would "frustrate rather than further the goals of national labor policy." If the dispute was arbitrable, as it was, arbitration should have been ordered to proceed under the collective bargaining agreement.

As an important ground for its decision, the court held that, federal law aside, arbitration should have been ordered in this case because the provision for Commissioner intervention applies only in a "narrowly circumscribed category of disciplinary matters." Dryer's action, again, was a contract dispute; the possibility that the Commissioner would withdraw the dispute from the arbitration process was "purely speculative." Furthermore, as distinguished from Graham, in which disputes between union members and employers were heard by union officials with no provision for an appeal to a neutral arbitrator, the arbitration panel under the NFL collective bargaining agreement is composed of two representatives from the players union and two from the management council. The disputing parties may request an outside arbitrator. Dryer did not show either that the NFL Commissioner had become involved in Dryer's grievance or that the possibility of such intervention presented a substantial "chilling effect" on the arbitration process.

(It should be pointed out that in a footnote Justice Kaus stated that it was not necessary for the court to reach the question of whether the arbitration provision of the NFL collective bargaining agreement constituted a contract of adhesion or whether the doctrine of adhesion "can even be applied to bona fide collective bargaining agreements since such agreements are not "ordinary contracts. . . ")

The trial court also had found that the individual parties sued by Dryer were not entitled to the benefit of arbitration because they were not parties to the contract between Dryer and the Rams. Justice Kaus noted that three of the four individuals were being sued in their capacities as the owners, operators or managing agents of the Rams and that each individual was a party (although perhaps not a signatory) to the employment contract. If the individual parties were acting as agents for the Rams, they were entitled to the benefit of the arbitration provisions of the collective bargaining agreement, concluded Justice Kaus in reversing the trial court order and directing the court to grant the Rams' petition to compel arbitration.

Chief Justice Bird, while concurring with the majority as to the application of the Graham standards to the NFL's arbitration procedures, dissented from the court's finding that section 301(a) of the federal Labor Management Relations Act would prohibit the court from inquiring into the fairness of the arbitration procedures contained in a negotiated collective bargaining agreement, emphasizing that Graham itself held otherwise. Chief Justice Bird did not find any federal law which would require the enforcement of arbitration procedures "which are so unfair as to come under the Graham holding," and expressed concern that the majority's opinion might be applied to enforce an arbitration provision which is facially fair but unconscionable as applied.

Dryer v. Los Angeles Rams, Case No. L.A. 31889 (Ca., Dec. 5, 1985) [ELR 7:8:14]

Music publisher's action against licensing agent is dismissed for lack of federal jurisdiction

A Federal District Court has ruled that federal jurisdiction was not properly asserted over the Harry Fox Agency in an action brought by Angel Music, Inc. in connection with ABC Sports' allegedly unauthorized use of nineteen seconds of a copyrighted song owned by Angel in an Olympics broadcast in February 1984. Angel claimed that Fox breached its fiduciary duty by failing to enforce the music publisher's synchronization rights. The music publisher did not assert a claim against the agency under the copyright laws.

Federal District Court Judge Sweet stated that Angel's claim against Fox, while developing out of the same alleged injury, was based on an entirely different legal theory. The fact that a separate trial might result in an overlap of proof was not sufficient to require Fox to participate in "a potentially complex and lengthy" federal copyright proceeding, stated the court.

Angel contended that "a common nucleus of fact" was present in its claim against Fox and in a defense asserted by ABC to Angel's copyright infringement action. ABC had averred that "agents and representatives" of Angel Music and a purported class of music publishers were aware that ABC Sports used copyrighted musical works, and had declined to take action against the broadcaster. But Judge Sweet observed that ABC's reference to "agents and representatives" apparently was directed at BMI. Even if the relationship between the Harry Fox Agency and Angel Music, and any breach of duty arising therefrom, became a factor in a defense asserted by ABC, the significance of such a defense was "only speculative." The court did suggest that it would consider a motion to add Fox as a defendant if, after discovery, Angel could present evidence to demonstrate that the music publishers' claims against the agency and ABC were "so intimately related as to constitute one case that would ordinarily be expected to proceed in one forum." Until this showing was made, pendent party jurisdiction over the Harry Fox Agency was not available.

Angel Music, Inc. v. ABC Sports, Inc., 609 F.Supp. 764 (S.D.N.Y. 1985) [ELR 7:8:15]

Federal Court of Appeals upholds Federal Communications Commission ruling that election of new board of directors of Storer Communications through proxy contest was not a substantial change in control requiring compliance with strict application approval procedures

A Federal Court of Appeals, in a case of first impression, has ruled that the Federal Communications Commission did not act capriciously or arbitrarily in its determination that the election of a new board of directors of a license, solely as a result of a proxy contest and unaccompanied by any significant change in ownership interests or voting rights, was not a substantial change in control requiring long-form application approval procedures.

A committee of minority shareholders of Storer Communications had mounted a proxy contest seeking to replace the existing board of directors. The committee's short-form application for approval was granted by the Commission's Mass Media Bureau.

In response to Storer's petition for review, the Commission reversed the Bureau in part, finding that there had been a cognizable transfer of control. But the Commission concluded that the public interest would be served by the Commission's review of the shareholder committee's action pursuant to a modified version of the FCC's short-form transfer of control application. The court noted that the FCC has broad discretion to implement the Communications Act. And the Commission had considered the fact that no change in stock ownership or voting rights was proposed by the shareholders, and that any decision by the newly-elected board to liquidate the assets of the company would be subject to prior Commission approval under long-form procedures. It also was found significant that due to the time factors involved in proxy contests, requiring compliance with the long-form might result in unduly insulating incumbent directors from challenge.

Storer Communications, Inc. v. Federal Communications Commission, 763 F.2d 436 (D.C.Cir. 1985) [ELR 7:8:15]

Limited partners' investment tax credit and depreciation deductions are disallowed because partnership's purchase of two motion pictures was not undertaken for primary purpose and intention of making a profit

In September 1975, Merjr Properties purchased from Cinerama the United States and Canadian distribution fights to the films "Revolt of the City" and "City Accuses." Merjr agreed to pay Cinerama $400,000 in cash and to execute a nonrecourse note for $2.6 million with interest; the security for the note was the two films. Under the purchase agreement, Cinerama would receive 60 percent of Merjr's proceeds from the distribution of the films until the note, including interest, was paid in full.

Merjr selected International Cinefilm Corp. to be the distributor of the partnership's films. Cinefilm agreed to release both films in 1975 and to spend at least $50,000 for prints and advertising in return for a specified share of 25 percent of the gross box office receipts from each film.

In October 1975, Roger and Kimiko Dersarkissian, Jason C. and Elizabeth Parker and Lawrence Keith acquired limited partnership interests in Merjr. In 1982, the Commissioner of Internal Revenue assessed deficiencies against these parties as follows: Dersarkissians: 1976: $14,700 / 1977: $8,500; Parkers: 1978: $24,200; Keith: 1975: $39,600. The Commissioner claimed that investment tax credits were not available to the limited partners because Merjr was not operated in a business-like manner. And the partners' depreciation deductions were disallowed because the method of depreciation "did not bear a proper relationship to a decline in the films' usefulness." The Commissioner alternatively determined that the portion of the depreciation deduction attributable to the amount of the nonrecourse note should be disallowed because the note lacked ,,economic substance" and thus was not a partnership liability which could be added to the cost or depreciable basis of the films.

In reaching the conclusion that the partnership's activities were not engaged in with the predominant purpose and intention of making a profit, Tax Court Judge Sterret cited the following factors: Cinefilm, which opened the films during the worst possible time of the year, did not provide Merjr with timely accountings or with a list of play dates for the films; the general partner of Merjr did not maintain close contact with Cinefilm and did not question Cinefilm's income statements even though Merjr did not receive any income from the distribution of the films during the years 1975 through 1978. Judge

Sterret characterized the general partner as "oblivious" with respect to the distribution of the films in that he did not know the amount actually spent on advertising or how many prints of each film were made. The films were not registered with the Copyright Office and were not screened for or rated by the Motion Picture Association of America.

Judge Sterrett pointed out that Internal Revenue Code section 167(a) permits a depreciation deduction for the exhaustion of property used in a trade or business or property held for the production of income. A partnership does not constitute a trade or business unless it is engaged in an activity with "the predominant purpose and intention of making a profit," and the profit objective must be in good faith.

The court agreed with the Commissioner of Internal Revenue that Merjr was formed and operated solely for the purpose of generating tax deductions for its limited partners. In addition to the factors cited above, Judge Sterrett noted that Merjr's general partner had no significant background in the motion picture industry, but did not seek the assistance of experts. Furthermore, he did not know where the films were being shown or whether they were being shown. The films had been purchased for $3 million and, three months later, had estimated future earnings of only $19,000, making it "obvious from the outset" that the films would not generate enough revenue to recover their cost, let alone make a profit. In all, the partnership's conduct "was carrying laissez-faire too far," concluded Judge Sterret.

Roger Dersarkissian v. Commissioner, 49 T.C.Memo. 1985-49 (1985) [ELR 7:8:15]

Tax Court finds that taxpayers used incorrect formula to determine depreciation deductions in connection with their investment in motion picture "Mysteries from Beyond the Triangle"

The Tax Court has resolved one of the "Mysteries from Beyond the Triangle" by determining that Walter H. Riester and Janet C. Riester were not entitled to depreciation deductions of about $4800 and $2100 on, respectively, their 1977 and 1979 tax returns.

The Riesters owned a 6.25 percent limited partnership interest in C.E. Associates, a limited partnership formed to exploit the "Mysteries" movie, which the partnership acquired in December 1976. C.E. Associates reported no income from the movie in 1976, 1977 and 1979. The losses reported by the Riesters reflected, in part, their share of the partnership's depreciation deductions, calculated according to the double-declining balance method, in 1977 and 1978, and the straight-line method in 1979.

Tax Court Judge Nims first ruled that C.E. Associates had made a binding election on its 1976 partnership return to use the income forecast method of depreciation. The partnership did not show that it had obtained consent from the Commissioner of Internal Revenue to change this method of depreciation. Therefore, as a matter of law, the partnership was required to compute depreciation pursuant to the income forecast method in 1977 and 1979. Since no income was derived from the movie during these years (the only income was a $10,000 distribution fee in 1978), the partnership was not entitled to depreciation deductions in 1977 and 1979, stated Judge Nims, in granting the Commissioner's motion for partial summary judgment.

Walter H. Riester v. Commissioner, 49 T.C. Memo. 1985-46 (1985) [ELR 7:8:16]

Dismissal of libel action brought by Penthouse Magazine is upheld as appropriate sanction for non-party reporters' refusal to disclose confidential sources for 1975 article about La Costa resort owners

When Morris Dalitz and Allard Roen sued Penthouse International, Ltd. for libel, they claimed that an article published by the magazine in 1975 described them as "mobsters, gangsters and members of organized crime," and implicated them in the Watergate scandal, nation-wide bank failures, and securities frauds totalling $50 billion. The article, entitled "La Costa: The Hundred-Million Dollar Resort With Criminal Clientele," was written by Lowell Bergman and Jeff Gerth. Dalitz and Roen, who shared ownership interests in the San Diego County resort with Mervyn Adelson and Irwin Molasky, also objected to the article's reference to the La Costa as a "watering hole" for gangsters, and sought $522 million in damages.

The trial court ruled that Dalitz and Roen were public figures and dismissed their complaint for lack of proof of malice. The trial court also dismissed Penthouse's crosscomplaint against Dalitz and Roen for libel and slander; the dismissal was a sanction for Bergman and Gerth's failure to disclose their confidential sources of information for the article.

A California appellate court ruled on Dalitz and Roen's action in an unpublished opinion, but did publish its decision affirming the dismissal of Penthouse's complaint.

Penthouse had argued that the trial court did not have jurisdiction to dismiss the cross-complaint since the reporters were not parties to this action and that only the reporters knew the identities of the confidential sources.

Judge Edwin F. Beach, although finding no California case directly considering the issue of whether a publisher may be held responsible for acquiring knowledge of the confidential sources of a reporter, nevertheless stated that Penthouse's libel claim sufficiently involved the acts of its reporters so that for purposes of the claim the reporters and the magazine constituted a single entity. The court therefore held that the trial court did not exceed its jurisdiction in striking Penthouse's cross-complaint for libel.

Penthouse next unsuccessfully contended that the trial court's sanction was unconstitutional as overbroad. Judge Beach stated, however, that the sanction was responsive to Dalitz and Roen's attempt to conduct discovery in connection with the magazine's claim, and did not deprive Penthouse of its right to defend the main action.

The appellate court agreed with the trial court judge's analysis of the United States Supreme Court decision in Herbert v. Lando, 441 U.S. 153 (1979), as a case which "ruled out" a source privilege. But the facts of Herbert v. Lando were inappropriate in the instant case, stated Judge Beach, in that Dalitz and Roen sought the disclosure of confidential sources of information rather than access to the editorial processes of Penthouse's reporters and editors.

According to Judge Beach, the fair administration of justice compelled disclosure in this case since the information requested went "to the heart" of Dalitz and Roen's defense. Penthouse was not entitled to use the shield of privilege, which provides immunity to media parties from being held in contempt, as a "sword" in its cross-complaint.

The California Supreme Court decision in Mitchell v. Superior Court (ELR 6:10:14) also did not require a reversal of the trial court's order. The trial court in Mitchell ordered the disclosure of confidential information by the Mitchells on the basis that the newsperson privilege they asserted did not exist in California. The California Supreme Court, however, concluded that in a civil action "a reporter, editor or publisher has a qualified privilege to withhold disclosure of the identity of confidential sources and of unpublished information supplied by such sources. The scope of that privilege in each particular case will depend upon the consideration and weighing of a number of interrelated factors."

The trial court in ordering the dismissal of Penthouse's complaint, considered the factors set forth in Mitchell and concluded that the scope of the privilege did not extend to Penthouse as a protagonist.

In remanding the case to the trial court for further proceedings, Judge Beach also stated that the discovery ordered did not violate the California Constitution by being overbroad, particularly since Dalitz and Roen had shown that the article might have been constructed totally from prior published material, or by interfering with the individual privacy rights of the various sources. It was emphasized that publishers and reporters still may protect the privacy of sources of information; they just may not rely on the nondisclosure privilege when bringing a lawsuit. The possible "chilling" effect of this position on a publisher's access to the courts did not present a significant chilling effect to freedom of the press, in the court's view.

According to news accounts, Penthouse and the La Costa parties have settled their libel litigation. Penthouse official:; reportedly stated that no money was paid to the resort as part of the settlement, but a statement was issued in which the magazine declared that it "did not mean to imply, nor did it intend for its readers to believe that Adelson and Molasky are or were members of organized crime or criminals. In addition, Penthouse Magazine acknowledges that all of the individual plaintiffs, including Messrs. Dalitz and Roen, have been extremely active in commendable civic and philanthropic activities which have earned them recognition from many estimable people."

Dalitz v. Penthouse International, Ltd., 214 Cal.Rptr. 254 (Ca.App. 1985) [ELR 7:8:16]

Lack of antitrust injury precluded action by cable television company against Missouri city in connection with franchise procedure; contribution was not

available to company as to competitor's claims in separate proceeding, rules Federal District Court

A Federal District Court in Missouri has dismissed an antitrust claim brought by TCI Cablevision, Inc. against the city of Jefferson, Missouri. The court cited the Local Government Antitrust Act of 1984, which expressly bars private damages actions against cities under the antitrust laws.

The court also found that TCI had failed to allege the essential element of "antitrust injury" when claiming that the city improperly used its monopoly power to unreasonably restrain trade in the cable television market in Jefferson. According to TCI, the city attempted to exclude the company from the cable television market by adopting a bidding process to determine the next recipient of a cable television franchise. But TCI managed to retrain its position as the sole cable television operator in the city. The "attenuated" harm of "enormous costs" and other sideeffects purportedly incurred when TCI challenged the city's allegedly illegal activity did not constitute an actionable antitrust injury, ruled the court.

Also dismissed was TCI's claim seeking contribution or indemnity from the city in the event TCI is found liable in an action filed by Central Telecommunications, a competing cable operator, against TCI and the city (see ELR 6:10:9). Central asserted claims for antitrust conspiracy, the violation of section 1983, and tortious interference with business expectations-there is no right of contribution under any of these claims, stated the court. Furthermore, since Jefferson City has settled with Central, TCI's claim for contribution would be barred by Missouri law.

TCI Cablevision, Inc. v. City of Jefferson, Missouri, 604 F.Supp. 845 (W.D.Mo. 1984) [ELR 7:8:17]

Briefly Noted:

Copyright Infringement.

A Federal District Court in Virginia rejected the University of Virginia's argument that the Eleventh Amendment barred a photographer's copyright infringement claim in connection with photographs taken at university sporting events. After examining the 1976 Copyright Act, the court held that the Act waived the state's Eleventh Amendment immunity from liability for damages. However, the court determined that the photographer was not entitled to statutory damages or attorney's fees for infringements which occurred prior to registration of the photographs.

Johnson v University of Virginia, 606 F.Supp. 321 (D.Va. 1985) [ELR 7:8:18]

Copyright Infringement.

In what may be the first case dealing with the application of section 101 of the Copyright Act to a condominium association holding a dance in its clubhouse, a Federal District Court in Florida has found that the unauthorized performance of copyrighted musical compositions at the dances was a public performance and did not fall within the "family exception" to copyright liability. Mainlands of Tamarac argued that its regularly held dances, during which copyrighted songs, including those owned by Walter K. Hinton, were performed by a live band, were for the benefit of residents only, and that the clubhouse was merely an extension of the residents' living rooms. The District Court rejected the owners' argument, finding it significant that there was unrestricted access to nonresidents attending the clubhouse dances, and that a $3.00 "suggested contribution" collected by the owners at the door actually was an admission fee. The court awarded the copyright owners the statutory minimum of $250 in damages for each infraction plus attorneys fees.

Hinton v. Mainlands of Tamarac, 611 F.Supp. 494 (S.D.Fla. 1985) [ELR 7:8:18]

Copyright Infringement.

A Federal District Court in Michigan has denied several copyright owners' motion for summary judgment against a lounge owner for copyright infringement. The court stated that the copyright owners, by presenting copyright registration certificates, established a presumption of copyright ownership which only served to shift the burden of proof on that issue to the lounge owner at trial. Also, the individual liability of the lounge owner was a question of fact because being a sole shareholder and manager did not of itself create liability for the allegedly wrongful appropriation of the works. The court did find, based upon the affidavits of two ASCAP employees, that the songs had been publicly performed at the lounge.

Bourne Co. v. Khalil, 611 F.Supp. 269 (E.D.Mich. 1985) [ELR 7:8:18]

Copyright Infringement.

In a copyright infringement action against the creators and producers of the movie "The Empire Strikes Back," Lee M. Seiler, an artist and designer of science fiction creatures and machines, sought to offer secondary evidence to prove the contents of missing originals of the designs which were allegedly copied in the film. However, a Federal District Court in California declared that the secondary evidence offered by Seiler was "inherently and overwhelmingly unbelievable," and found that Seiler did not make the requisite showing for the admission of the secondary evidence that the originals of his drawings, more probably than not, were lost or destroyed without bad faith.

Seiler v. Lucasfilm, Ltd., 613 F.Supp. 1253 (N.D.Ca. 1984) [ELR 7:8:18]

Copyright Infringement.

When photographer Timothy Graham received an exclusive commission to photograph the British Royal Family at Kensington Palace, he agreed that the photographs would not be published in the United States before March 15, 1983. Sygma Photo News obtained sixteen slides of the photographs from Graham and transferred the slides to Globe International, a weekly tabloid. When Sygma learned that the March 22d issue of the Globe would go on sale on March 14th, Sygma sued the Globe for fraud and misrepresentation in state court and obtained a preliminary injunction restraining the premature appearance of the March 22nd issue of the tabloid. The action was removed to a Federal District Court where Judge Gagliardi granted Sygma's motion to amend its original complaint by adding copyright infringement and Lanham Act claims against the Globe. The court rejected the Globe's arguments that the copyrights actually were owned by Buckingham Palace as the employer of Graham under the "works for hire" provision of the Copyright Act. The extent to which Buckingham Palace controlled the creation of the works was minimal, held the court. Also rejected was the Globe's argument that Graham's assignment of the copyrights to Sygma was in violation of New York's champerty law and therefore void under public policy. Judge Gagliardi pointed out that the assignment occurred after Sygma had filed its original lawsuit against the Globe, and also that Sygma had undertaken the assignment of the copyrights for nonmercenary reasons. The parties' motions for summary judgment on their copyright infringement claims were denied since genuine issues of fact existed as to the meaning of the terms of the license agreement.

Sygma Photo News, Inc. v. Globe International, Inc., 616 F.Supp. 1153 (S.D.N.Y. 1985) [ELR 7:8:19]

Theater Marquee.

A New York trial court has granted summary judgment to the City of New York in an action by a motion picture theater owner claiming compensation for the removal of its marquee. Since 1926, the theater had sported the marquee which extended over the sidewalk in front of the theater and out to the curb. Plans for street widening by the city would have caused the marquee to extend several feet over the street, in violation of a city-issued permit. The court dismissed arguments by the theater owner that the issuance of the permit, as well as the lengthy existence of the encroachment could be constructed as a conveyance of title by the city to part of the street. Since the marquee did not constitute an interest in real property, the court held, the owner was not entitled to compensation.

Northern Consolidated Realty Co. v. City of New York, N.Y. Law Journal, p.13, col. 2 (Queens Cnty., Sept. 10, 1985) [ELR 7:8:19]

Bailment.

A New York trial court has denied a motion picture distributors challenge of a film laboratory's lien on twelve of the distributor's films. The distributor, which had an outstanding debt of $29,000 at the laboratory, executed a payment agreement and then gave the laboratory twelve additional films to print. However, the laboratory did not print the films but placed a lien on them and attempted to sell them. The court held that the laboratory possessed a valid lien because it previously had made prints for the distributor, thereby complying with the statutory requirement providing that no lien may exist unless a print of a film is made.

21st Century Distribution Corp. v. Studio 16 Film Labs, Inc., 491 N.Y.S.2d 551 (N.Y.Cnty. 1985) [ELR 7:8:19]

Art Exhibit.

Albert Piarowski, the art department chairman of an Illinois junior college, brought a federal civil rights action against the college alleging the violation of his First

Amendment rights. The school had ordered Piarowski to relocate three of his stained glass windows, which were sexually explicit and racially offensive, from a gallery located in an alcove next to a mall which was the "busiest corridor" in the college, to an alternative site on campus. A Federal Court of Appeals has upheld a District Court finding that the school did not infringe Piarowski's First Amendment rights. The gallery was not a public forum, noted the court. And even if the gallery was accorded public forum status, the school's order to relocate the art works was "less menacing" to artistic freedom than would be an order removing the works from display. Judge Posner stated that there is "no constitutional right to exhibit sexually graphic works of art in a gallery that is missing an outside wall." The fact that the college had delegated to Piarowski and another art professor the authority to organize the exhibits did not preclude the college from participating in decisions concerning the exhibit. It also was noted that the exhibit was not political in nature, that suitable alter native exhibition space most likely would have been available and, that because the display was created by a faculty administrator, visitors at the mall might wrongly have concluded that the school officially approved of or sponsored the works. The court was reluctant to hold the college liable for the additional reason that such a decision might have "disturbing implications for the scope of federal judicial intervention in the affairs of public museums and art galleries."

Piarowski v. Illinois Community College District 515, 759 F.2d 625 (7th Cir. 1985) [ELR 7:8:19]

Sports Agent/Jurisdiction.

A Federal District Court in New York has ruled that Professional Sports Management, the purported exclusive agent for professional basketball player Michael Ray Richardson, may be sued in New York. Professional, apparently based in Seattle, Washington, was sued by Roundball Enterprises for tortious interference with an alleged exclusive representation contract between Roundball and Richardson. Roundball, held the court, had made a prima facie showing that the statutory requirements to establish jurisdiction over Professional were met by producing evidence of Professional's contacts with the state, including the agency's numerous calls, letters and visits to Richardson, a New York resident.

Roundball Enterprises, Inc. v. Richardson, 616 F.Supp. 1537 (S.D.N.Y. 1985) [ELR 7:8:19]

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NEW LEGISLATION AND REGULATIONS

California Business and Professions Code is amended to provide relief against unauthorized decorative use of trademarks

Section 14330 of the California Business and Professions Code has been amended in accordance with a bill introduced by Assemblyman Gray Davis.

The section provides for injunctive relief when a party establishes the likelihood of injury to business reputation or the likelihood that the distinctive quality of a registered trademark, or a trade mark or trade name valid at common law, will be diluted, notwithstanding the absence of competition between the parties or the absence of confusion as to the source of goods or services.

As amended, the section will provide for injunctive relief against infringement in additional circumstances, such as when a person uses a mark "other than in an otherwise noninfringing manner," either on the person's own goods or services or to describe the person's own goods or services, irrespective of whether the mark is used primarily as "an ornament, decoration, garnishment, or embellishment on or in products, merchandise, or goods, for the purpose of enhancing the commercial value of, or selling ... merchandise, goods or services" without the prior consent of the owner of the mark.

The statute does not prohibit comparative advertising, which is defined, for the purposes of the section, to mean "the use of a competitor's trademark in advertising to compare the relative qualities of the competitive goods."

An act to amend Section 14330 of the California Business and Professions Code (effective January 1, 1986) [ELR 7:8:18]

IN THE NEWS

National Collegiate Athletic Association approves new academic requirements for college athletes and authorizes drug test for athletes competing in NCAA championship events and bowl games

The National Collegiate Athletic Association has approved the use of college entrance examination scores to determine whether or not a college athlete may participate in varsity sports during his/her freshman year. Students entering college this fall may have a score as low as 660 on the Scholastic Aptitude Test and a grade average as low as 1.8 on a four point scale. Next year, the minimums would rise to 680 and 1.9. And, in 1988, the figures will be 700 out of 1600 on the SAT (or 15 out of 36 on the American College Test) and a 2.0 grade average in 11 academic courses. At present, a student needs only a 2.0 high school grade average, in any set of courses, to be eligible for an athletic scholarship.

The NCAA also has authorized drug testing for athletes competing in the association's championship events and the major postseason football bowl games. Competing athletes may be examined at random for any of 86 prohibited drugs and an athlete testing positive may be barred from the events and suspended from further competition for at least 90 days. After that period, if the athlete again tests positive for a drug, he/she will be suspended from postseason competition for the rest of the academic year as well as for the next year.

It is expected that the first athletes subject to drug testing will be runners in the NCAA's cross-country championships in November. [Jan. 1986] [ELR 7:8:20]

WASHINGTON MONITOR

Federal Communications Commission limits authority of cities to regulate satellite receiving dishes

The Federal Communications Commission has voted that municipalities may ban satellite receiving dishes only if the dishes interfere with the public health, safety or welfare or if they conflict with "reasonable and clearly defined" aesthetic values. The dishes, which sometimes are used to intercept programs being transmitted to cable television systems without paying program service fees, may not be restricted in order to limit competition for cable television systems or broadcasters. [Jan. 1986] [ELR 7:8:20]

DEPARTMENTS

A Memorial Tribute to Melville B. Nimmer 1923-1985

The legal profession has suffered an enormous loss. And for those of us who work in the Copyright, Free Speech, and Entertainment sectors of the profession, the loss is personal and acute.

On November 23, 1985, Professor Melville B. Nimmer passed away, following a brief battle with cancer. Though he was only 62 years of age, he left behind a vast body of scholarly and influential work that will stand forever as a monument to his intellect.

Mel is best known for his four-volume treatise Nimmer on Copyright. First published in 1963, the treatise became the "bible" for, and Mel became the "dean" of, American copyright lawyers. For years, Nimmer on Copyright has been cited in virtually every reported copyright decision. And not infrequently, the citations are preceded by a phrase describing Mel as "the leading authority." (See, e.g., L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 489 (2d Cir. 1976).) The National Law Journal too had praise for him, calling him "the King of Copyright" and one of the nation's 100 "most powerful lawyers."

Mel earned these accolades, and the respect they reflect, with his scholarship and the quality of his writing. He had the ability to clearly explain a conceptual and theoretical body of law that consists of an ephemeral blend of statutory language, legislative history, and judicial decisions. Indeed, he did this so well that citations to Nimmer - by judges as well as by lawyers - are more useful, and frequently more conclusive, than citations to the underlying cases and code sections.

Mel also had a keen ability to anticipate as yet unanswered questions that were likely to arise; and he had the willingness to address such questions in advance, when he felt they ought to be answered in a particular way. This happened, for example, in Columbia Pictures Industries, Inc. v. Redd Horne Inc., 568 F.Supp. 494, 500-501 (W.D.Pa. 1983), affd., 749 F. 2d 154, 159 (3d Cir. 1984), where the issue was whether the in-store viewing of rented videocassettes constitutes a "public" performance, even if done in very small viewing rooms that are never shared by strangers. The District Court noted that by "foreseeing an operation similar to" the defendant's, "Professor Nimmer" had provided a "remarkably prescient discussion" of this very issue in his treatise. Similarly, the Court of Appeals wrote that

"Professor Nimmer would seem to have envisaged" the defendant's operation when he anticipated the case in his treatise and explained how it ought to be decided. Mel's conclusion was that such performances "should obviously be regarded as public performances within the underlying rationale of the Copyright Act." And the District Court and the Court of Appeals both agreed.

Mel was born in Los Angeles in 1923 and graduated from Los Angeles High School in 1941. He attended UCLA for two years, served in the Navy, and then graduated from the University of California, Berkeley, in 1947. Mel's interest - and accomplishments - in copyright date from his years as a Harvard Law School student. Though Harvard did not then offer a formal copyright course, in his senior year there, he wrote a paper entitled "Inroads on Copyright Protection" which was awarded first place in the ASCAP Nathan Burkan

Competition. (4 ASCAP Copyright Law Symposium 3 (1952).)

Following his graduation from Harvard in 1950, Mel took a job in the legal department of Paramount Pictures. While there, he continued to do legal research of a scholarly sort; and in 1954, he published an article entitled "The Law of Ideas," 27 So.Cal.L.Rev. 120 (1954). Though his work on this topic was scholarly, it may not have been entirely "academic," because in 1949, a man named Victor Desny had submitted an idea to Billy Wilder which (according to Desny) Paramount and Wilder made into the movie "Ace in the Hole," without compensating Desny. A lawsuit followed, and Mel was one of the lawyers for the defense. Paramount and Wilder were successful at first, as the Superior Court granted their motion for summary judgment and dismissed Desny's suit. The California Supreme Court reversed, however, in an opinion which became (and remains) a landmark in the field of idea protection law. Desny v. Wilder, 46 Cal.2d 715 (1956). Though Mel's side lost, the decision must have given him some pleasure, for it cited his article, twice.

After six years as a studio lawyer, Mel went into private practice, in partnership with Paul Selvin. Among Mel's clients in those years was a Navy Commander named Kenneth Strickler. In 1956, Strickler had been a passenger on a commercial airliner flying from Honolulu to San Francisco. The plane developed engine trouble and made an emergency landing, from which Strickler and the other passengers were rescued by the Coast Guard. The following year, NBC televised a dramatized version of the rescue, and in doing so, portrayed Strickler in a manner that caused him humiliation, embarrassment, and great mental pain and suffering. Mel filed a complaint on Strickler's behalf alleging that the telecast invaded Strickler's right of privacy and misappropriated his right of publicity.

In fashioning Strickler's right of publicity cause of action, Mel relied on research he had done in writing an article entitled "The Right of Publicity," 19 Law & Contemporary Problems 203 (1954). At the time the case was filed, this right had been recognized in Pennsylvania and by the Second Circuit, but had not yet been recognized in California. In response to an NBC motion, the court dismissed the publicity claim, saying "This Court does not feel it wishes to blaze the trail to establish in California a cause of action based upon the right of publicity." On the other hand, the court refused to dismiss the privacy cause of action, saying that it was up to a jury to decide whether the manner in which Strickler had been depicted in the telecast was "offensive to a person of ordinary sensibilities," because if so, Strickler had a right to recover. Strickler v. National Broadcasting

Co., 167 F.Supp. 68 (S.D.Cal. 1958). Thus, Mel won that hearing; and eventually, California did come to recognize the right of publicity he had argued for back in 1958.

While in private practice, Mel also represented the Writers Guild of America. He was the Guild's chief negotiator during the five-month strike in 1960 that resulted in residuals being paid to screenwriters on account of television broadcasts of movies they had written for theatrical exhibition. By that time, Mel had already spent two years working on the manuscript for what was to become his copyright treatise. Though he continued to work on it during the Writers Guild strike, by waking up especially early - it was his "one touch with sanity," he later recalled - it eventually became clear that he would need more time to finish it. And within a year after the strike was settled, he decided to teach law, rather than practice it.

In 1962, Mel joined the faculty at UCLA Law School. Although he withdrew from full-time practice when he began to teach, he did keep a "toe" in the practical world, by becoming "Of Counsel" to the Beverly Hills firm of Kaplan, Livingston, Goodwin, Berkowitz & Selvin and later to the Los Angeles office of Sidley & Austin. In that role, he served as a consultant to entertainment industry clients and lawyers on libel, privacy, and copyright matters, and handled numerous appeals. His last oral argument was before the 11th Circuit Court of Appeals in the "Gone with the Wind" sequel case, which he won just weeks before his passing. Trust Company Bank v. MGM/UA, 772 F.2d 740 (11th Cir. 1985).

Mel also served as Vice-Chairman of the National Commission on New Technological Uses of Copyrighted Works. He authored a law school casebook, entitled Cases and Materials on Copyright and Other Aspects of Law Pertaining to Literary, Musical and

Artistic Works, the third edition of which was published in 1985. And over his in teaching, at least nine of his own students won national prizes in the ASCAP Nathan Burkan Competition which had started his own copyright career.

Although Mel was best known for his work in the copyright field, he also was a First Amendment scholar of renown. In 1984, he published Nimmer on Freedom of Speech. The book deals primarily with the theory of First Amendment analysis, and is the first volume of what Mel had projected as a two-volume work on First Amendment theory and its application in a wide variety of contexts, from national security to commercial advertising.

Mel was not only a First Amendment scholar, but a civil liberties advocate as well. As a volunteer lawyer for the American Civil Liberties Union, he handled cases in almost every kind of court, from the Justice

Court of Santa Barbara County to the California Supreme Court and the Supreme Court of the United States. In Justice Court, he argued, but lost, a case attacking the Constitutionality of an ordinance prohibiting nude sunbathing. In the California Supreme Court, he argued, and won, a case which held that the Board of Education could not revoke a public school teaching credential simply because the teacher had become involved in a homosexual relationship. Morrison v. State Board of Education, 1 Cal.3d 214 (1969). In the U.S. Supreme Court, Mel argued, and won, a case which held that his client had a First Amendment right to wear a jacket bearing the words "Fuck the Draft." Cohen v. California, 403 U.S. 15 (1971). The Court's decision in that case now appears in most Constitutional law casebooks, and Mel once said that it was the most satisfying case of his career.

At the time of his passing, Mel was at work on a new treatise he had begun some years before with the late Alan Latman, to be entitled World Copyright Law. The book will contain chapters on the significant copyright laws of the world, each chapter to be written by a leading copyright expert in that nation. To assure uniform style and content, Mel and Professor Latman prepared the chapter outline that all of the contributing authors are following. Mel and Professor Latman also were to coauthor the treaty chapters and were to co-edit the entire work. When Professor Latman died in 1984, Mel wrote that it would be "difficult to accept the fact that Alan will not be here to see this project through to fruition. It will at least serve as a memorial to him." (32 Journal of the Copyright Society of the U.S.A. 11 (1984).) The same must now be said of Mel. Following Professor Latman's death, Los Angeles lawyer Paul Edward Geller joined Mel as coeditor of World Copyright

Law, and Mr. Geller will see the book through to completion. Publication is expected early in 1987.

Those of us who rely so heavily on Nimmer on Copyright in our day-to-day work will be pleased to know that it will be kept up-to-date by Mel's son, David Nimmer. David is a graduate of Stanford University and received his J.D. degree from a law school that Mel (ever the Harvard graduate) used to refer to as "an institution in New Haven." David was admitted to the California bar in 1981, practiced law privately with the Los Angeles firm of Hufstedler, Miller, Carlson & Beardsley, and is now an Assistant United States Attorney.

In the Preface to the 1978 Comprehensive Revision of the treatise, Mel wrote that "David was weaned on copyright," and so he was. I first met David in 1968 in a class session of Mel's Copyright course at UCLA Law School. I was then a law student and was enrolled in the course. David was then a 13-year-old junior high school student. The topic for the day was "substantial similarity." After discussing the "abstractions" and "pattern" tests for "substantial similarity," Mel asked the class to consider whether "West Side Story" was substantially similar to "Romeo and Juliet." (See, Nimmer on Copyright, sec. 13.03, pp. 13-25 to 13-27, for Mel's own analysis.) The question is not an easy one, and the class hesitated before answering. A hand went up in the back of the room, however, and Mel called on the volunteer, though not by name. The answer offered was excellent, but the voice was unfamiliar to me and sounded especially young. When I turned around to see who had spoken, I did not recognize the speaker - at first. Even at 13, however, David bore an uncanny resemblance to his father; and it was soon evident to the entire class that we had witnessed a father/son performance which entertained - and informed - us all enormously.

Mel's wife Gloria, and his son-in-law Paul Marcus (Dean of the University of Arizona College of Law), have honored me by asking that I author the supplements to Nimmer Freedom of Speech, and I shall be doing so. Mel played an especially important part in my own life and career. Over a period of 19 years, he was my teacher, colleague and friend. His course and seminar in Copyright sparked and then fanned my own interest in the subject. His career as a law teacher was the model I imagined when I myself decided to leave practice to teach. And when, in 1978, I first talked with him about my thoughts of starting the Entertainment Law Reporter, he encouraged me to do so.

I miss him and will forever more. In this respect, though, I am not alone. A memorial service held for him in December was attended to overflowing by friends, some of whom had known him since high school, by law school colleagues and students, past and present, by members of the law firms with which he had been affiliated, and even by opposing counsel in cases he had argued.

Mel is survived by his wife Gloria, daughter Rebecca Marcus, sons Larry and David, son-in-law Paul Marcus, daughters-in-law Melissa and Marcia, and grandchildren Beth and Emily Marcus and Andrew, Steven and Jacob Nimmer.

A "Melville B. Nimmer Memorial Fund" has been established at the UCLA School of Law.

Lionel S. Sobel

[ELR 7:8:3]

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[ELR 7:8:21]