BUSINESS AFFAIRS

Suing the Stars - 80's Style: The Copyright Infringement Lawsuit

by Michael J. Pollack

It reads like a roster from a Musical Hall of Fame: Michael Jackson, The Bee Gees, Huey Lewis, Led Zeppelin, George Harrison (of the Beatles), Charlie Daniels, Ray Parker, Jr., Julio Iglesias, Laura Branigan, John Fogerty, Barry Manilow, Graham Russell (of Air Supply), GQ, Buddy Holly, Stevie Wonder, Mick Jagger and Dolly Parton. But if allegations made against such individuals were true, it instead could be deemed a rogue's gallery of tipoff artists who have stolen other people's property and used it for their own substantial economic benefits. Welcome folks to the music world's latest gambit in high stakes gambling - the copyright infringement lawsuit.

It isn't hard to play "sue the star" since the only elements that are needed are: an originally written musical composition; a registration of such composition with the United States Copyright Office; similar elements to another musical composition which was registered later than yours (typically the composition chosen for attack has obtained substantial commercial success which potentially allows for substantial damages if you will be successful in your attack); some form of argument to show "access" to your composition; an expert witness (there are plenty of musicologists available); a lawyer (no scarcity there either) and some "investment capital" (or a lawyer who truly believes).

Just as smart Texans know you sue the bankers and other "deep pockets" if you've been swindled on an oil well deal, smart New York and California lawyers know that the music publishers and record companies who have exploited the composition you are attacking can be liable for damages or profits. Hence, what is essentially a fight between two writers can turn into a discovery and liability nightmare for the music publisher (which may or may not be controlled by the writer) and for the record company which in all likelihood had no knowledge of the plaintiff's claim and relied in good faith on the writer's and/or music publisher's warranties and representations.

The Scoreboard

Turning to the scoreboard, how have plaintiffs fared in their battles with the record stars?

1. George Harrison was found guilty of subconsciously infringing "He's So Fine" when he wrote "My Sweet

Lord." Damages were originally assessed at $1,599,987 but were reduced to $597,000 on the ground that Allen Klein, who had purchased plaintiff's rights for $587,000, had breached his obligation to George Harrison as a business manager. Abkco Music v. Harrisongs Music, 508 F.Supp. 798 (S.D.N.Y. 1981), affd. with modifications, 722 F.2d 988 (2d Cir. 1983).

The prevailing legal test under federal copyright law remains the impressions the two songs in dispute make upon the lay ear, with any expert testimony going to the weight of the evidence. The Harrison case was a non-jury trial decided by Judge Richard Owen who has a substantial musical background and who I am told writes operas in his spare time. It is interesting to speculate whether a jury made up of individuals without specialized musical knowledge would have reached the same result.

2. In the Bee Gees case ("How Deep Is Your Love"), after a jury had returned a verdict of guilty of copyright infringement against the Bee Gees, Judge George Leighton granted the defendants' motion for a judgment notwithstanding the verdict overturning the jury finding on the basis that the plaintiff had failed to contradict the Bee Gees' testimony of independent creation and to establish circumstances from which access could be inferred, regardless of how similar the two tunes might be. Judge Leighton's ruling was upheld on appeal. Selle v. Gibb, 567 F.Supp. 1173 (N.D.Ill. 1983), affd., 741 F.2d 896 (7th Cir. 1984).

3. Jury verdicts were rendered in favor of Michael Jackson ("The Girl Is Mine"), Dolly Parton ("9 to 5") and Charlie Daniels ("Long Haired Country Boy") after strong testimony and performances by each of them at their trials.

4. The copyright infringement action against GQ ("Disco Nights") was dismissed in an opinion rendered from the bench by Judge Weinfeld of the United States District Court for the Southern District of New York.

5. The Ray Parker, Jr. ("Ghostbusters") lawsuit was settled just prior to trial, and the Barry Manilow ("The Last Duet") lawsuit was settled shortly after the complaint was filed.

6. To the best of my knowledge, litigation is presently continuing against Huey Lewis, Led Zeppelin, Julio Iglesias, Laura Branigan, John Fogerty, Graham Russell, Buddy Holly, Stevie Wonder and Mick Jagger.

Early Disposals or Limitations as to Meritless Claims

The common structure of many rock and roll songs and their relatively simple, repetitive musical elements and common phrasings can provide a broad ground for meritless claims brought by a frustrated songwriter looking for a deep pocket or perhaps the publicity that has eluded him in other efforts at "making it big." Thus, in many recent infringement cases, a variety of attempts have been made to dispose of the claim early on, or at least to dispose early on of as much of the burden of litigation relating to discovery as is possible until the merits of a claim can be established.

One approach is the motion for Summary Judgment. Without proof of actual copying, a plaintiff must prove either that the two songs are "substantially similar" and the defendants had access to the allegedly infringed song, or that the songs are so "strikingly similar" that access can be "inferred" from the surrounding circumstances. The plaintiff uses expert testimony to establish the similarity of the two songs at issue.

The issue of substantial similarity is a question of fact. A summary judgment motion is generally appropriate in cases where there is no genuine issue of material fact. Proof of independent creation or prior common use can overcome evidence of similarity. There has been a traditional aversion in copyright infringement cases to summary judgment disposals. However, in recent years, motions for summary judgment have been more frequently granted (mainly in motion picture screenplay and other non-musical copyright infringement cases) especially as to the issue of substantial similarity. Hopefully, similar results will occur with greater frequency in copyright infringement cases involving musical compositions.

As a general matter, my guess is that most judges feel more comfortable and competent dealing with a summary judgment motion in connection with a copyright infringement dispute concerning a motion picture or television screenplay than they would in connection with a copyright infringement dispute concerning a musical composition dispute. We have all read since we were kids. In our high school and college English courses we have analyzed and discussed plots, themes, character traits, geographical and historical factors and myriads of other elements of a particular work. Frequently, we engaged in comparisons between the work we are currently reading and works we previously read. Thus, after carefully reading the two works in dispute, a judge, based on his prior training, is likely to feel confident in his ability to make a determination as to whether or not he should grant a summary judgment motion.

On the other hand, my guess is that most judges cannot read music and, although they may have enjoyed listening to music during most of their lives, they probably have not had any substantial experience in analyzing and comparing specific musical elements in different works. As indicated before, many rock and roll songs share a common structure of simple, repetitive musical elements and common phrasings and there are a finite number of musical notes. Thus, it is far from unusual for songs to contain some similarities to other songs and for judges to feel a lack of confidence in their ability to make judgments on substantial similarity before they (or a jury) have had an opportunity to weigh evidence given by experts.

However, even if one accepts this premise, there are certain cases in which the granting of a summary judgment motion is warranted (e.g., if defendants can convincingly show proof of independent creation). Further, there are judges who can read music and whose musical training should give them the same confidence with respect to granting motions for summary judgment in copyright infringement cases involving musical compositions as they probably have in copyright infringement cases involving motion picture and television screenplays.

Bifurcation: The Severance of Liability and Damage Issues Coupled with a Stay of Discovery as to Damages and Profits

Another method of deterring meritless cases and of expediting the resolution of copyright infringement actions generally is the making and upholding of a pre-trial motion to postpone discovery as to damages and profits and a decision thereon until after liability has been established.

In Cuden v. Begg, C.D.Cal. No. 84-0108 LTL, which involved the alleged infringement of plaintiffs script in connection with a television production, the defendants made such a motion in accordance with Rule 42(b) of the Federal Rules of Civil Procedure and summarized their request in the following language:

"Specifically, defendants request an initial and separate trial on the following liability issues:

1. Plaintiffs' ownership and the validity of their copyrights;

2. Alleged copying by defendants (i.e., access, substantial similarity and proof of independent creation); and

3. Whether defendants' infringement, if established, is excused by any affirmative defense.

Defendants request that the following damages and profits issues be reserved for later discovery and trial only after a finding of liability:

1. Actual damages suffered by plaintiff due to the alleged infringement; and

2. The profits received by defendants from the allegedly infringing work.

Defendants base this motion upon the grounds that the determination of damages and profits is complex, the issues of alleged liability and damages and profits do not overlap, the motion is conducive to expedition and economy in the conduct of the litigation, and that, without bifurcation, defendants will suffer prejudice and be forced to disclose highly sensitive and confidential business information and documents pertaining to their profits."

Defendant's motion was denied without an opinion.

A decision on bifurcation and stay of discovery motions in a musical copyright infringement case was issued by Judge Keenan in Intersong-USA, Inc. and Chia v. CBS Inc., CCH Copyright Law Reports para. 25,773 (S.D.N.Y. 1985), in which allegations of copyright infringement are made against Julio Iglesias and others, both motions were denied. With respect to the bifurcation motion, the judge said that "the liability and damage issues are neither so distinct nor so complex as to warrant two trials." The judge denied the motion for a stay of discovery, in part, because he considered defendants' case weak. Judge Keenan revealed his feelings when he said:

"The Court also notes that it has listened to the two musical compositions at issue in this case and to the Court's untutored ear, the pieces are remarkably similar. Defendant's hearsay assertions notwithstanding, this similarity does not bode well for defendants' yet to be submitted summary judgment motion."

Bifurcation Factors

What can a party in a copyright infringement action do to improve the odds that a motion to postpone discovery as to damages and profits and a decision thereon until after liability has been established will be granted?

Under Rule 42(b), the following factors are considered in determining whether bifurcation of the issues of liability and damages and profits is appropriate:

1. expediting disposition of the matter and conserving trial time and other judicial resources:

2. prejudice in the absence of bifurcation; and

3. fostering convenience in that the issues to be separated are essentially independent so that bifurcation will avoid evidentiary duplication.

Essentially, the party in addressing the Rule 42(b) factors must set forth a workable outline for the two trials that meets the concerns that many judges have regarding the duplication of evidence and overlapping of issues and concurrently point out the complexities and burdens in calculating damages and profits.

Discovery Burdens

In connection with litigation in Los Angeles involving a claim that the popular Air Supply song "Lost In Love" infringes a composition entitled "Save Me," Arista

Records was named a defendant, and one of our executives filed an affidavit with the court in connection with a bifurcation motion in which he stated the following:

"Arista would suffer a severe hardship if it were required to calculate and disclose its net profits applicable to each particular record embodying Air Supply's performance of 'Lost In Love' and to produce precise figures relating to the gross revenues derived and the expenses deducted from gross revenues from each such record so as to calculate net profits. Contrary to what I understand plaintiffs' counsel has claimed, Arista does not have such information readily available in a handy 'bottom line' format. Rather, Arista would be required to review at least hundreds of invoices and related data for over a nearly five-year period (e.g., data pertaining to discounts and credits) so as to attempt to construct accurate gross revenues and thereafter would be required to attempt to construct the accurate deductions from such gross revenues by searching for, gathering and analyzing data (much of which is also nearly five years old)...."

"Arista's task in computing and providing gross revenues and net profits for Air Supply's record performances of 'Lost In Love' would be further complicated by the fact that those calculations must be done with respect to several different record releases of 'Lost In Love.' For example, in the United States, 'Lost In Love' has been released by Arista alone on two separate phonographic (disc, cassette and compact disc) albums (with several different catalog numbers), as a single and as a 'flash-back' single (again with two different catalog numbers). Further, Arista has licensed several third parties in the United States the right to include 'Lost In Love' on various record compilation packages. The existence of a number of different record releases is also true in every country outside of the United States where

Arista exploited through its licensees Air Supply's record performances of 'Lost In Love.'"

The Court refused to grant our motion to sever damages from liability and to stay discovery as to damages and profits. As a result, we were forced to hire at the peak almost 30 temporary employees who searched for documentation in over 300 cartons during a four week period. RCA Records, which performs certain administrative services for Arista, also had to retain a substantial number of temporary employees to search for documentation. Further, an accounting firm was retained to analyze the gathered data and to calculate gross revenues and net profits based upon such data. In addition, Arista produced 4 executives for depositions which consumed 5 business days: 3 days for testimony and 2 days for preparation.

This brief description hardly begins to describe the extent of disruption on our business activities. Each department at Arista suffered interruptions as working files were reviewed for documents, and executives and other departmental employees were questioned as to the existence and location of files. Desks had to be found and set aside for the temporary employees. Lines began to form at copying machines. Despite furnishing the temporary employees with written guidelines as to what documents to pull and copy, numerous questions arose which had to be answered by a qualified Arista employee. Reproduced documents had to be reviewed and segregated in a manner consistent with the document requests and interrogatories to which we were responding. Logistical problems had to be overcome in the transportation, storage and internal movement of cartons.

In addition to the above, it is impossible to accurately estimate the man-hours lost and profit opportunities missed by Arista. For example, our Associate Director of Business Affairs was the primary contact person for the temporary employees and our outside litigators. I estimate that he spent 80% of his time on matters relating to this litigation during the period in which the document search was conducted. Normally, he would have been spending a good portion of that time either actively seeking third-party licensing opportunities for our product or monitoring the exploitations and receipts of payments from such licenses or analyzing other proposals involving revenues and/or expenditures by Arista.

Proposed Compromise

To my knowledge this "damages and profits" discovery uncovered no "smoking guns," although it did produce a lot of numbers and massive amounts of paper. Since the plaintiffs are represented by a law firm that has record companies as well as major record artists as part of its clientele, I proposed furnishing, subject to an appropriate protective order, sales information encompassing gross shipments as well as royalty-bearing sales for records distributed by Arista or its licensees which embodied the allegedly infringing composition in lieu of an expensive and time-consuming "damages and profits" discovery prior to the finding of liability. I pointed out to one of the partners that based on his knowledge of the industry he could make reasonably accurate determinations as to "per unit" costs (e.g., manufacturing, copyright royalties, etc.), that if he found it necessary I was prepared to furnish information with respect to other costs (e.g., marketing, promotion, etc.), subject to an appropriate protective order, but that in my opinion based on the sales information alone plaintiffs would be in a position to pursue their liability claim and to evaluate settlement proposals. The offer was not accepted. As and when this litigation is resolved, I hope the plaintiffs' attorneys will explain to me why the damages and profits discovery was necessary at the time it was conducted and why my proposal would not have sufficed.

Every once in a while there is a case involving two experienced and knowledgeable litigators who can zero in on the important issues, recognize their respective sides' strengths and weaknesses, and conduct the copyright litigation in a speedy, cost effective and prudent manner which fully protects the interests of their clients. One such case involved the allegation that "Ghostbusters" infringed the popular Huey Lewis and the News song "I Want A New Drug." The lawyers for the parties not only conducted depositions and other discovery expeditiously, but prepared a stipulation to bifurcate which provided a thorough treatment of a workable procedure to waive a jury trial, determine liability and apportionment issues first, and then discovery and damage issues before a special master as quickly as possible thereafter.

After setting forth the issues which would be adjudicated initially, the parties stated the following:

"Should trial of those issues result in the determination that the song 'Ghostbusters' infringes 'I Want A New Drug' and that the allegedly infringing elements of the song 'Ghostbusters' contributed in any manner to its popularity, the parties would then be given a period of four months to conduct discovery on the issues regarding plaintiffs alleged actual damages, along with the numerous and complex accounting issues relating to the profits, as distinguished from gross revenues, realized by defendants from the sales of the album and single, from the licensing and exhibition of the film, and from other forms of commercial exploitation of the song. Following the conclusion of that period should the parties not have reached a settlement, the damage issues and the accounting issues (which would be the only remaining issues, liability and attribution having previously been adjudicated) would be tried before the Court at a bench trial or, should the Court deem it advisable, be referred to a special master for determination, subject to confirmation by the Court."

Both attorneys believed, and so stated in the stipulation for bifurcation, that adoption of the bifurcation proposal would "substantially enhance the chance that this case will be settled before the first phase of trial and, most certainly, before the second phase, assuming a favorable outcome for plaintiff in the first phase." In actuality, the parties settled the case before the judge gave his ruling on the proposed stipulation.

Dismissal Based On Laches Or Estoppel

A recently filed case, Triple A Partnership v. MPL Communications, No. 85-2010-0 (D-Kansas), raises some new issues in the musical copyright infringement area. Three brothers, the Hamburgs, claimed to have copyrighted a song entitled "That'll Be The Day" less than a month before Buddy Holly did in April of 1957 and to have performed it publicly six months before at a show in Oklahoma where Buddy Holly was present. The defendant is Paul McCartney's corporation which acquired the ownership in Holly's songs. The defendants seek to dismiss the action on the theories of]aches and estoppel, considering the Hamburgs have waited almost 30 years to assert their claim. The defendants claim that plaintiff s lack of diligence and delay have resulted in prejudice to defendants, since they exploited the song for years without any notice of a claim as to its originality and since Buddy Holly and Norm Petty, the two key witnesses as to access, copying and first registration of the song, are both dead.

A further prejudice and danger in not dismissing this case is clear. Even if there was copying, if a plaintiff is allowed to refrain so long from asserting a claim of which he is aware while a defendant builds up profits that will eventually have to be surrendered, the plaintiff will have the incentive to delay a claim until he is in a position to maximize his award.

Determination of Substantial Similarity: The Ninth Circuit Speaks

To establish infringement a plaintiff must show that the works are substantially similar both in terms of ideas and protected expression. Three recent Ninth Circuit cases, Litchfield v. Spielberg, 736 F.2d 1352 (9th Cir. 1984), Landsberg v. Scrabble, 736 F.2d 485 (9th Cir. 1984) and Berkic v. Crichton, 761 F.2d 1289 (9th Cir. 1985), discuss the tests to be applied to determine whether an infringement has occurred; and although to my knowledge these tests have not as yet been applied by the Ninth Circuit in a music copyright infringement case, the same principles should be applicable.

To determine whether there is substantial similarity of ideas, the trier of fact, according to Litchfield (which was relying on the bifurcated test for infringement previously set forth in Sid and Marty Krofft Television Productions, Inc. v. McDonalds Corp., 562 F.2d 1157 (9th Cir. 1977), is to apply what is termed the "extrinsic test," which "focuses on alleged similarities in the objective details of the works." Such test "requires a comparison" of specific identifiable elements of the two works rather than just ideas at a "general level."

With respect to substantial similarity of expression, the trier of fact is to next apply an "intrinsic test" to determine whether the substantially similar ideas are expressed in a substantially similar manner. However, the trier of fact must eliminate from consideration elements of expression in the copyrighted work that are not protected by the copyright therein before applying this test. The copyright in a work extends to and protects only those elements of expression in the work that were original to its creator and anyone may legally copy those elements of expression that were not.

Also not protected by the copyright in a work are those elements of expression that are the result of its creator having developed and expressed his ideas in a "stock" manner. Thus, in the context of a musical copyright infringement claim, elements of expression that are the result of the composer of the copyrighted song having employed stock tools or standard methods for the composition of musical works of the same general type as that which the alleged infringer composed must be identified and eliminated from consideration by the trier of fact before the intrinsic test is applied.

In applying the intrinsic test to protected expression, it is stated in Landsberg that "the degree of substantial similarity required to show infringement varies according to the type of work and the ideas expressed in it." Landsberg goes on to explain that "some ideas can be expressed in myriad ways, while others allow only a narrow range of expression." In the latter case, "similarity of expression" may have to amount to verbatim reproduction or very close paraphrasing, before infringement is established. Since many rock and roll songs are expressed within a narrow range of expression using many stock or common tools, forms and ideas, the standard of similarity required to establish infringement should be almost verbatim reproduction or close paraphrasing.

Determination of Apportionment: The Second Circuit Speaks

Apportionment, in musical copyright infringement cases, means the allocation of profits and expenditures between the infringing and non-infringing elements of the particular composition and the allocation of profits and expenditures between the infringing and non-infringing compositions performed on a record. The former allocation is referred to as intrasong; the latter allocation is referred to as intersong. The burden is on the defendant to offer a reasonable basis for apportionment of profits between infringing and non-infringing elements, intrasong and intersong, on an album or single.

The most thorough reported discussion of apportionment in musical copyright infringement cases is Abkco v. Harrisongs, 508 F.Supp. 798 (S.D.N.Y. 1981), affd., 722 F.2d 988 (2d Cir. 1983). Two additional decisions which discuss apportionment of performances of musical compositions are Lottie Joplin Thomas Trust v. Crown Publishers, Inc., 456 F.Supp. 531 (S.D.N.Y.

1977), affd., 592 F.2d 651 (2d Cir. 1978), and MCA Inc. v. Wilson, 677 F.2d 180 (2d Cir. 1981).

There is no scientific way to apportion, and the reasonable discretion of the judge has been the only method utilized up to the present. In the Air Supply "Lost In Love" litigation, the defendants have offered a theory based on the argument that there are five elements to a successful song: (1) music, (2) lyrics, (3) arrangement, (4) production, and (5) artist stature. Certain of those elements can be broken down further (e.g., the music element will usually consist of melody, rhythm and various other defined features). A weighing of these factors, whether they be similar or dissimilar elements of the songs, should provide a more accurate gauge for intra-song apportionment than factors that have been used in previously reported cases. The elements of artist stature and production will usually have greater weight in connection with intersong apportionment (e.g., Greatest Hits albums).

Conclusion

By becoming aware of how easy it is, and how frequent it has become, to commence copyright infringement litigation, songwriter/recording artists can take certain protective actions. The Bee Gees were ultimately able to prevail, notwithstanding an adverse jury verdict, by being able to prove independent creation through testimony and copies of demo tapes showing stages of the work in progress. Thus, songwriter/recording artists would be well advised to keep diaries, make demo recordings of songs in different stages, and have creditable individuals witness the process of creation. They should also consider obtaining errors and omissions insurance which protects against legal expenses and damages arising from copyright infringement actions.

If sued, the songwriter/recording artist's choice of lawyer is a key decision. A good lawyer will immediately investigate the allegations and make an initial judgment as to the likelihood of liability. In certain circumstances, the lawyer may be able to negotiate a quick and inexpensive settlement or a dismissal with or without prejudice. Such actions avoid or limit negative publicity and the time consuming burdens of discovery and trial. Further, a settlement is much easier to achieve before substantial legal expenses have been Incurred and emotions have been inflamed.

Failing in such efforts, the lawyer should make plans to file a motion for summary judgment (if the facts permit) and/or move to postpone discovery as to damages and profits and a decision thereon until after liability has been established. In doing so, the lawyer should set forth a workable outline for the two trials that meets the concerns that many judges have regarding the duplication of evidence and overlapping of issues and concurrently point out the complexities and burdens in calculating damages and profits. In making the motion for summary judgment the lawyer should cite the Landsberg case and argue that the standard of similarity required to establish infringement of a musical composition should be almost verbatim reproduction or close paraphrasing.

Finally songwriter/recording artists and their lawyers should coordinate and work closely with their music publishers (if it is an independent company) and their record companies if they are also named as defendants. Such companies will likely have had prior experiences with such type of action and can offer advice and direction on strategy and procedures.

Litigation is frequently a cost of doing business for those who attain success in the music industry. However financial resources are finite and money spent on litigation cannot be spent on creating and marketing product. Thus, it is in the mutual interest of songwriters, performers, music publishers and the record companies to find more economical and efficient ways of handling copyright infringement litigation.

Michael Pollack is Vice President and General Counsel of Arista Records, Inc., and a member of the Advisory Editorial Board of the Entertainment Law Reporter. This article is based on a presentation made by Mr. Pollack last October in Texas at a symposium on legal aspects of the music industry sponsored by the American Bar Association Forum Committee on the Entertainment and Sports Industries.

[ELR 7:9:3]

RECENT CASES

Federal Court of Appeals affirms order granting summary judgment to Paramount Pictures in copyright infringement action involving "Raiders of the Lost Ark"

A Federal Court of Appeals has affirmed a District Court decision (ELR 7:5:7) granting Paramount Pictures' motion for summary judgment in a copyright infringement action brought by Gary Zambito in connection with the film "Raiders of the Lost Ark." The court agreed with the District Court that many of the alleged similarities between Zambito's screenplay "Black Rainbow" and the "Raiders" film, such as the archeologist -

hero and the South American jungle locale, were non-copyrightable. Therefore, such additional elements as "native laborers, golden treasures hidden in caves and guarded by snakes, descents into dark holes, discovery of decomposed bodies below ground, and theft of treasures by bandits," were so "standard and predictable" as to constitute unprotectible scenes a faire.

The alleged similarity in 34 "concrete expressions" cited by Zambito derived from his use of "virtually identical words to describe extremely dissimilar events and expressions," stated the court. Thus, the District Court properly determined that as a matter of law no jury could find substantial similarity between Zambito's screenplay and the Raiders film.

It should be pointed out that the Court of Appeals' opinion was accompanied by a cautionary note, as follows: "Since this statement does not constitute a formal opinion of this Court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court."

Zambito v. Paramount Pictures Corp., Docket No. 85-7684 (2d Cir., Dec. 11, 1985) [ELR 7:9:9]

Federal District Court grants summary judgment to lime Life Films in copyright infringement action involving the motion picture "Fort Apache, The Bronx"

In 1976, Thomas Walker, a former police officer for the New York City Police Department, wrote a book entitled "Fort Apache;" the book related Walker's experiences in a high crime precinct in the Bronx. Prior to the book's publication, a screenplay by Heywood Gould entitled "Fort Apache, The Bronx" was copyrighted in

March 1974. And in February 1981, Time Life Films released the motion picture "Fort Apache, The Bronx" based on Gould's screenplay.

In response to Walker's action for copyright infringement, violation of the Lanham Act, unfair competition, deceptive trade practices and breach of a fiduciary and confidential relationship, a Federal District Court in New York has ruled that no reasonable observer could find substantial similarity between the motion picture and Walker's book, and therefore granted summary judgment to the Time Life parties.

Federal District Court Judge Edelstein first pointed out that the police reports of the 41st Precinct were not "independent creations of Walker's imagination entitled to copyright protection." The events described in Walker's book had been the subject of extensive news coverage; the subject matter thus was not entitled to copyright protection and was "fair game" for any artist.

Furthermore, any account of a police officer's experiences in a high crime area most likely will contain certain standard incidents, characters or settings, i.e., unprotectible scenes a faire. Walker's book and the Fort Apache motion picture both may have portrayed the disarming of threatening individuals and the poor morale of "disgruntled officers" these situations are stock material for most police stories.

The copyrightable elements of the book and film also were not substantially similar in that the allegedly similar phrases were not a material part of the book or were "too strained, far-fetched and abstract to be of consequence." The court also cited in support of its dismissal of the copyright infringement claim the differences between the leading characters in the film and book, and the fact that Walker's book was structured as a diary of events rather than a distinctive dramatic creation.

Walker's Lanham Act claim was rejected, in part because a trade newspaper advertisement for the motion picture did not provide a basis for a reasonable observer to infer that the motion picture was derived from the book. Walker also failed to establish public confusion as to the source of the motion picture.

The court concluded by finding that Walker had not supported his claim that he entered a confidential or fiduciary relationship with Gould or that Time Life engaged in deceptive trade practices.

A Federal Court of Appeals recently upheld the District Court's decision; a report on the Court of Appeals ruling will appear when the opinion becomes available.

Walker v. Time Life Films, Inc., 615 F.Supp. 430 (S.D.N.Y. 1985) [ELR 7:9:9]

"Back to the Future" hero "Marty McFly" may remain in the picture as Federal District Court denies restaurant chain's request for a preliminary injunction to prevent Universal City Studios' alleged infringement of "McFly" service mark

McFly, Inc. and Maxwell McFly, Inc., the entities which own and operate about ten California restaurants and bars bearing the "McFly" surname, have been denied a preliminary injunction in their lawsuit against Universal City Studios, the producer and distributor of the motion picture "Back to the Future." The restauranteurs alleged that the continued use of the name "McFly" for certain characters in the motion picture would infringe McFly's federal and California service marks, and common law trade name rights, and also would dilute the service marks in violation of section 14330 of the California Business and Professions Code.

According to Universal, the name Marty McFly appeared in Bob Gale and Robert Zemeckis' February 1981 first draft of the screenplay for the motion picture; neither author had any knowledge of the McFly establishments until the week before the July 3, 1985 release date of the movie. Gale testified that the name McFly was developed to match the initial "M" in the name of the hero Marty, and to reflect both the "flyweight" character of the father in the motion picture and the flight through time taken by his son.

Federal District Court Judge Alicemarie Stotler, in Findings of Fact and Conclusions of Law accompanying the order denying a preliminary injunction, first noted that the name McFly most likely was made up by the restauranteurs and, as such, was a fanciful name and a strong mark. The strength of the mark was weakened, however, by its use as a surname. And while the restaurant and motion picture McFly names are identical, the services offered by McFly, Inc. and Universal are unrelated, as are their advertising and marketing practices.

McFly's evidence of actual consumer confusion was "insubstantial," stated the court, and did not establish the requisite showing of a likelihood of confusion. McFly had participated in the promotion of the motion picture by holding a party at one of its Los Angeles facilities; the party was cosponsored by Universal and a local radio station. But McFly's did not present evidence that any individual attended "Back to the Future" thinking that it was "supported or endorsed or sponsored" by McFly's, Inc., or that any individual patronized or refused to patronize any of the McFly's restaurants for that reason.

Judge Stotler next pointed out, with respect to the dilution claim, that no showing was made that the name McFly has achieved widespread recognition among the general public. Universal used the name in a "non-mark" sense without predatory intent and without any "unwholesome or unsavory connotation." Also, it was not likely that an appreciable number of ordinarily prudent consumers would reasonably believe that the use of the name McFly was linked to the restaurant's services; that McFly would suffer either any damage to the distinctive quality of its service marks or trade names, or any irreparable harm to its business, profits or reputation from the continued distribution of the motion picture.

In denying injunctive relief, the court also cited the enormous hardship which might result if Universal were barred from using the name McFly in the motion picture, adverting to the potential loss of the "invaluable momentum" created by enormously expensive advertising and promotional efforts by Universal; a potential loss to Universal of more than $37 million in film rental payments; a loss of income to income participants in the motion picture; and the denial, at least for some period of time, of the public's right to see the motion picture. Furthermore, if Universal were ordered to change the references to the McFly surnames in the release prints (an alternative to being prohibited from showing the motion picture) considerable expense and disruption and difficulty still would result, with "a material risk of loss of creative and technical integrity of the movie. . ."

It also was noted that McFly's had failed to commence a lawsuit promptly or to take any measures during the period from July 9 to July 19, 1985 (when the lawsuit was filed) to avoid the alleged threat of confusion of dilution, thereby prejudicing Universal. In all, due to McFly's failure to show a likelihood of success on the merits of its claim or the likelihood of irreparable harm, and because the equities and the balance of hardships favored Universal, McFly's motion for a preliminary injunction was denied.

McFly, Inc. v. Universal City Studios, Inc., Case No. 85 5440 (C.D.Ca., Oct. 9, 1985) [ELR 7:9:10]

Rental of videodisc movies to resort guests was not a public performance in violation of motion picture studios' copyright interests, rules Federal District Court in California

While staying at the LaMancha Private Club and Villas in Palm Springs (a resort operated by Professional Real Estate Investors, Inc.), guests may rent videodiscs from the hotel and watch movies on videodisc players in their rooms.

Several motion picture studios brought an action for copyright infringement against the resort, alleging that the videodisc exhibition was an unauthorized public performance of their copyrighted works, in violation of the Copyright Act.

Refusing to tilt windmills on the issue of whether the LaMancha facility was a private club or a hotel, Federal District Court Judge William P. Gray declared that he would consider the resort a hotel for purposes of the matter before him, and granted summary judgment to the LaMancha. Judge Gray found that the hotel rooms containing the videodisc players were not public places under the copyright law.

In his Findings of Fact and Conclusions of Law, Judge Gray noted that there was no allegation or proof that the resort showed movies in any of its common areas; that the studios did not contend that the resort obtained any illegal or pirated copies of the movies; or that the movies were being retransmitted from a central source to each of the guest units via cable or any other means. The court concluded that "the viewing of motion pictures in a hotel room is no different from viewing movies in a private home, which is admittedly a private use and not a public performance under the copyright law." The audiences for the movie showings would he limited to families staying at the resort and their social acquaintances. And hotel rooms, according to the court, traditionally, and under the Fourth Amendment and common law, have been considered private places.

The court stated that its decision was not contrary to the decisions in Columbia Pictures Industries, Inc. v. Redd Home, Inc. and Columbia Pictures Industries, Inc. v. Aveco (see below). These cases involved video stores which contained small screening rooms which could be used for viewing rented movies. Characterizing the viewing room system as "mini-movie theaters," the courts in Redd Horne and Aveco found that public performances indeed were taking place in violation of the copyright holders' interests. But the primary purpose of renting a hotel room is not to view movies, noted Judge Gray; and the resort therefore was entitled to summary judgment on the copyright infringement claim.

Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc., Case No. 83-2594 (C.D.Ca., Jan. 15, 1986) [ELR 7:9:10]

Rental of motion picture videocassettes for in-store viewing is ruled a public performance in violation of the Copyright Act

Aveco, Inc., the operator of two Nickelodeon Video Showcase enterprises in Pennsylvania, was liable for copyright infringement, a Federal District Court has ruled, in connection with the rental of videocassettes of copyrighted motion pictures.

The video stores, in addition to selling and renting videorelated supplies, contained viewing rooms which would accommodate between two and twenty-five people; the rooms were equipped with couches, television sets and videocassette players.

Several major motion picture studios alleged that the Nickelodeon's practice of renting videocassettes combined with the renting of viewing rooms was equivalent to operating a movie theater and violated the studios' exclusive rights to authorize public performances of the copyrighted works.

Section 101 of the Copyright Act defines public performance (in relevant part) as a performance "open to the public or at any place where a substantial number of persons outside of a normal circle of family and its social acquaintances is gathered . . ."

Federal District Court Judge Muir agreed with the studios that the decision in Columbia Pictures Industries, Inc. v. Redd Horne, Inc. was controlling. In Redd Horne, a Federa] Court of Appeals ruled that Maxwell's Video Showcase was liable for copyright infringement with respect to its rental of in-store viewing rooms, upholding a Federal District Court's conclusion (ELR 6:3:6) that Maxwell's was a "place open to the public."

Aveco pointed out that Maxwell's employees, rather than the store's customers, played the cassettes which customers would view in the rented rooms, and that Maxwell's videocassette players were located in a central area outside of the "Private" viewing rooms. But the Nickelodeon's rental of viewing rooms was not necessarily related to the rental of cassettes, and the stores did not maintain "physical dominion and control over the cassettes."

Judge Muir, while noting the differences between the Nickelodeon and Maxwell's, found that those differences did not warrant a finding that no infringement had occurred. In Redd Horne, the Court of Appeals had held that for purposes of the Copyright Act, Maxwell's viewing rooms and the entire store were places "open to the public," and that performances of the cassettes were public performances, notwithstanding the fact that the rooms in which the movies were viewed by a family or other small group were closed to other members of the public. The Nickelodeon similarly was "open to the public," and the cassettes were being publicly performed without authorization. By enabling its customers to perform the cassettes, Nickelodeon infringed the studios' rights to authorize such public performances.

As in Redd Horne, the first sale doctrine did not give the Nickelodeon stores the right to exhibit cassettes of the motion pictures. The sale of a videocassette to a retail operation does not amount to a waiver of all of the exclusive rights of a copyright holder, including the right to perform the copyrighted work publicly, declared

Judge Muir, who found that the stores' activities amounted to a "showcasing" operation to which the first sale doctrine did not apply.

In addition to the above-cited facts, it should be noted that in Redd Horne, the District Court order which was upheld granted several motion picture companies' motion for summary judgment; enjoined the Erie, Pennsylvania video store parties from exhibiting copyrighted motion pictures; and awarded damages to the copyright holders in the amount of $44,750. The Maxwell's video stores, in a front showroom area, contained video equipment for sale or rental, and also contained dispensing machines for popcorn and beverages. The showcase areas in the rear of the stores contained a total of 85 viewing booths, each outfitted with a color television and an upholstered bench. The fee charged for utilizing the booths was based on the number of people in the viewing booth and the time of day. Maxwell's advertised on the theater pages of the local newspapers and the advertisements, which emphasized Maxwell's selection of films, apparently did not state that the films were videocassette copies.

Federal Court of Appeals Court Judge Re agreed with the District Court's conclusion that Maxwell's "unquestionably" was open to the public, and provided services which essentially were the same as a movie theater in that the store showed its one copy of a film repeatedly to different members of the public. The store therefore conducted unauthorized public performances. The first sale doctrine, again, did not preclude liability, because showcasing a videocassette at Maxwell's was a "significantly different transaction" than renting a tape for home use, particularly since the tapes never left the store.

Redd Horne, Inc. conducted all of the advertising and promotional work for Maxwell's, services which were essential to the infringing activities, according to the court, and by its substantial knowing participation in Maxwell's activities, the company liable as a co-infringer.

The dismissal of the Maxwell parties' antitrust counter-claims also was upheld.

Columbia Pictures Industries, Inc. v. Aveco, Inc., 612 F.Supp. 315 (M.D.Pa. 1985); Columbia Pictures Industries, Inc. v. Redd Horne, Inc., 749 F.2d 154 (3d Cir.1984) [ELR 7:9:11]

Pennsylvania Feature Motion Picture Fair Business Practices Law is upheld as constitutional regulation of film licensing procedures

In upholding the constitutionality of the Pennsylvania Motion Picture Fair Business Practices Law, Federal

District Court Judge Marvin Katz began his 59 page opinion by noting that the 1980 statute was enacted in order to establish "fair business practice procedures for the licensing and distribution of feature motion pictures. . ." The statute prohibits the use of blind bidding; provides that film licensing agreements may not require the payment of guarantees or advances; and contains a "42 day clause" which prevents distributors from granting exhibitors exclusive runs for more than 42 days, at which time the run must be expanded to other theaters within the geographical area.

Bidding procedures also are regulated by the statute in some detail, including a requirement that exhibitors who submit bids have a right to be present when bids are opened, and that a distributor must notify all the bidding exhibitors of the identity of the successful exhibitor and the terms of the successful bid. The statute also requires rebidding in the event that a distributor rejects all bids.

And if a distributor chooses to license by bidding, it cannot switch to negotiation if the terms offered in the bids are disappointing.

Judge Katz stated that the effect on the motion picture business of the statute's "modest effort" to reform unfair trade practices would be relatively minor in view of the background of "seamy conduct and exaggerated claims" on the part of both distributors and exhibitors.

The court rejected the distributors' argument that the trade screening requirement of the statute might require the costly rescheduling of the scheduled release dates for certain films. Trade screenings provide more information about a film to exhibitors than the typical "glowing" descriptions contained in bid solicitation letters, stated the court, descriptions which, on occasion, have "passed beyond hype into deception." An exhibitor viewing even an unfinished print of a film has an opportunity to obtain an "overall impression" of the work and to determine the most appropriate theater situation for the film. The release date delay argument was discounted by the court, given the industry's practice of accelerating post production work and the fact that a film may be licensed promptly after the trade screening. In all, trade screenings "give the race to the swift producers of movies rather than to the swift pre-emptors of theaters." There was no evidence to support the claim that the diversion of resources to make a trade screening print would have any effect on the quality of films being released.

Judge Katz also cited the unfortunate 1977 bid solicitation for the film "Swarm," in which a Federal District Court jury in Texas found that Warner Bros. had committed false, misleading or deceptive acts or practices under the Texas Deceptive Practices Act in connection with the marketing of the film, which was not screened for exhibitors (see ELR 6:5:16).

Judge Katz next found that the ban on guarantees and advances would benefit the public in that independent exhibitors would be protected from the "predatory practices" of larger exhibitors who can afford to offer substantial guarantees. And, contrary to the argument of the distributors, advances are not the only means of assuring payment from exhibitors. Similarly, the regulation of bidding procedures will place all exhibitors on an "equal footing," and does not portend collusion among exhibitors resulting in less favorable licensing terms.

The 42-day clause also would be of public benefit by allowing for the wider dissemination of a film after the initial exclusive run.

On the basis of its extensive review of each provision of the statute, the court held that the Pennsylvania Act did not discriminate against or unconstitutionally burden interstate commerce. There was no evidence that the statute had decreased the number of films entering the state, or that it would impose more than an incidental burden on commerce.

The statute also did not violate the First and Fourteenth Amendments, ruled the court. In prior rulings in this case, (ELR 4:9:2; 3:9:1), it was found that the statute was contentneutral trade practice legislation, which forwarded substantial interests of the Commonwealth. Again, there was no evidence that the statute had had any effect on the quality, timing or number of films being exhibited in Pennsylvania.

And the statute was not preempted by the Copyright Act since it did not create any rights equivalent to the exclusive rights given to copyright owners, or present any obstacles to the federal copyright system. Rather, the statute promoted the purposes underlying the Copyright Act, stated Judge Katz, by improving the public's access to creative products.

A final credit - the statute did not violate the Pennsylvania constitutional provision which would be equivalent to the Equal Protection clause of the Fourteenth Amendment in that the statute was a valid and reasonable exercise of the police power. Although distinguishing the motion picture industry from other trades, the statute applied equally to all parties within that business.

Associated Film Distribution Corporation v. Thornburgh, 614 F.Supp. 1100 (E.D.Pa. 1985) [ELR 7:9:14]

Portrayal of motion picture character was not "of and concerning" real-life individual with same first name, rules California appellate court in granting summary judgment to author and distributor of "Zoot Suit"

L.A. still was a small-time town back in 1942. The kind of town with a lover's lane named Sleepy Lagoon. And the kind of town where gang fights and killings were not yet routinely featured in the morning newspaper. So the Sleepy Lagoon killing was big news. The surf kept rolling in at a Malibu shore unburnt by fires and greed as 22 MexicanAmericans were charged with murder after a man was killed during a fight at a party; 12 of the men were convicted, but their convictions were overturned on appeal.

About thirty years later, Los Angeles had grown up like the rest of us. And Luis Valdez wrote a play and then a screenplay called "Zoot Suit." The play and film focused on the Sleepy Lagoon trial, but, according to a California appellate court, did not sufficiently focus on Bertha Aguilar so as to allow Aguilar to proceed with her action for defamation, invasion of privacy and intentional and negligent infliction of emotional distress against, among others, Valdez and Universal City Studios.

Aguilar claimed that she was libeled by Zoot Suit in that she was the character in the film named "Bertha" and was falsely portrayed as "a fornicating woman of loose morals." Aguilar's invasion of privacy claim was based on the alleged exposure of "unsavory incidents" from her past.

A trial court ruling granting summary judgment in favor of the Universal parties on all counts has been affirmed on appeal on the ground that no reasonable person could understand the character "Bertha" in the film Zoot Suit to be a portrayal of Ms. Aguilar.

California Court of Appeal Judge Johnson first pointed out that the mere similarity or even identity of names is insufficient to establish that a work of fiction is of and concerning a real person, noting that "In a country of this size, containing all nationalities, it would be truly remarkable if an author used a name which was possessed by no one. Only the creator of 'Mork' from Ork would appear to be safe." Furthermore, there was no similiarity between Ms. Aguilar and "Bertha" in terms of age or physical appearance. Ms. Aguilar was 13 years old at the time of the Sleepy Lagoon incident; "Bertha" is not portrayed as a 13 year old in the film.

Most significantly, the court stated that Ms. Aguilar's involvement in the Sleepy Lagoon incident did not resemble the role played by Bertha in Valdez' work. Judge Johnson noted that "Close parallels between real and fictional events may establish a reasonable belief in identity despite the author's efforts to hide the real person through alteration of name or physical appearance." Thus, in Bindrim v. Mitchell (ELR 1:4:1), while there were no similarities in name or physical appearance between a fictional and a real therapist, both conducted "nude encounters." And the court in Bindrim, after reviewing other similarities between the fictional work at issue and actual therapy sessions, determined that a reasonable person could recognize Dr. Bindrim as the therapist in the novel.

Ms. Aguilar did grow up in the neighborhood where some of the Sleepy Lagoon participants lived; she knew some of the gang members, but did not "hang out" with the gang. "Bertha" was the ex-girl friend of the gang leader, but was not shown in the film as being present during the Sleepy Lagoon killing. However, Ms. Aguilar was present when the gang engaged in the fatal fight, and testified at the trial. And although she was not a witness to the murder and was not a defendant in the trial, Ms. Aguilar was placed in a state school for girls during her youth.

The appellate court also found it significant that Valdez testified that he had never heard of Ms. Aguilar; and that the only witness who claimed to believe "Bertha" was Bertha Aguilar did not believe that Ms. Aguilar looked anything like the actress who played Bertha in the film. In all, no triable issue of fact was raised to preclude summary judgment.

Aguilar v. Universal City Studios, Inc., 219 Cal.Rptr. 891 (1985) [ELR 7:9:15]

Doubleday & Company may recover $50,000 advance paid to Tony Curtis, rules Federal Court of Appeals, because the publisher acted in good faith in rejecting as unsatisfactory the actor's manuscript for a novel

Publishers have a duty to appraise a writing honestly, but do not have an out-of-contract duty to perform adequate editorial services in connection with the writing, a Federal Court of Appeals has held.

The court was considering Doubleday & Company's breach of contract action against Tony Curtis, in which the publisher sought the return of a $50,000 advance paid to Curtis in September 1977 as one-half of the advance for a novel. Doubleday previously had published Curtis' novel "Kid Andrew Cody and Julie Sparrow." The manuscript for the second novel was due on October 1, 1978, at which time Doubleday was obligated to pay the balance of the advance on "acceptance of complete satisfactory manuscript." The contract further stated that the failure to comply with the satisfaction clause would allow the publisher to terminate the contract and would obligate Curtis to return any sums advanced. But the contract did not set forth any methods or standards for determining whether a manuscript was "satisfactory;" there was no mention of the plot, subject, title, length or tone of the proposed novel.

The venture's "sweet smell of success" was enhanced by Doubleday's reprint agreement with New American Library. New American Library promised to pay Doubleday $200,000 for the paperback rights to Curtis' second novel in the event that Doubleday published the work by December 31, 1980. Curtis would receive fifty percent of the proceeds from the paperback reprint agreement.

In April 1980, Curtis delivered to Doubleday a partial first draft of "Starstruck," a "rags-to-riches story of a lascivious Hollywood starlet." In August 1980, Doubleday editor Adrian Zackheim sent Curtis a letter in which he "criticized the numerous inconsistencies and inherent contradictions that pervaded the manuscript and exhorted Curtis to tighten the plot." However, Zackheim also praised Curtis' story-telling ability and stated that

Starstruck had "wonderful possibilities," and that he did not expect substantial changes in the basic outline of the novel. During the next few months, Curtis and Zackheim maintained only sporadic contact, a situation quite different from the close working relationship Curtis had with his editor on the previous novel.

In August 1981, Curtis provided Zackheim with a completed draft of Starstruck. According to Federal Court of Appeals Judge Kaufman, Zackheim Aas "appalled" at the draft, and concluded that the novel was unpublishable. Curtis apparently had ignored editorial suggestions concerning the work and wrote an "unexpectedly poor conclusion." After an editorial supervisor at Doubleday expressed the view that the novel was "junk, pure and simple" and could not be edited into shape or even rewritten into shape, and after Curtis' agent rejected the publisher's suggestion that Curtis avail himself of a "novel doctor," the company canceled the reprint agreement with New American Library, terminated the 1977 contract with Curtis, and demanded the repayment of the $50,000 advance.

A Federal District Court in New York (acting on the basis of diversity jurisdiction) dismissed Doubleday's complaint and Curtis' counterclaim in which Curtis alleged that Doubleday's failure to provide adequate editorial services (a duty derived from its implied obligation to perform in good faith), prevented him from completing a satisfactory manuscript. Curtis sought $150,000 in damages on the ground that he would have received a second payment of $50,000 as well as fifty percent of the paperback reprint sale if, after following "the usual and customary editorial process," Doubleday had published Starstruck.

The District Court, without deciding the issue of whether a clause requiring the delivery of a manuscript "satisfactory to the publisher" infers a duty to edit (an issue as yet unresolved by New York appellate courts) concluded that even if a duty to provide editorial services is required under New York law, Doubleday had performed its obligation to Curtis. But the publisher was not entitled to recover the $50,000 advance, stated the court, because it had waived the "time is of the essence" clause of the contract with Curtis by accepting the manuscript about eighteen months after the original deadline had passed. Furthermore, Doubleday also waived its right to demand the return of the advance by leading Curtis to believe that Starstruck eventually would be published.

Judge Kaufman first pointed out that the 1977 contract did not provide for any obligation on Doubleday's part to transform Curtis' rough drafts into a polished novel. However, when the satisfactory performance of one party is to be judged by another party, New York courts have required the party who terminates the contract to act in good faith. Judge Kaufman endorsed the "honest dissatisfaction" standard as a means of rescuing authors who otherwise might be placed at "the unbridled mercy of their editors," and also found that publishers have a corollary obligation not to mislead an author deliberately regarding the work required for a given project, such as by willfully failing to respond to a request for editorial comments on a preliminary draft. Publishers do not have a duty to perform "skillfully," emphasized the court. An author properly bears the risk that a publisher or editor may provide inferior editing and can guard against this possibility by an express contractual obligation requiring the publisher to perform adequate editorial services or to provide a particular editor. Implying such a duty would be "an unwarranted intrusion into the editorial process" and might involve triers of fact in "the manifold intricacies of an editorial relationship."

Judge Kaufman noted that the good faith termination standard was consistent with the court's ruling in Zilg v. Prentice-Hall (ELR 5:11:10) which reversed a judgment against a publisher for failing to promote a book adequately. In Zilg, the contract left to the discretion of the publisher the number of copies to be printed and the level of advertising expenses. The court required only that the publisher make an initial good faith effort to promote the book, and exercise good faith business judgment in evaluating promotional decisions.

In the Curtis-Doubleday matter, stated the court, Doubleday did not act dishonestly, with willful neglect or with bad faith toward Starstruck. Zackheim offered to discuss the novel with Curtis, albeit belatedly, and to review the draft; Curtis refused this assistance. There was no allegation that Doubleday deliberately or recklessly assigned Starstruck to an unsuitable editor. Curtis, in his contract, could have reserved a right to participate in the selection of an editor.

In all, Doubleday's rejection of Starstruck was undertaken in good faith, stated Judge Kaufman in upholding the dismissal of Curtis' counterclaim. Curtis cited Dell Publishing Co. v. Whedon (ELR 6:5:10) and Harcourt Brace & Jovanovich v. Goldwater (ELR 4:5:4) as decisions purportedly recognizing a duty on the part of publishers to provide adequate editorial services and which denied the publishers the recovery of their advances. But the court, in a footnote, stated that in Whedon and Goldwater, as distinguished from Curtis' case, the authors received no response to their requests for assistance in the preparation and revision of their manuscripts.

Judge Kaufman next reversed the District Court ruling dismissing Doubleday's complaint and remanded the case with instructions to enter judgment in favor of

Doubleday's right to recover the $50,000 advance. The District Court had found that the publishers waived its right to demand the return of the advance, but his issue was not properly before the court; the waiver issue was not pleaded by Curtis or even implicitly raised at trial, and the dismissal therefore was inconsistent with due process rights to adequate notice and an opportunity to be heard and with federal procedural rules, concluded the court.

Doubleday & Company, Inc. v. Curtis, 763 F.2d 495 (2d Cir. 1985) [ELR 7:9:15]

Internal Revenue Service regulation denying investment tax credit to television variety shows and game shows was invalid, rules United States Claims Court

The United States Claims Court has ruled that tapes of variety shows and game shows are entitled to investment tax credits under 26 U.S.C. section 48(k). Under the section, investment tax credits are available for videotapes "created primarily for use as public entertainment or for educational purposes." A tape does not qualify for the credit if the market for the tape is "primarily topical or is otherwise essentially transitory in nature."

The Internal Revenue Service denied the credit to Bill Cosby, the producer of "The New Bill Cosby Show," a comedy-variety show aired during the "pre-Huxtable" 1972-1973 television season, and to Jack Barry Productions, Inc., the producer of the game show "The Joker's Wild" which appeared on CBS from 1972 to 1975.

The government contended that section 48(k) was intended to differentiate between programs that are produced for distribution at an immediate profit (without the expectation of substantial additional profit through syndication), and programs that are produced with the expectation that profits will be earned from syndication after a successful network run. According to the government, Congress was aware that situation comedies and dramas usually fall within the latter category. Thus, the credit was created to remove some of the financial risks of producing these types of programs.

Cosby and Jack Barry Productions argued that the investment tax credit should be denied only to those programs with an "ephemeral" market such as news programs and sporting events which deal with "issues of immediate and current interest."

Chief Judge Kozinski first observed that section 48(k) was enacted to carry out the investment tax credit's goal of creating jobs in the United States; that the "topical or transitory" test in some way was considered a substitute for the "useful life" test that was eliminated by the Tax Reform Act of 1976; and that the relevant legislative history consistently uses the terms "topical or transitory" to refer to the continuing market appeal of the content of taped programs, rather than a particular tapes's actual market performance.

Furthermore, applying the generally accepted meanings of "topical" and "transitory," would result in denying the credit only to tapes dealing with subjects of "parochial or immediate interest, losing all audience appeal after a relatively short time." This interpretation would conform with the former useful life test and with the creation-of-jobs purpose of the credit, in that Congress "may have thought it superfluous to grant the credit where the underlying event would be staged regardless of taping for television," as is the case with news items.

The Government suggested that the statutory language has been followed because the Internal Revenue Service examines the market for television program tapes in general rather than the content of particular tapes. The market for one group of programs-situation comedies and dramasusually is network distribution. Although initially there may be little profit in this market, producers are looking toward the hoped-for "pot of gold at the end of the off-network syndication rainbow." The second group of programs consists of all other types of programs - game shows, variety shows, news programs, and interview shows - that generally are produced and sold to the networks with no expectation of substantial additional gain from syndication.

Judge Kozinski pointed out, however, that there was "no hint" that Congress was aware of this distinction, or that the "topical or transitory" test was chosen to achieve the result suggested by the Government. Other anomalies noted by Judge Kozinski were that some situation comedies and dramas are produced for first run syndication, bypassing network distribution altogether; and that a "topical or transitory" test based on whether a program is capable of syndication after its network run does not account for the many situation comedies and dramas that do not become eligible for syndication - the off-network aftermarket for most of these shows is every bit as transitory as that for variety shows and game shows. And the Government's interpretation was not the only one which would increase employment in the entertainment industry - the production of variety shows and game shows requires significant talent and other resources.

The court therefore concluded, as did the Tax Court in Goodson-Todman Enterprises v. Commissioner, 84 T.C. 255 (1985; ELR 7:3:7) that section 48(k) was enacted to deny the investment tax credit to productions that reasonably can be expected to become dated very rapidly.

In turning to the regulation enacted pursuant to section 48(k) - 26 CFR section 1.48-8(a)(3)(iii) (1984) - Judge Kozinski, after a thorough review, expressed "serious concern" with that part of the regulation which purported to deny "on a wholesale basis," the investment tax credit to various types of programs such as news shows, interview shows and sporting events, and to game shows and variety shows, and held that the regulation's categorical denial of the investment tax credit to variety shows and to game shows did not comport with the language of the statute and was invalid. The court pointed out that "The New Bill Cosby Show" was created and produced for national distribution, did not deal with issues of local or transitory interest, often broadcast shows months after they were taped, employed a large staff and in all, did not contain "topical or transitory" material, and did not focus on events or personalities of current interest.

"The Joker's Wild" also was produced for national distribution, with contestants selected from all parts of the country. The questions asked during the program tested general knowledge in a variety of subjects, not current events. And game shows are not events with significance independent of television, such as the World Series or the Olympics, but are created and produced specifically and exclusively for distribution on network television and in first run syndication, a medium particularly unsuitable for programs containing "topical or transitory" subject matter.

William H. Cosby and Jack Barry Productions, Inc. v. The United States, Case Nos. 168-83T; 432-83T (U.S. Claims Court, July 1, 1985) [ELR 7:9:17]

Briefly Noted:

Tennis Player Insurance.

A Federal District Court in New York has granted summary judgment to USAA Casualty Insurance Company in an action seeking a declaration that the company was not obligated, under a homeowner's policy issued to John McEnroe, Jr., to insure the tennis player for damages that might arise from an incident during a match at the 1983 United States Open Tennis Championship. The incident, described in full at ELR 7:6:11, occurred during a courtside "exchange" between McEnroe and Christopher Schneider, a spectator at the match. McEnroe was successful in defeating Schneider's $6 million lawsuit (the Nassau County Court opinion was issued on September 6, 1985, just five days before the District Court's ruling in the instant case). If McEnroe had been held liable for damages to Schneider, USAA Casualty would not have been obligated under the homeowner policy because any injury that may have been sustained by Schneider arose out of McEnroe's "business pursuits," and was excluded from coverage. The court rejected McEnroe's argument that the altercation with Schneider was merely coincidental to the tennis match, or that it was a "frolic and detour" from the tennis match and not in furtherance of a business pursuit. "The business of tennis is not confined solely to the game of tennis," noted the court, and, in view of tournament regulations, the incident with Schneider could have had an "immediate and substantial effect on McEnroe's business pursuit..."

USAA Casually, Insurance Company v. Schneider, 620 F.Supp. 246 (E.D.N.Y. 1985) [ELR 7:9:18]

Beauty Pageant.

The keys handed to Cheryl Rixon, during the taping of the Penthouse Pet of the Year pageant for 1980, did in fact fit the ignition of the $75,000 Diamonte automobile before which she was standing. The automobile, however, was borrowed, and to date, Penthouse has yet to deliver to Rixon, as promised, her own Diamonte along with many of the other prizes to which she was entitled as the winner of the pageant. The prizes awarded were to be given to Penthouse by various companies in return for advertising space in Penthouse Magazine. Since the contest, however, Mathews Motor Coach Company, the manufacturer of the Diamonte, went out of business. Following the pageant, Rixon also discovered that jewelry which she had left with a Penthouse employee (upon being instructed not to wear her own jewelry during the pageant) was missing. A New York trial court has awarded damages to Rixon on her breach of contract claim for the value of the undelivered prizes in the amount of $85,750, finding that there was a valid contract and obligation by Penthouse to deliver the prizes. The court, however, dismissed Rixon's jewelry claim, since she had failed to establish value of the jewelry, the existence of a bailment, or negligence.

Rixon v. Penthouse International, Ltd., N.Y. Law Journal, p.12, col. 7 (N.Y. Cnty., Sept. 9, 1965) [ELR 7:9:18]

Copyright.

A Federal District Court in Virginia has granted a motion for default judgment, ordered injunctive relief and awarded statutory damages and attorneys fees against Alfa Foods, Ltd., the owner and operator of the Best Western Virginia Inn in Richmond, Virginia, in a copyright infringement action brought by the owners of the copyrights to the popular songs "I'd Just Love to Lay You Down", "Blue Eyes Crying in the Rain" and "Orange Blossom Special." The copyright owners complained that their works had been performed at the Inn on numerous occasions and that Alfa had failed to respond to warning letters and visits by ASCAP, the holder of non-exclusive licensing rights to the songs. The court considered Alfa's past violations in awarding a permanent injunction, and found that a statutory damage award of $1,500 per infringement, for a total of $4,500, was appropriate because the infringement was willful.

Music City Music v. Alfa Foods, Ltd., 616 F. Supp. 1001 (E.D.Va. 1985) [ELR 7:9:18]

Copyright.

A Federal District Court in Pennsylvania has granted partial summary judgment to Dorothy Rodgers and several other copyright holders in their copyright infringement action against the owners of the Eighty Four Lumber Company. Eighty Four operated a sound system in five stores whereby copyrighted musical compositions were retransmitted by radio broadcasts from a central location to speaker systems in the stores. Eighty Four unsuccessfully argued that the performances were exempt under section 110 of the Copyright Act since the primary purpose for using the music was to muffle industrial noise for the benefit of employees, not to attract the public. The court found that the sound system resembled a commercial sound system more than it did the exempt single receiving apparatus commonly used in private homes. The purpose for which the music was used therefore was irrelevant. However, finding that a genuine dispute existed regarding the willfulness of the infringement, the court denied summary judgment on the issue of damages.

Rodgers v. Eighty Four Lumber Company, 617 F.Supp. 1021 (W.D.Pa. 1985) [ELR 7:9:18]

Horse Racing License.

A Federal Court of Appeals has affirmed a District Court's dismissal of a civil rights claim by harness horse driver Bernard Scott against members of the Illinois Racing Board, following their continued denial of his li-

returned an indictment against Scott for accepting and failing to report a bribe not to use his best efforts to finish a race. Scott was acquitted of the criminal charges in 1981. However, his 1982 and 1983 racing license applications were denied by the Board. Scott then filed claims against the Board members and various racing officials, alleging, in part, the deprivation of his due process rights under section 1983 of the Civil Rights Act. The Federal Court of Appeals found that the beliefs or attitudes held by Board members were not a proper subject to judicial inquiry, and that the Board had not exceeded its jurisdiction over horse racing in the state. And Scott did not allege that two stewards acted with an improper motive or intent in denying Scott his license, or otherwise violated his constitutional rights.

Scott v. Schmidt, 773 F.2d 160 (7th Cir. 1985) [ELR 7:9:18]

Antitrust/Horse Racing.

A group of race horse trainers who were denied access to free on-track stall space at a Florida race course alleged that Calder Race Course, Inc. and Tropical Park, Inc. had engaged in a restraint of trade in violation of section 1 of the Sherman Act by conspiring or combining to refuse to deal with the trainers. A Federal District Court jury, while finding that the method of assigning stall spaces was the result of a combination or conspiracy and constituted a restraint of the horse trainers' business, nevertheless concluded that the allocation procedure was not unreasonable in the given circumstances. A Federal Court of Appeals has upheld the District Court's determination that the rule of reason standard, rather than the rule of per se illegality, governed the trainers' claims. The denial of stall space was not a classic horizontal combination in restraint of trade, stated the court, noting that Calder, which operated its races during the summer, and Tropical Park, which operated its races in the winter, were not competitors for customers or for horses. And there was no showing that the alleged restraints would have any other anticompetitive effects, such as price fixing, which might indicate the existence of a per se violation, or that the race tracks were attempting to coerce the trade practices of the trainers. The allocation of a limited number of horse stalls necessarily would result in the exclusion of some horses, with potential economic harm to their trainers, stated the court, insufficiency of the record on appeal, the court stated that it would not review the jury's finding that the restraint indeed was reasonable.

Cha-Car, Inc. v. Calder Race Course, Inc., 752 F.2d 609 (11th Cir. 1985) [ELR 7:9:19]

Press Restriction.

When the United States Government decided to prohibit press coverage of the initial stages of the United States military intervention in Grenada, magazine publisher Larry Flynt brought an action for injunctive relief, protesting that the decision was in violation of his constitutional rights. A Federal Court of Appeals, affirming a District Court ruling, found that Flynt's request for injunctive relief was clearly moot since the press ban had been lifted shortly after the suit was brought. Because there was not a "reasonable expectation" that the Grenada controversy would recur, the court found that the second claim for declaratory relief did not fall within the exception to the mootness doctrine for those controversies "capable of repetition, yet evading review." The court remanded the case to the District Court with instructions to dismiss the complaint.

Flynt v. Weinberger, 762 F.2d 134 (D.C. Cir. 1985) [ELR 7:9:19]

Tax Law.

Daniel McCarthy, a three percent partner in the New York Yankees franchise, unsuccessfully challenged income tax deficiencies assessed and collected by the Internal Revenue Service. McCarthy took amortization deductions for his pro rata share of attorney and accounting fees incurred while purchasing the Yankees franchise. A Federal District Court in Ohio held that the legal and accounting fees were a capital expenditure which could not be amortized. The fees must be added to the cost basis of the franchise and can only be used to compute gain or loss upon the subsequent sale of the franchise.

McCarthy v. United States, 613 F.Supp. 67 (N.D.Ohio 1985) [ELR 7:9:19]

First Amendment.

A cable television subscriber successfully challenged the constitutionality of a Miami city ordinance regulating the distribution of "indecent material" through cable television. A Federal Court of Appeals affirmed a District Court ruling (ELR 5:7:7) and held that the city ordinance was unconstitutionally overbroad. The court found that the ordinance was not limited solely to obscenity and that it failed to consider certain variables such as the time of day, the context of the program in which the material appears, and the composition of the viewing audience. The ordinance also violated due process because it gave the city manager the authority to initiate complaints, to assess their validity, to preside over hearings and determine applicable sanctions. Placing the procedural functions of the ordinance in the hands of one person created "an intolerably high risk of unfairness."

Cruz v. Ferre, 755 F.2d 1415 (11th Cir. 1985) [ELR 7:9:19]

Antitrust.

A Federal Court of Appeals has affirmed a District Court order denying the Oakland Tribune's request for a preliminary injunction in the newspaper's antitrust action against Chronicle Publishing Company, the publisher of the San Francisco Chronicle. The court found that the Tribune failed to establish irreparable harm resulting from the Chronicle's use of exclusive contracts for feature items, such as syndicated columns and cartoons. The Tribune did not show that any decline in its sales was caused by the exclusivity provisions of the feature article contracts. Exclusivity provisions, which are customary in the newspaper industry, forbid a syndicate from selling a feature to any newspaper, other than the purchaser, within a defined geographic area. The contracts generally are terminable by syndicators upon thirty days notice. Any loss of circulation or revenue to the Tribune which might have been caused by the exclusivity provisions would likely involve only monetary harm which is measurable in damages. The court also found significant the Tribune's long delay before seeking to enjoin the use of the exclusivity provisions; the admission by the Tribune's counsel that there was no evidence that Tribune readers would change allegiance because the Chronicle carried the comic strip

"Doonesbury;" and the Tribune's failure to show that it bid to wrest any features from the Chronicle. No authority was cited for the Tribune's arguments that antitrust laws should especially protect newspapers because of their role in public debate, or for the proposition that in the newspaper industry, decreased circulation is "tantamount to irreparable harm."

Oakland Tribune, Inc. v. Chronicle Publishing Company, Inc., 762 F.2d 1374 (9th Cir. 1985) [ELR 7:9:19]

Previously Reported:

The following cases, which were reported in a previous issue of the Entertainment Law Reporter, have been published: Horgan v. MacMillan, Inc., 621 F.Supp.

1169 (7:7:8); City of Oakland v. Oakland Raiders, 220 Cal.Rptr. 153 (7:7:8). [ELR 7:9:19]

IN THE NEWS

Recording Industry Association of America statistics show 1985 was record year for anti-piracy law enforcement activities

The Recording Industry Association of America (RIAA) has announced that year-end statistics for 1985 reflect the most successful results to-date by law enforcement and the RIAA's Anti-Piracy Unit (APU) in combating sound recording piracy.

During 1985, more than 375,000 counterfeit and pirate cassettes were seized by law enforcement authorities assisted by RIAA personnel throughout the country, an increase of 667.6% over the previous year. These actions led to the arrests of 229 individuals for violations of the Federal Copyright Law and various state statutes which protect sound recordings. In 1984, 39 arrests were made. In addition, approximately 4,000,000 counterfeit labels were seized during the year, compared to 1984, during which 294,500 counterfeit labels were seized - an increase of 1,202%.

Six major counterfeit tape manufacturing facilities were raided in 1985 yielding millions of dollars worth of illicit product and equipment. The RIAA estimates an average of 1,700 pieces of product per seizure during the year an indication that piracy is swiftly becoming big business.

Anti-Piracy investigations were commenced in 38 states, the District of Columbia and Puerto Rico, and involved the participation of numerous Federal Law Enforcement agencies including the FBI, Secret Service, IRS and both U.S. and Canadian Customs. In addition, approximately 40 local, country and state police agencies contributed to the 231 piracy-related search warrants and seizures which took place in 1985, an increase of 120% over 1984.

"Of specific note is the stepped-up campaign by law enforcement and the RIAA Anti-Piracy Unit to attack the retail sale of counterfeit and pirate cassettes at swap meets and other secondary markets while continuing the overall effort to target the manufacturers of this illicit product," stated Joel M. Schoenfeld, Director of Anti-Piracy Operations for the RIAA. "The entire recording industry is indebted to the continued efforts of law enforcement and concerned prosecutors, who, through their work, have made an extraordinary contribution to the protection of the intellectual property of our industry and the creative rights of artists, musicians and composers."

The RIAA reports that the number of piracy cases referred to them has doubled over the past year. These referrals come from a variety of sources including law enforcement officials, recording companies, legitimate retailers, RIAA's tollfree hot-line (1-800-BAD-BEAT), as well as leads from the International Federation of Phonogram Producers (IFPI) and the media. According to Kenneth Giel, Deputy Director of Anti-Piracy Operations at the RIAA, "We are seeing the majority of illicit product in cassette format, being sold in the secondary markets with a heavy concentration of these outlets in California and the South Eastern states."

The 1985 statistics reflect an increase of over 100% in parallel importation matters investigated by RIAA APU over 1984. Parallel imports are illegal gray market goods that are manufactured outside the U.S. and slated for distribution outside the U.S., but are imported into this country for sale without the authorization of the copyright proprietors.

1985 was the first year that the Record Rental Amendment Act was in effect. This Act prohibits the rental of records released after October, 1984, without authorization of the copyright owner. The RIAA noted a substantial number of referrals this year concerning incidents of apparent violations of rights pursuant to this act.
[Feb. 1986] [ELR 7:9:20]

President of New York company engaged in leasing of master recordings enters guilty plea in prosecution for tax fraud

In 1980, Stanley Pearson became the president of IFC Leasing Inc. (also doing business under the name Music Leasing), a company which acquired master recordings to be leased as tax shelters. According to the United States Attorney for the Southern District of New York, several intermediary companies controlled indirectly by Pearson acquired 160 master recordings for a total cost of about $1 million. Other firms in which Pearson was involved then purchased the same master recordings in sham transactions for an artificial value of about $104 million. Investors who leased the master recordings from Pearson were able to claim investment tax credits amounting to ten percent of the lease price. Between 1980 and 1982, IFC and Music Leasing netted $4 million in cash from their investors. However, because the value of the master recordings was fraudulently inflated, the government incurred a loss of approximately $9 million in taxes.

The government charged Pearson and his co-conspirators with procuring false and fraudulent appraisals of the recordings, and acquiring recordings without proper title in the course of their tax fraud.

In addition to pleading guilty on the tax fraud charges, Pearson also pleaded guilty to charges that he evaded about $100,000 in personal taxes by claiming an investment tax credit of $84,000 on the basis, in part, of his lease from IFC of a master recordings of The Who which was acquired for $3200 and which Pearson valued for tax purposes at $2 million. Sentencing in the matter has not yet been announced. [Feb. 1986] [ELR 7:9:20]

Canadian government report recommends restrictions on foreign control of film and videocassette distribution in Canada

The Canadian Film industry Task Force, in a report released on December 10, 1985, has recommended that Canadian distribution rights for films and videocassettes should be restricted to companies owned and controlled by Canadians.

Citing the fact that in 1981, about 97 percent of the profits from Canadian theatrical distribution went to foreign (mainly United States) companies, the report suggested that no new foreign distribution company should be permitted to establish operations in Canada. At present, the American film industry usually considers Canada a part of its domestic market, and Canadian distribution rights often are included when American distribution rights for a film are purchased. The proposed legislation would not deny foreign companies access to the Canadian market, according to the task force, but would enable Canadian companies to "compete fairly for the acquisition of these rights."

The report also favored the enactment of legislation to increase competition in the distribution and exhibition of films in Canada by eliminating concentration and vertical integration in the industry. 49 Antitrust & Trade Reg. Report I076 (Dec. 19, 1985) [ELR 7:9:20]

DEPARTMENTS

In the Law Reviews:

Professional Sports Franchise Relocation: Introductory Views from the Hill by Senator Slade Gorton, 9 Seton Hall Legislative Journal 1 (1985)

Of Franchise Relocation, Expansion and Competition In Professional Team Sports: The Ultimate Political

Football? by Glenn M. Wong, 9 Seton Hall Legislative Journal 7 (1985)

Ticket Scalping Legislation-A New Jersey Case Study by Lawrence Bershad and Richard J. Ensor, 9 Seton Hall Legislative Journal 81 (1985)

The Application of Section 7 of the Clayton Act to the Cable Television Industry, 9 Seton Hall Legislative Journal 277 (1985)

The Child Protection Act of 1984: Child Pornography and the First Amendment, 9 Seton Hall Legislative Journal 327 (1985)

Defaming Public Figures, by T.E.F. Hughes, 59 The Australian Law Journal 482 (1985) (published by The

Law Book Company Limited, 389-393 Lonsdale Street, Melbourne, VIC. 3000, Australia)

Keeping the Game Fair and Square-Antitrust Laws and Professional Sports in America by John P. Morris, 59 The Australian Law Journal 476 (1985) (for address, see above)

The Functions of "Functionality" in Trademark Law by A. Samuel Oddi, 22 Houston Law Review 925(1985)

National Security and the First Amendment: The Proposed Use of Government Secrecy Agreements Under National Security Directive 84, 19 Columbia Journal of Law and Social Problems 209 (1985)

Harper & Row v. The Nation: A First Amendment Privilege for News Reporting of Copyrightable Material?, 19

Columbia Journal of Law and Social Problems 253 (1985)

The Effect of NCAA v. Board of Regents on the Power of the NCAA to Impose Television Sanctions, 18 Indiana Law Review 937 (1985)

Collegiate Licensing in Canada and the Statutory Advantage by Sheldon Burshtein, 12 The Journal of College and University Law 227 (1985) (published by Fred Rothman & Co., 10368 West Centennial Road, Littleton, CO 8OI27)

Betamax Meets the Supreme Court: A Judicial Disappointment by Richard K. Berger, 20 New England Law Review 285 (1984-5)

Let Me Count the Ways - Dispute Resolution in the Entertainment Industry by Richard L. Feller, 4/2 The Entertainment and Sports Lawyer 1 (1985) (published by the ABA Forum Committee on the Entertainment and Sports Industries, 750 North Lake Shore Drive, Chicago, IL 60611)

Music Law Symposium Held in Texas by Edward P. Pierson, 4/2 The Entertainment and Sports Lawyer 18 (1985) (for address, see above)

Hollywood Unchained: The famous Paramount consent decrees stripped the studios of their theaters and changed the motion picture industry, by Ed Cray, 6/2 California Lawyer 32 (1986) (published by The State Bar of California, 555 Franklin St., San Francisco, CA 94102)

1985 Entertainment, Publishing and the Arts Handbook has been published by Clark Boardman Company, Ltd. (435 Hudson Street, New York, NY 10014, (212) 929-7500) and contains the following articles:

Overview by Eileen L. Selsky

Important FCC Actions by Robert G. Finney
FCC Action: FCC Declines to Reinstate Syndicated Program Exclusivity Rules and Refuses to Expand Protection for Sporting Events Carried by Cable Systems by Lionel S. Sobel

Who's Sorry Now? Termination Rights and the Derivative Works Exception by Howard B. Abrams

Copyright Licensing Considerations by John F. Hornick

The First Sale Doctrine-The Defense That Never Was? by Richard Colby

Videocassettes, Videodiscs, and the Role of the Theatrical Distribution by David Waterman

Cable Communications Policy Act of 1984 by Robert G. Finney
Multi-Channel Television Sound by Janis T. Eto

Dracula: Still Undead. Unresolved Right-of-Publicity Questions Are Sure to Haunt the Courts by Stephen F. Rohde

A Canadian Perspective on the Protection of an Individual's Personality from Commercial Exploitation by David Himelfarb

Special Procedures for the Entry of Alien Entertainers by Steven C. Bell

New Protection for the Semiconductor Chip: A 1984 Federal Law Gives Exclusive Rights and Related Remedies to "Mask Work" Owners by Elliott N. Kramsky [ELR 7:9:23]