BUSINESS AFFAIRS

Music Video: Realities of the Business

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"May you live in interesting times" is an old Chinese curse. Well, the interesting time for music video is certainly upon us, as this new art form has quickly become one of the most talked about and visible media in our society. Interest in music video, and its future, is indicated by considerations that are subtle to the uninitiated. Scores of attorneys, artists' managers, and record company, film company and publishing executives are negotiating the plethora of contracts required to professionally produce and exploit a music video.

One sure sign of the interest in this new medium is the significant number of attorneys changing their specialties from non-entertainment fields to the music business. Ironically, however, due to the general erosion of music business revenues in recent years, many music attorneys, to sustain their practices, are forced to attempt to move into the television and film fields as well as non-entertainment fields.

Do not be confused by the glamour of the term "music video," which is a trendy and aesthetic way of hiding stark legal reality. That is the reality of television or film production, with all the problems of contracts, production, insurance, copyright, and union negotiations that pertain to producing television and film programs in general.

The music video industry began as a collection of film clips of artists as they performed live on television teen dance shows. Record companies found it less expensive to send clips overseas for promotional purposes than to provide tour support for artists who could not themselves afford to travel abroad. Depending on one's point of view, the video clip has turned into either an excellent and effective way to promote an artist's career or an expensive way to massage an artist's ego.

While commentators point to the fledgling video market as a new growth industry, and other interested parties look to video licensing to replace the millions of dollars lost because of declining record sales, industry insiders are quick to point out that profits for the artists and record companies are not yet being made on the video side of an artist's deal. In fact, knowledgeable sources state that record companies are recouping only 5 to 10 percent of their music video production costs.

What follows are some selected issues of interest affecting a number of parties in the chain of production and distribution. We have tried to include, wherever possible, the philosophies of the various parties which have led to the contractual and negotiating realities pervading the industry today. This article includes some of our own opinions which are, of course, subject to change as we continue to learn more about the business.

Bear in mind, as you read, that the burgeoning music video business is not unlike many others in the entertainment industry where the negotiation of the deal seems to take on greater significance than the product itself. In advising clients, it is probably best to start with the proposition that the record company usually gets everything its way in negotiations with non-established artists and that the way the deal turns out will depend upon the artist's bargaining position. Superstar artists make the best deals for themselves (not necessarily for the industry, however).

The Music Video Definition

In the late '70s and early '80s, the growing popularity of music videos presented a new way to market recording artists and to potentially increase the coffers of the artists and record companies. This resulted in an expansion of the provisions in recording contracts which defined what music video was to be, detailed the expanding rights the record company was requiring, and what was to happen when an artist performed in front of a camera. This evolving contract language has helped many attorneys in the industry to hone their skills in obfuscation and interpretation. A standard recording contract of a major record company in the late '70s would have contained grant of rights language much like the following:

"We and/or our designees shall have the worldwide right in perpetuity to manufacture, sell, distribute and advertise records or other reproductions (visual or non-visual) embodying such masters, to lease, license, convey or dispose of the master by any method now or hereafter known, in any field of use. . . ."

In such typical contracts, the entire music video clause might merely have been stated as follows:

"The artist will, upon request, appear on dates and at film studios or other locations to be designated by us, upon reasonable notice to you, for filming or taping or promotional films and TV tapes. In connection therewith, we, or our designees, will make a payment to the artist for services performed by the artist pursuant to the terms of this paragraph, within a reasonable time after completion thereof, at the rate of the appropriate union scale."

The only other reference to music video in the so-called standard form contract was in the definition of phonograph records as including:

"... all forms of recordings (both visual and non-visual) including, without limitation, discs of any speed or size, pre-recorded tapes, cartridges and any other recorded devices now known or which may hereafter become known." (Some record companies agreed, however, not to release so-called "sight and sound" recordings without the artists consent.)

The foregoing definitions made it difficult to determine what rights had been granted. It was also difficult to distinguish a "video" from a film or videotape of an entire live concert performance, a full length feature film, a musical film in which the artist performed a song on camera, or a simple guest performance on "The Tonight Show." Additionally, it was impossible to distinguish a 3 to 5 minute "promotional" music video clip from a twenty to sixty minute "commercial" music video which might combine more than one performance by an artist.

Expansion of the Definitions

It is important to understand the evolution of the definitions in current use, from the viewpoint of the record companies' marketing and promotion departments, especially in light of the undeniable reality that the industry has not generated enough video income from the commercial use of videos to recoup even a small portion of the millions tion of video clips. As far as record company marketing departments are concerned, the music video is an effective tool in establishing and furthering an artist's career. In its promotional form, however, it was neither designed nor intended to be a viable commercial product per se nor to be an income-generating source separate from records.

In the early 1980s, record companies began expanding the definitions of promotional film clips, attempting to tie up all commercial exploitation rights for these promotional tools to enable the record companies to at least recoup their rising video production costs. The definitions are now considerably more sophisticated in protecting the record companies' share of this potential source of income. Great care and detail in drafting is now given to the production of music video, promotional and commercial usages and potential income sources.

Although we are really talking about an audiovisual recording combining the artist's audio performance with visuals, some record companies would rather view a music video as "a motion picture containing an artist's audiovisual performances," and thereby tie up the rights any time an artist stands in front of a camera. But, record companies are in the business of selling records, and few artists' attorneys would believe that the motion picture business is within the parameters of the recording business, or that a record company has enough expertise in television and film production, advertising, promotion, distribution and financing to justify such overreaching.

Therefore, one of the points of heavy negotiation in an artist's contract is the type of visual performance an artist may engage in without record company intervention and interference. This is particularly important for artists who regularly perform in films or do guest appearances on television programs such as "The Tonight Show" or "Saturday Night Live." The "permitted recordings" paragraph in an artist's contract should permit an artist to render services for such purposes so long as there is no right granted to authorize any person other than the record company to manufacture and sell audiovisual records for home use or to record soundtrack albums without the consent of the record company. Record companies are generally satisfied that the clauses in the recording contracts that give them exclusive rights to an artist's name, likeness and performances allow the record companies to block any third party from exploiting any performance of their exclusive artist in an audiovisual work without their consent, unless it is a permitted recording. This should be an area of intense negotiation because, taken to the extreme, a record company could prevent an artist from performing a song in a feature film (even if there were to be no soundtrack album), or even from performing simply as an actor.

Record companies have spent much time and energy to arrive at broad, all-encompassing definitions, and most of the definitions contained in the typical record company contract are non-negotiable. Record companies may negotiate with respect to such things as other commercial usages (video jukeboxes, home video software, etc.), royalty rates, commercial tie-ins, video coupling, etc., much like the audio recording portions of a recording contract. However, the audiovisual record is still an extension of the audio master recording, and the only rights that the record company should be able to restrict should be uses or performances connected with the sound recording itself. Some companies agree that music videos, as defined in their artist agreements, will cover only audiovisual performances substantially embodying their respective master recordings. Most record companies would not want their artists to make audiovisual recordings for any other company. Artists' attorneys have attempted to place time limits of from 5 to 15 mintues on a video, but record companies will strongly resist this limitation because the length of the video is more within the control of the artist (some artists like to write songs of great duration), and record companies want to tie up "long form" video rights in any event.

What is Promotional and What is Commercial?

Record companies are going to great lengths to define what uses are promotional and what uses are commercial. The important point for the artist to remember is that no income is paid to the artist for promotional uses. This, again, is akin to similar provisions in the recording agreement which provide that no royalty is payable on the distribution of promotional audio recordings.

In one typical contract, the term "commercial exploitation" means the "use of the video tape for which Company receives money with the exception of the home video market" for which royalties are payable pursuant to a separate royalty structure. Therefore, a promotional music video would become a commercial video if money were received in connection with the promotional use of that video. This would apparently mean that programs such as "Friday Night Videos" (an NBC network television program), which may pay a fee in excess of $1,000 to the record company for the right to broadcast the record company's video, would constitute commercial exploitation. But, record companies have characterized this type of use as "incidental," and the revenues have not been considered by them as income payable to the artist. Most broadcast outlets, however, pay only small service fees for the right to broadcast videos.

As far as record companies are concerned, music videos broadcast on MTV are promotional, though they constitute commercial programming for MTV. From a record company viewpoint, videos are promotional because of their obvious benefit to record sales, and because this philosophy obviates the need to allocate any portion of the money received to the artist. However, when companies such as MTV are willing to pay millions of dollars (a total industry figure) to record companies for the exclusive limited right to broadcast videos, the artist may feel justified in asking for some allocation of that money. Some record companies entered into the exclusive MTV deals out of fear that MTV might not otherwise exhibit their videos, and the companies no doubt feel that the loss of other promotional outlets, due to MTV's exclusive rights, justifies retaining most of the money received. Most major record companies allocate such money to general overhead or recoupment of overall video production costs, transfer costs, duplication costs and shipment fees (which can be considerable), and similar costs.

Quietly, record companies probably recognize the eventual need to make some sort of allocation but do not have standard formulae as to how, or to which artists and in what percentage. This allocation is something for the artist's attorney to argue for. To the extent that the fees received by record companies become substantial, the trend will probably be to allocate a portion of the money received from commercial programming (network and local TV, video jukeboxes, etc.) to the artist's account, at the very least for recoupment of video production costs. These may become legitimate forms of commercial income which should be shared with the artist after some type of recoupment. Record companies, however, are trying to avoid the day when the producer of the master recording, who as a royalty participant has been traditionally ignored when it comes to video, as well as the video director and music publisher, will insist on a piece of the same action.

Notwithstanding the foregoing, it is incumbent upon the artists' attorneys to attempt to limit the record companies' ability to exploit videos without compensation to the artist and to demand a fair share of the commercial income received in connection with videos. Obviously, it is easier for a superstar artist to negotiate better terms. In reality, new artists will not have very much to say about these matters.

In the homevideo market, however, there is a more recognized obligation on the part of the record companies to share royalties from the sale of individual music videos because this is analogous to the sale of records. The contract form of one record company in the early 1980s contained language that enabled it to sell and rent, primarily for home use, any form of reproduction of music videos subject to good faith negotiation concerning the royalty for such sales. If an agreement concerning royalties were not reached, the record company and its licensees still would have had the right to sell such homevideo devices. Several years later, however, the companies have attempted to set forth the various royalties payable for such home use and have met with considerable resistance because of the perception that the royalties offered are too low, especially when the record company has its own distribution system for homevideo sales and is able to receive a higher percentage return.

Hopefully, the increase in the sale of videocassette recorders and the production of more creative conceptual music video programming will increase sales in the homevideo market. To date, however, sales have been disappointing (with the exception of programs such as "Elephant Parts" done by Michael Nesmith, David Bowie's "Serious Moonlight" and Michael Jackson's "Thriller"). The extensive programming on TV, cable TV and all the various music video shows may be displacing homevideo market sales since a consumer's favorite music video can be seen at almost any time of the day or night. Why should the consumer purchase a video for home use when it may be readily available on free television? Further, is a music video actually an item that a consumer would want to watch repeatedly?

Music Videos as Feature Film Trailers

Other interesting issues arise when a music video embodying an artist's performances and film footage from a feature film are used to help promote that film. In the last few years, there has been an emergence of these types of music video trailers as promotional devices for the film companies that are attempting to reach the MTV-oriented audience that might not otherwise see a particular film. Film companies are spending substantial amounts of money to have these music video trailers produced for broadcast over as many MTV-type outlets as possible.

Record companies would prefer to have the right to license and exploit a video made for a feature film. But to the film company, these trailers are being made for promotional purposes only. Were they to be commercially exploited, the various film unions (such as the Screen

Actors Guild) would demand substantial reuse payments for their respective members. Consequently, film companies have restricted the use of these music video trailers so as to maintain their promotional use status. (This, by the way, is a classic example of the difficulty in defining and distinguishing between promotional and commercial uses in an artist's recording agreement.)

Record companies will continue to ask film companies to help finance videos where the record companies' artists are performing songs in films or their artists' master recordings are being used in films and on soundtrack albums, as any joint venture effort or splitting of video production costs will help reduce the record companies' overhead allocated for music video expenditures.

Film companies that are now helping to co-op (split) funding for music videos will probably continue to do so only if the cross-promotional aspects of film and music show increased box office revenues as a result of the broadcasting of these music video trailers on programs such as MTV. Because the cost to produce a promotional music trailer is substantial, these costs could become prohibitive so far as the film company is concerned. Film companies are not in the business of licensing music videos for profit; they perceive the clips as being promotional. If the film companies' marketing dollars are not being well spent on music video trailers, they will begin to use those marketing dollars to advertise their movies in a different fashion or medium.

Record Company Controls Over Music Video Production

How does the video production process begin? Who is really calling the shots? Who has ultimate control and veto power over the production aspects? And who determines whether the video will be made?

Because record companies have exclusive rights to an artist's performance, name and likeness, the record company is generally in the driver's seat in making decisions on how and when a video will be made, or if it will be made at all. It is very difficult in any record company negotiation to demand that a record company be obligated to make a music video.

The record company's promotion and marketing strategies become paramount in deciding whether a video is going to be released to help support a single released from an album. The key consideration is a "single" that is climbing the charts, as videos are usually produced only if there is a potential or proven hit single to promote, unless there is a contractual requirement to do so for a superstar artist. If a record company really believes in a new artist, a video may be produced sooner, but, for the most part, from the record company's point of view, the record must succeed first with radio stations around the country before a video is justified. With some exceptions, the audiovisual medium has not generally been used to break new artists. Economic considerations will be of prime importance as it is ordinarily questionable whether the artist will have a hit single.

Because the record company typically owns and controls the sound recording embodied in the video, along with the exploitation rights in the video itself, and has the financial resources, it is the record company that initially pays for and advances the cost of video production. The marketing department's budget, however, determines how much money will be spent on a given video. The marketing department will take into consideration the stature of the artist and potential album sales in determining how much will be spent on video production. Costs of such production are currently ranging from $50,000 to $80,000 per 3-minute video clip.

Record companies generally do not permit artists to make their own videos while they are under contract or to control any rights of exploitation, because that is the job of the record company in marketing and promoting its artists. The record company does not want the artist doing a video on his or her own for a composition which the record company may not choose to release as the single from the album. The record company wants to determine which song is appropriate as a single and the appropriate manner of supporting it. Thousands of dollars will be spent on media timebuys and in-store displays, all in a concerted and coordinated marketing strategy. Record companies are also concerned about quality standards, and can exercise their "blocking" rights to prevent the artist from separately creating or exploiting a video that may not meet its technical or creative standards. For the same reason, a record company would not expect an artist to have made a video on his or her own before entering into a record company contract, as the video may not be of the quality that the record company desires.

The artist and his or her attorney can argue that, out of fairness, the artist should be allowed to finance and license his or her own video with the blessing of the record company, if the record company refuses to do so, but the record company does not want an artist's interference in these matters.

The record company's interest always is to protect its promotional and marketing strategies and to control the musical direction of its artist's career and how and where the video is to be exploited. The decision generally will be that of the record company because that is what the record company machinery exists for. The record company is not merely a bank financing the production of the records and videos. The very purpose of the promotion and marketing departments is to sell records. Record companies feel they can do it best and do not want interference from an artist who may know how to create a record, but not how to sell it.

In line with these arguments and philosophies, the rec ord company will almost always take the position that it has the right to make all production decisions, but will normally do so in "consultation" with the artist. It will not, however, generally agree to mutual approvals, especially when such approval is over the budget, the selection of the song, or the storyboard, script or basic content of the video. Even if the record company should agree to mutually approve some of the production elements, there will usually be language providing that, in the event of a stalemate or disagreement between the record company and the artist, the record company's decision will be final. This is usually not a matter of negotiation or arbitration.

Video Production Agreements

Most record companies do not have in-house video production staffs or video facilities, but generally use outside vendors who control video production facilities. This is partially because of the cost of maintaining such facilities, but also because of the creative and artistic diversity offered by outside independent producers and additionally because it avoids union problems and cost escalations in that videos are generally produced on a non-union basis.

Typically, a record company will engage a video director who also functions as, or in, a video production company. The record company will pay one "all-in" fee to the video director (as an independent contractor) to deliver the finished music video clip. Record companies have considered hiring in-house directors, much like the '60s and early '70s when staff producers at the record companies produced artists' records. For creative reasons, however, record companies look to different directors for conceptual input in making videos. At the current rate at which video production costs are rising, however, it might not be a bad idea for record companies to own their own video production facilities. It might be far less expensive than what they are doing at present, except for potential union problems.

When the record company gives a video director $50,000, for instance, the video director is expected to pay all third party costs and pocket the difference as his profit. Therefore, if all production costs amount to $30,000, the video director is making a $20,000 profit for himself.

The self-contained artist (as opposed to a sideman performer) who performs in the video usually does not get paid any fee other than standard union scale payment for graphics, animation and other special effects, and more elaborate video concepts, however, video costs have increased anyway. This has cut the margin of profit for video directors unless they are able to convince record companies that a larger budget is required to produce the video and maintain quality comparable to other competitive record company acts.

The record company has very specific requirements in terms of delivery of the actual videotape and what it contains, where it is to be recorded and what selections it embodies. Also, the record company generally is the owner of all right, title and interest in and to the video and has the complete, unfettered right to use the video or any portion of it for any and all purposes. Further, the video director generally is responsible for all production costs and is responsible for any over-budget expenditures.

Video directors may receive royalties if videos are actually exploited in the homevideo market. Most record companies, however, feel that royalties for video directors for homevideo sales are unjustified.

The remaining provisions are very similar to a typical record company contract in terms of accountings in connection with royalty-bearing units. Finally, it should be noted that video directors generally are responsible for obtaining clearances and releases from all participants in the music video production (dancers, walk-ons, extras, etc.), as well as being responsible, and assuming liability, for insurance purposes in the event of injuries or other losses or claims of damage to equipment or property in the making of the video.

The Music Publisher

A music video is a rendition in picture form of the performance of a song which is usually owned or controlled by someone other than the record company. The owner may be one or more artists who have written and recorded the song; it may be one or several music publishers. To legally use the song, appropriate licenses must be secured from a number of parties or licensing agents.

When music is recorded for use in a visual medium, there are several rights and licenses that must be secured from the copyright proprietors by the producer and/or distributor of the music video prior to exploitation. Failure to secure the licenses can subject a producer to liability for copyright infringement.

First, there is the matter of public performance licenses. Any time a song is publicly sung or played, danced, acted out, broadcast or exhibited, it constitutes a "performance" for which both the music publisher and the composer are entitled to receive royalties. Any time a music video is exhibited, public performances will be generated. Traditionally, TV broadcasters have been responsible for the payment of public performance fees pursuant to licenses which could have been acquired from either the music publisher directly or more commonly through one of the performing rights societies representing composers and publishers. In the United States, the major performing rights societies are the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI). Television and radio broadcasters pay annual fees to both organizations for the right to broadcast all of the compositions in their respective catalogues (commonly referred to as "blanket licensing"). Therefore, if the composition is registered with one of the performing rights societies and the music video containing the composition is broadcast in a medium licensed by that performing rights society, the public performance rights will have been "cleared" (by virtue of the preexisting blanket licensing arrangement).

Bear in mind, however, that in recent years there has been much negotiation and gnashing of teeth over the rate structures which the performance rights societies are trying to charge both free television and pay, cable and subscription television broadcasters. As a result, there has been litigation in recent years challenging the legality of blanket licensing. The litigation so far has been unsuccessful, but television stations are lobbying for passage of legislation that would shift the burden of seeking performance rights from television broadcasters to program producers. Broadcasting a video on a station that did not have valid performing rights licenses could subject the would-be video producer and distributor to a copyright infringement action. For many years, MTV did not secure ASCAP or BMI licenses, and only recently did they enter into formal agreements.

The grant of rights which ASCAP gives to an exhibitor is the right to make a "small" or nondramatic public performance of a composition, meaning a simple performance of the composition without, among other "dramatic" elements, sets, costumes and props or without being performed in such a way as to tell the story of the song. If, however, in the production of the video, the story of the song is in fact being told using, among other things, sets, costumes and props which carry forward the story, this may constitute a dramatic performance of the composition. ASCAP and BMI do not license dramatic public performances. The right to make a dramatic performance must be secured directly from the publisher or its representative.

We have all seen a number of videos in which this is precisely what has occurred. There have been very few situations to date, however, where a publisher has raised claims for separate direct licensing of these types of videos. This is probably due in large part to the fact that videos have been successful in promoting new artists and the sale of records, which is an important way for publishers to receive income. Bringing actions for infringement of dramatic rights would be like killing the goose that might lay the golden egg. This can still be an important issue, however, at different points in the distribution chain when and if the video loses its promotional character and starts to look more like commercial programming.

Another right that the publisher controls is the right to arrange and adapt the composition. This right must be secured directly from the publisher, depending on the type of arrangement and adaptation contemplated. Such things as substantial lyric changes, performance of composition in a comedic setting or the use of partial nudity may require a special clearance from the music publisher directly. In other words, because the publisher holds the copyright in the song, it can always say no to a particular use, and thus the publisher is able to control the content of the video. A video that visually represents a different interpretation of the song or that uses imagery of questionable taste in the mind of the publisher could cause problems for the music video producer, especially if the video has already been recorded and edited.

Lastly, when a composition is reproduced in synchronization with video images, the producer must secure what in the film industry has come to be known as a synchronization license, (because the music is being synchronized with the video). In the copyright sense, this right is derived from the copyright owner's exclusive right to reproduce the work. Synchronization licenses are secured directly from the publisher or through the publisher's agent for such purposes.

Music video producers would like to have the longest possible time period to exploit the video in all media in order to increase the chances of recouping at least some portion of the video production costs. Therefore, when planning a video, most record companies seek worldwide rights to the music in perpetuity for all media. Some publishers, however, are not willing to give such extensive rights. Where the song is not controlled by the artist, the term of the publisher's license may be limited to 6 months for promotional uses or up to 5 years for other uses. Television may be the only media that the publisher may license, leaving homevideo negotiations and possible theatrical or nontheatrical licensing for later. Most publishers will grant licenses for free or for nominal cost for at least the first 6 months of promotional distribution, because effective promotion means they will receive mechanical royalties from the sale of records. Thereafter, if not clearly settled up front, the fees charged by a publisher may be subject to negotiation. The standard Harry Fox Agency (the agent licensing reproduction rights for many publishers) music video form provides for good faith negotiation of the fees at sometime in the future based on prevailing industry standards.

Most record company contracts contain what is called a "controlled compositions clause," which gives the record company the right to use a song written or "controlled" by the artist at a rate which is predetermined or to be negotiated within certain guidelines for commercial uses and at no fee at all for promotional uses. Therefore, whenever a song in a video is a controlled composition, the artist or the artist's publishing company may be forced to grant rights to the record company for little or no fee for all media in perpetuity. If the artist records a song which the artist does not own or control, or the artist's publishing company will not grant a license at the fee the record company is willing to pay, the record company, faced with the clearance of all the rights mentioned above, may very well deem the fees paid to the publisher as a production cost recoupable out of the artist's royalties.

When using non-controlled compositions, there are several other considerations of importance. It is entirely possible for the rights to one song to be controlled by a number of parties, each of whom may have to be contacted for permission to record the composition in a territory for which that party controls the rights. Accordingly, with noncontrolled compositions, one can find situations where rights are so fragmented that the total fees demanded by the various copyright proprietors far exceed the income to be generated by the video. For a number of complex reasons, the right to exhibit in certain media may practically be restricted (for example, only TV rights may be available with homevideo rights restricted due to the prohibitive fees charged by foreign copyright societies); and exhibition in certain territories outside of the United States may not be possible at all. Some record companies require the artist to warrant that anything the artist records will be available for use or the artist may be responsible for obtaining the necessary clearances.

The following is a true story worth noting. An artist, for her new single, had recorded a cover version of an old song, with recording costs of about $40,000, and produced a video of the song for another $70,000. She discovered, upon broadcasting the video, that for the last twenty years the composition had been restricted for any televised use. This song continues to remain restricted.

The Concept of Recoupment

The concept of recoupment has always existed in the record business and has impact on the making of music videos as well. The record company usually demands the right to recoup its video production costs from any and all sources of income generated by the record company's efforts to expose and promote the artist. There is an intangible, hard to quantify element involved in breaking a new artist. However, record companies feel that, as a result of their efforts to expose and break new artists, they are justified in recouping video production costs from record royalty income as well as from any video income generated from the commercial exploitation of the music video. Artists, on the other hand, argue that video production costs are actually marketing costs in disguise that the record company should pay for entirely.

The record companies' position in negotiation is usually to start with the right to recoup all of the video production costs from 100% of any and all record royalties as well as from mechanical income generated from the publishing of controlled compositions if they are involved. Record companies realize that, due to the lack of video income and high video production costs, artists would never be paid any record royalties if the record companies were to recoup 100% of the video production costs from record royalties. That realization gave rise to a 50% limitation which exists in most artist's contracts today. In other words, the record company will first look to recoupment of up to 1/2 of the video production costs from record royalties and take the balance from video income, if any. By taking the balance of the unrecouped video production costs from 100% of the video income, record companies can in effect make the artist pay entirely for the artist's own videos much like the artist pays for the production costs of a record, but only if the record sells. It is only the major superstar artist that is able to establish entirely separate record royalty and video royalty accounts that are not cross-collateralized.

Distribution of Video Income After Recoupment

Although most record company artists never recoup all of their recording costs and/or video production costs, in certain remote situations, if recoupment does occur, video royalties would be payable in connection with homevideo sales. For the broadcasting of videos or other licensing where the record company receives a flat fee, the artist will typically be paid 50% of the so-called "net receipts" earned after the deduction of the production costs, distribution fees and payments to third party participants such as music publishers. In connection with homevideo sales, the artist's royalties usually will not exceed more than 20% of the wholesale selling price of the video to a wholly owned distribution company. The artist will usually receive some comparable percentage of the record company's net receipts (usually 50%) when the homevideo is licensed to a third party distributor, such as Vestron Video.

The music publishers of "controlled compositions" expect to have a participation interest in the commercial exploitation of the videos, and they usually receive a flat fee with respect to broadcast-type uses (from $250 to $500). With respect to homevideo sales, they will generally receive somewhere in the area of 4% (prorated) of the wholesale selling price of the video if the video is being distributed by a record company's wholly owned subsidiary, or 10% to 12 1/2 % (prorated) of net receipts if it is a licensee distributing the homevideos.

Finally, the various unions such as the American Federation of Musicians and AFTRA are jumping on the bandwagon and demanding a piece of the video income as well. This will become a major issue only if the making of videos becomes a union enterprise. Although possible residual obligations do not seem to be exorbitant, current video production is done on a non-union basis to avoid, among other things, the staffing requirements that have led to the high production costs associated with union productions in general. The AF of M has entered into a supplementary agreement with the signatories of the AF of M Phonograph Record Labor Agreement for certain payments to nonroyalty artists performing for promotional and commercial uses. With respect to AFTRA, however, there have been more detailed proposals put on the table for the payment of residuals for various broadcasts. Similarly, record companies and other manufacturers and producers of music videos are going to have to face the same questions with the Directors Guild and the Writers Guild.

Conclusion

Everyone involved in the music business wants to participate in income generated from the exploitation of music videos, whether they are in the form of promotional video clips, compilation packages of various video clips for the homevideo market, or any other uses contemplated with future technology. With the rising costs of production, however, record companies would like to limit video income participations so that the record companies will not have to continue engaging in deficit financing of video production costs. With record companies recouping only 5 % to 10% of their total video production costs, it is hard to see light at the end of the tunnel, and they may never be able to recoup the large sums of money now being spent to produce videos.

Obviously, this will have to change, and substantial video income will have to be generated from some source, if the business is to become viable and attract creative people, the promotional aspects notwithstanding. Some commentators and producers of music video programs are looking to various free, pay, cable and subscription television broadcasters to provide that source of income, because they are now acquiring programming virtually for free. As the number of broadcast outlets increase, it is felt that there will be additional opportunities for the record companies to demand payment if broadcasters are seriously in need of new and original programming. It must be remembered, however, that the cost of music video programming must be less than the cost of competitive programming. If a music video program begins to cost more than a re-run of "I Love Lucy," the medium will be in serious trouble.

Record companies started with a promotional concept and justified their expenditures on the basis of promoting records to enhance record sales. They are now finding that the costs of video production often consume any potential profit that could ever be generated from record sales.

It is important for artists and their attorneys to recognize the economic considerations and existing controls that the record companies have, and will always fight to retain, with respect to the provisions of most new artist contracts. When the artist is a superstar, the standard rules are thrown out the window, as always, because superstar artists have much more bargaining power in negotiating certain demands and limitations on the making of videos and in controlling the exploitation rights.

One cannot ignore, however, the primary purpose for making the promotional music video. The record company is attempting to promote and sell records. To the extent there is going to be a potential market for the selling of records in the form of audiovisual devices with visual images enhancing the music, record companies will want to control that form of exploitation as much as possible. Record companies always will feel the need for blocking rights to prevent any other exploitation when it is not done in conjunction with the record companies' objectives and goals and perception of the best musical direction for the artist. Otherwise, record companies cannot build the long term career for an artist which is essential to develop product that can be successfully exploited for the life of the copyright and as part of the overall record catalogue.

Ronald H. Gertz has represented clients in the television, recording and publishing fields and was formerly head of legal and business affairs for EMI Videograms, Inc. He is currently president of The Clearing House, Ltd. The Studio Music Department, concentrating on the clearance of music rights and the supervision, production and packaging of musical scores for television programs and feature films. Mr. Gertz also publishes a booklet entitled "A Producer's Guide to Music Clearance."

Gary D. Culpepper is currently Director of Business Affairs, Music, for the motion picture group at Paramount Pictures. He was formerly Director of Business Affairs at Capitol Records and was previously with Casablanca Records and Filmworks, ABC Records and A&M Records.
[ELR 8:1:3]

RECENT CASES

Major league baseball clubs own the copyrights in game telecasts, rules Federal District Court in rejecting baseball players' claim to publicity rights in the telecasts

In a dispute concerning the ownership rights in the television broadcasts of major league baseball games, the club owners claimed that they held the copyrights in the telecasts, and that baseball players were employees whose work product, i.e., their performance in the telecast games, was encompassed by the "work made for hire" doctrine. The players' claim that they had property rights in their playing performances was, according to the club owners, preempted by the Copyright Act.

The players, seeking to bargain directly with the television networks, argued that their "evanescent," albeit often impressive, performances in baseball games were not copyrightable "works of authorship," and did not provide a basis for a works made for hire claim. Rather, two sets of rights were outlined by the players-the clubs' copyright interest in the telecasts of baseball games, and the players' publicity rights to their likenesses and performances as embodied in the telecasts. Thus, in the players' view, the clubs' copyright in the telecasts did not grant them any rights to the underlying player performances.

A Federal District Court in Illinois has granted summary judgment to the clubs, agreeing that the telecasts of baseball games, in which players' performances are simultaneously videotaped and broadcast, are works subject to copyright and that the clubs own the copyrights in the games as fixed in tangible form on the videotapes. The clubs, in producing major league baseball games, provide the players with the apparatus by which the players create "at the instance and expense" of their employers, the product which may be included in the videotapes of the games. Thus, the clubs' copyrights included "the underlying performances of its employees just as a telecast of a live opera performance embodies the performances of the cast members whom the opera company has employed to perform and provided with stage, scenery and costumes."

Furthermore, the players' assertion of publicity rights in their likenesses and live performances amounted to a right "equivalent" to the clubs' copyrights, for the performances were valuable as part of the clubs' production of the games. The players' claim therefore was preempted by the Copyright Act, stated the court, emphasizing the fact that the work made for hire doctrine distinguished this case from standard right of publicity claims; the clubs were not attempting to prevent the players from asserting such a claim outside the scope of their employment relationship with the clubs.

The players next argued that summary judgment was precluded because contract provisions and the bargaining history of the parties raised disputed factual issues as to whether the clubs and the players had agreed in writing that the work made for hire doctrine governed their relationship. The court observed that the bargaining history between the clubs and the players did not result in any written agreement concerning the clubs' ownership of the copyrights in telecasts of ball games. Again, the players were not entitled to separate their purported performance rights from the ownership of the game telecasts.

The clubs also sought a declaration from the court that under the principles of master-servant law, they owned the rights to the performances of major league baseball games, including the right to perform and show the games publicly and to license showings by others. The players responded by claiming that the rights provided under sections 50/51 of New York's Civil Rights Law meant that baseball games could not be sold to broadcasters unless the clubs obtained express grants from the players to use their names and likenesses. Judge Charles P. Kocoras (without discussing the basis for applying

New York law) found that the clubs' use of the players' names and likenesses was not an unauthorized exploitation of the players without their knowledge or consent. The players had entered contracts agreeing to render public performances before a live audience and for television viewing in exchange for salaries and other benefits. The players cited cases in which employees were allowed to assert publicity rights against an employer. But those cases did not involve the employer's use of the "product" the employee was hired to create, noted the court. And when a performer knows that a performance is being recorded, he/she may not state a claim for misappropriation - the baseball players were well aware of the telecasts.

The players next referred to the contractual arrangements in other major league sports leagues, such as the National Football League Players Contract. The NFL contract contains a publicity clause permitting the club and league to use a player's name and picture for publicity and promotional purposes; the clause does not mention the use of player's name and picture during game telecasts, observed Judge Kocoras. And the contractual arrangements in other sports leagues reflected the result of negotiation and bargaining among the parties involved concerning television revenue and were not necessarily analagous to the baseball players' claim of television rights.

The court concluded by finding that the players had not reserved any television rights in their collective bargaining agreements with the clubs and that the allegedly disputed meaning of the agreements did not create a question of fact. Summary judgment was granted to the clubs on the copyright claim and the master-servant claim, leaving the parties "to their bargaining strategies to resolve how much major league baseball revenue,

from whatever source derived, shall remain with the clubs and how much shall be
traded to the Players in exchange for their skilled performances."

Baltimore Orioles, Inc. v. Major League Baseball Players Association, Case No. 82C3710 (N.D.Ill., May 1985) [ELR 8:1:11]

Carson Productions' use of actor's film performance in two commercials did not violate New York Civil Rights Law, rules Federal Court of Appeals, because SAG agreement provided requisite consent for reuse of film

Actor Charles Welch's appearances in a 1967 commercial for Benson & Hedges cigarettes and in a 1972 commercial for United Airlines were included in a 1982 television program entitled "Television's Greatest Commercials-Part II." The program was produced by Carson Productions Group, Ltd. Carson had been advised by the Screen Actors Guild that in order to reuse the commercials, the company would have to comply with the terms of the 1977 SAG Television Agreement (Green Book). Section 36 of the agreement provides that a producer may not reuse television film of an actor in any manner other than that for which the actor originally was employed "without separately bargaining with the player and reaching an agreement regarding such use. . ." The agreement also specifies the fee to be paid to the actor, and provides that if both the producer and SAG are unable to locate the actor, the producer may use the film without penalty.

Carson and SAG failed to identify Welch from the commercials, but soon after the television program was broadcast Welch contacted SAG. SAG notified Carson of Welch's identity and Carson, in turn, sent Welch a consent form and informed Welch that he would be entitled to receive $596, the payment set forth in the Green Book.

Welch, however, stated that the payment was inadequate' and eventually, when the parties could not reach an agreement, the actor sued Carson alleging the violation of sections 50/51 of New York's Civil Rights Law.

A Federal District Court. after a jury trial, granted Carson's motion for a directed verdict on the ground that Welch had consented to the reuse of the commercials through his membership in SAG, and that Carson had complied with the union's regulations for the reuse of film performances. Furthermore, Welch's remedy, if any, was limited to the provisions of section 36(c) of the Green Book, whereby a producer may submit a dispute concerning a reuse fee to the union's Board of Directors for determination.

On appeal, Welch argued that Carson was required under section 51 to obtain Welch's express written consent to the reuse and that the Green Book did not serve to grant Carson the necessary consent because the union's collective bargaining agreement applied only when there existed an express contract between an actor and the producer seeking to reuse the film. Thus, according to Welch, the issue of consent should have been submitted to a jury.

A Federal Court of Appeals has affirmed the District Court's decision, agreeing that "a reasonable and fair minded jury could not have concluded that the collective bargaining agreement binding Welch did not supply the necessary consent to reuse the commercials. . ." (The court did not address the alternate basis for the directed verdict, i.e., the remedies available under section 36(c).)

When Welch joined SAG in 1953, he signed a membership application agreeing to abide by the rules of the union and all collective bargaining agreements which SAG negotiated on behalf of its members. The Green Book was one such collective bargaining agreement. The provisions of section 36 were designed to protect SAG members and, according to testimony by a SAG official, did apply in instances where a producer not associated with the original filming of a commercial and with no contractual association with the players in the commercial, attempted to reuse the commercial in a different format.

The District Court correctly found that Welch, as a member of SAG, waived his statutory protection under section 51 in cases of reuse photography in exchange for the protection of section 36 of the Green Book, stated Judge Miner, who pointed out that "It is well settled under New York law that statutory benefits or protections otherwise available to individual may be waived by union members under collective bargaining agreements where alternative protective measures, which do not conflict with the legislative purpose of the statute at issue, are agreed upon in negotiations." Section 36 forwarded the purpose of the statute - to prevent the commercial exploitation of an individual without his/her consent. Carson had complied with the section and therefore was entitled to the entry of a directed verdict.

In a related proceeding, a New York trial court granted summary judgment to Philip Morris, Inc., the producer of the Benson & Hedges commercial in which Welch appeared, in the actor's action against the company for violating section 51 of the New York Civil Rights Law. The court found that the pleadings raised issues which were "virtually identical" to those considered in Welch's federal court action against Carson in that each complaint focused on the allegedly unauthorized use of

Welch's picture for purposes of trade. The issues raised by Welch were fully litigated in the federal court, noted Justice Wilk, and the doctrine of collateral estoppel therefore applied to preclude further consideration of Welch's claims.

Welch v. Carson Productions, Docket No. 85-7774 (2d Cir., May 16, 1986) ; Welch v. Philip Morris Incorporated, New York Law Journal, p.7, col. 1 (N.Y.Cnty., March 20, 1986) [ELR 8:1:12]

Writers of the song "Handyman" may proceed with copyright infringement claim against Culture Club's "Karma Chameleon rules Federal District Court in New York

Come-a, come-a, come-a

Come-a, come-a, come-a
Yeah, Yeah, Yeah
Come-a, come-a, come-a
Come-a, come-a, come-a
They'll come running to me
Yeah, Yeah, Yeah
Yeah, Yeah, Yeah

This classic chorus and its musical accompaniment appeared in the 1960 recording by Jimmy Jones of the song "Handyman," which was written by Jones and Otis Blackwell. Although the chorus had not been included in the copyrighted 1959 version of the song, it did appear in subsequent recordings by Del Shannon and James Taylor. The 1960 version was registered with the Copyright Office in August 1984.

Karma, Karma, Karma, Karma

Karma, Chameleon

The above chorus, which was included in Boy George (George O'Dowd) and Culture Club's 1983 song "Karma Chameleon," inspired a copyright infringement action by Jones and Blackwell against Virgin Records, Ltd. and Epic Records, the distributors of the records on which Karma Chameleon appeared and against Virgin Music Publishing, Ltd. and Warner Tamerlane Music, the purported owners of the copyright in Karma Chameleon.

Federal District Court Judge Mary Johnson Lowe has denied the Karma parties' request for summary judgment. Judge Lowe first found that Jones and Blackwell showed that they possessed a sufficient beneficial interest, including the right to receive royalties, to sue for copyright infringement. And Handyman was not in the public domain, as argued by the Karma parties because the failure to affix a copyright notice to phonorecords of the song did not alter the statutory or common law protection available to the underlying musical work.

Judge Lowe next cited Rosette v. Rainbo Record Mfg. Corp., 354 F.Supp. 1183 (S.D.N.Y. 1973), affd. per curiam 546 F.2d 461 (2d Cir. 1976) a case relied upon infrequently by other District Courts, in support of the proposition that the sale of a record does not constitute the publication of the previously unpublished musical works contained on the record, thereby divesting the common law copyright in such works. Since the 1960 version of Handyman was published only insofar as the song was included on recordings, the version had not lost its common law copyright protection under the Copyright Act of 1909.

Also rejected was the Karma parties' claim that Jones and Blackwell improperly used a supplemental registration to add words and music to the 1959 version of the song. Rather, the writers registered a derivative work claim of copyright in the 1960 version. And Jones and Blackwell were not estopped from bringing their action due to an alleged shared corporate identity, i.e., CBS, Inc., between Epic and the CBS Catalogue Partnership (the current owner of the copyright in the song Handyman).

Judge Lowe concluded by denying the Karma parties' request for a ruling limiting the remedies available to Jones and Blackwell since it had not been alleged that the 1960 version of Handyman was distributed after January 1, 1978, and the availability of damages under the 1976 Copyright Act depends, in part, on the publication date of a work.

Jones v. Virgin Records, Ltd., Case No. 84 Civ 5907 (S.D.N.Y., March 1986) [ELR 8:1:12]

Retrial is ordered in actress Robyn Douglass' false light invasion of privacy claim against Hustler magazine for unauthorized publication of nude photographs; United States Supreme Court lets stand Federal Court of Appeals decision reversing damage award to Douglass

In January 1981, Hustler magazine published a feature entitled "Robyn Douglass Nude," which contained photographs of the actress which were taken in 1974. Douglass sued the magazine and its photography editor, Augustin Gregory (who had taken the pictures) for false light invasion of privacy. A Federal District Court jury awarded Douglass $500,000 in compensatory damages against Hustler and against Gregory, and $1.5 million in punitive damages against Hustler. Douglass eventually accepted a remittitur in the punitive damages award to $100,000. In accordance with a pretrial agreement, Douglass did not attempt to execute the judgment against Gregory.

A Federal Court of Appeals has ordered a new trial in the matter, notwithstanding some preliminary observations supportive of Douglass' action. Judge Posner, after describing the contents of the January 1981 issue of Hustler, noted that an individual who was depicted as having "voluntarily" posed for the magazine might find such a depiction degrading. The nude photographs of Douglass, although taken in a photo session for Playboy, had not been published before. And although several nude photographs of Douglass were published in Playboy in the mid '70s, Judge Posner observed that a reasonable jury might find that "posing nude for Playboy is consistent with respectability for a model and actress but that posing nude in Hustler is not. . ." Thus, the fact that Douglass posed for Playboy did not preclude a false light claim. And the insinuation, from the photographs and accompanying test, that Douglas was a lesbian, also set forth a false light cause of action, declared the court.

Hustler cited in its defense a release purportedly signed by Douglass. But the court stated that if indeed there was such a release, the jury might have found that only Douglass or Playboy, and not Augustin, was authorized to consent to the publication of the photographs, and that neither had done so.

In all, it was found that Douglass did present a cause of action against Hustler for portraying her in a false light and that the jury also correctly found that Hustler violated Douglass' rights under the "commercial appropriation" branch of the right of privacy. Hustler may have been entitled to publish a story about Douglass and to use photographs in the public domain, but the magazine was not entitled to use photographs of the actress made for commercial purposes but previously withheld from public distribution. In Judge Posner's view, Hustler's conduct resembled a violation of common law copyright, since any release executed by Douglass granted Gregory limited rights, if any, and she retained a right in the photographs, which, "if not quite a property right," was an interest protected under "the rubric of privacy."

Judge Posner nevertheless declared that it was erroneous to have allowed the jury to find an invasion of Douglass' right of publicity based, at least in part, upon the publication of still photographs from the actress' appearances in movies and television shows. The court also expressed concern as to whether the jury could have found that Hustler acted with actual malice in publishing the nude photographs.

Ultimately, a number of factors persuaded the court that a new trial was required, including the trial court's failure to instruct the jury to base a finding of actual malice (on the false light invasion of privacy claim) on clear and convincing evidence; and allowing an expert witness to display a highly offensive slide show comprised of about 128 of the "all-time" worst pictures from Hustler.

The effect of Douglass' pretrial settlement agreement whereby she promised not to execute any judgment against Gregory in return for his truthful testimony in accordance with his deposition also was scrutinized by Judge Posner. The agreement had not been disclosed to the jury or (arguably) to Hustler; thus the magazine might not have conducted its most effective cross-examination of Gregory.

Judge Posner concluded by conducting a lengthy review of the damages award, characterizing the compensatory damages award as "so excessive that the jury must have been carried away by 'passion and prejudice,'" even if the ultimate award of $600,000 may not have been excessive. A critical review was undertaken of an economist's testimony concerning Douglass' lost earnings due to the publication of the photographs. And an award of $300,000 for emotional distress was "absurd," stated the court, since Douglass suffered no severe or permanent psychiatric harm. Several suggestions then were offered to the trial court for its guidance in conducting a new trial on all issues. The United States Supreme Court has let stand, without comment, the decision ordering a new trial.

Douglass v. Hustler Magazine, Inc., 769 F.2d 1128 (7th Cir. 1985) 607 F.Supp. 816 (N.D.Ill. 1984) [ELR 8:1:13]

Release form signed by mother of children whose nude photographs were published by Hustler Magazine provided complete defense to childrens' invasion of privacy claim

A book entitled "The Sex Atlas," published in 1977, contained nude photographs taken of Kelly and Brandon Faloona five years earlier when they were about seven years old and five years old. The children's mother, Linda Fredrickson, had signed a release in 1973 granting all rights in the pictures to the photographer. The children and Fredrickson consented to the use of the photographs in a work they viewed as "a serious and comprehensive educational text on human sexuality." However the Faloona parties claimed that they did not consent to Hustler Magazine's use of the photographs in its November and December 1978 issues in connection from it. A lawsuit followed, in which the Faloona parties sought $10 million in damages for false light invasion of privacy, the unauthorized public disclosure of embarrassing private facts, and misappropriation of the Faloonas' image for Hustler's commercial advantage.

The Faloonas argued that "skin" magazines such as Hustler should be required to obtain judicial consent to the use of nude photographs of minors. A Federal District Court in Texas has rejected this argument and has concluded that the release signed by Linda Fredrickson was valid under Texas and California law (the family lived in California when the pictures were taken).

In granting summary judgment to Hustler, Judge Buchmeyer also found that the Faloonas' right of privacy claims were baseless because the publication of the photographs was not capable of conveying derogatory or false meaning about the Faloona children. The Faloonas argued, citing Braun v. Flynt (ELR 6:9:19) that the publication of the photographs placed them in a false light by implying that they approved of and participated in the "lifestyle" depicted in Hustler features. But the court in Braun v. Flynt did not hold that Mrs. Braun was placed in a false light merely because she objected to the contents of Chic, the magazine which used her photograph without authorization. Rather, Mrs. Braun's photograph appeared in a section of the magazine containing overtly sexual material. The Faloona photographs accompanied a legitimate book review and an excerpt from an educational text on sexuality; the very same context, observed the court, in which the identical pictures appeared in The Sex Atlas. Furthermore, no ordinary reader of Hustler could assume that the children were "unchaste or promiscuous or had an unfavorable character" because their pictures appeared in the magazine.

Also rejected was the Faloonas' claim based on the appropriation of their likenesses - the mere publication of a person's likeness in a magazine does not create a cause of action for misappropriation, stated the court. The public must be able to identify the person from the photograph or drawing and the publisher must have capitalized upon the likeness of the person in order to sell more magazines. But Hustler did not identify the Faloonas and did not exploit the photographs in a publicity campaign designed to sell more copies of the magazine.

Judge Buchmeyer concluded by declaring that the Faloonas, although claiming to seek damages, actually sought censorship - "they intensely dislike Hustler and believe that it should not exist ... However, the constitutional protections of the First Amendment ... block these censorship efforts, as indeed they should. For if one succeeds in censoring Hustler, then another will most certainly attack The Sex Atlas,. . . or other scientific, medical, artistic, or literary works, because they contain pictures of nude children..." Quoting Clare Booth Luce, the court concluded that censorship, "like charity, should begin at home; but unlike charity it should end there."

Faloona v. Hustler Magazine, Inc., 607 F.Supp. 1341 (N.D.Tex. 1985) [ELR 8:1:14]

Random House fails to obtain summary judgment in action to recover $150,000 advance paid to author of rejected manuscript

In April 1982, Random House and Leo Damore entered a contract wherein Damore agreed to write a non-fiction book concerning Senator Edward Kennedy and the events at Chappaquidick. Random House paid

Damore $150,000 as advances under the contract; the publisher was obligated to pay Damore an additional $100,000 upon acceptance of the manuscript.

In August 1984, after Damore had submitted the first draft of the manuscript for "Senatorial Privilege," the author's agent informed Random House that Damore was willing to assist in editing the work. The publisher, however, elected to terminate the contract and demanded the return of the $150,000 advance. In February 1985, when Random House sent Damore another demand notice, the author's letter in response to the publisher stated, in part: "I will know better in the next several months when it will be possible for me to repay the advance." Random House cited this statement by Damore in seeking summary judgment in its lawsuit against the author.

New York State Supreme Court Justice Leonard N. Cohen has refused to grant summary judgment to

Random House on the ground that Damore's letter was ambiguous and not an admission of liability as a matter of law. Damore claimed that he was rewriting the manuscript and hoped to sell it either to Random House or to another publisher. Justice Cohen cautioned that the statement at issue was qualified and had to be read, preferably by the trier of fact, in the context of the entire document and in view of the relationship of the parties.

11, col.2 (N.Y.Cnty., May 1, 1986) [ELR 8:1:15]

New York trial court grants summary judgment to host and broadcaster of radio talk show in libel action brought by former FBI agent who participated in the "French Connection" matter

In March 1976, Robin Moore, the author of the book "French Connection," appeared on the "Long John Nebel Show," a live radio call-in program, to discuss his latest book. During the program, a caller asked Moore about Francis E. Waters, a former FBI agent who participated in the "French Connection" investigation. Moore replied that Waters was "doing 40 years in the slammer"; that he had "ripped off' Moore for $10,000; and stated "You'll never get the truth out of Waters."

Following these statements, Waters and another caller phoned the program and claimed that Moore's comments were false and that Waters had been acquitted. Moore, at the request of Candy Jones, the moderator of the program, then apologized to Waters on the air. However, Waters proceeded to bring an action for libel against Moore, Jones, Straus Communications and the since-deceased John Nebel.

A New York trial court has granted the radio program parties' motions for summary judgment due to Waters' failure to demonstrate actual malice.

The court noted that since the publication of "French Connection," Waters had written several articles and conducted interviews concerning his role in the drug investigation, thereby qualifying as a public figure. But the evidence did not support a finding that Jones was aware, or should have been aware of the probable falsity of Moore's statements about Waters. The program featured Moore's current book, not the "French Connection," noted the court. And it would be overly burdensome to require broadcasters "to know the truth of every statement made by every guest on every one of their shows," since the broadcaster then might avoid all controversial subjects. Jones promptly elicited a retraction from Moore, indicating that the radio program parties did not intend to injure Waters' reputation.

Furthermore, the seven second delay prior to the air time of the calls was an insufficient period of time during which a broadcaster might be expected to conduct a full investigation into statements which were not obviously false.

Waters v. Moore, New York Law Journal, p. 14, col. 2 (N.Y.Cnty., Aug. 26, 1985) [ELR 8:1:15]

Real estate developer Donald Trump's libel action against Chicago Tribune and its architecture critic is dismissed

A Federal Court in New York has dismissed Donald Trump's libel action against the Chicago Tribune and Paul Gapp. its architecture critic. Trump, a real estate developer, sought damages based upon statements contained in an article written by Gapp which discussed Trump's plan to construct the world's tallest building. The article was accompanied by a Tribune artist's illustration depicting a building which Trump called "an atrocious, ugly monstrosity." The article stated that "the world's tallest tower would be one of the silliest things anyone could inflict on New York or any other city." Trump claimed that Gapp's criticism of the proposed venture damaged his reputation and destroyed his plans.

Gapp and the Tribune argued that the critic's comments were opinions and entitled to immunity under the First Amendment.

Agreeing with the Tribune, the District Court stated that the presentation of the article in the magazine section with a byline identifying Gapp as the Tribune's "architecture critic" informed readers that the article contained expressions of opinion. And the court noted that Trump's objection to the illustration which accompanied the article and his allegation that it had a defamatory meaning was based upon "precisely the same sort of individual, subjective aesthetic opinion which ... Gapp expressed in the article."

Trump v. Chicago Tribune Co., 616 F.Supp. 1434 (S.D.N.Y. 1985) [ELR 8:1:15]

Distributor's breach of contract claim against producer of the Spanish film "Volver a Empezar" must be determined under New York law rather than under laws of Spain, rules Federal District Court in New York

In May 1982, John Whitney Stillman, doing business as Stillman International, entered into an oral agreement in Madrid with Nickel Odeon, S.A. to distribute, on a worldwide basis, except for Spain, the film "Volver a Empezar" (Begin the Beguine). Stillman licensed the film to distributors in Australia and in Israel, but in March 1983, Nickel Odeon canceled a written agreement with Stillman confirming the licenses; Nickel Odeon claimed that the Australian and Israeli distributors failed to comply with the payment terms of the written agreement. Soon after, Nickel Odeon apparently entered its own license agreement with the Australian distributor.

In considering Nickel Odeon's motion for summary judgment with respect to Stillman's breach of contract claim, Federal District Court Judge Sand made the initial determination that the laws of both New York and Spain had substantial contacts with the dispute - the preliminary negotiations and initial agreement between the parties occurred in Spain; Nickel Odeon and its two principals were citizens of Spain; and the subject matter of the alleged contract was a Spanish-made film. But Spain was specifically excluded from the scope of Stillman's representation. And Stillman performed most of his promotional and distribution activities from his New York office, including entering into one of the two licensing agreements. In all, New York had significant contacts with the contract as a whole.

Nickel Odeon asserted that Spanish law should apply in the matter because under Spanish law, film companies are required to register with the country's General Film Management Office; Stillman's failure to register, according to Nickel Odeon, meant that the purported contract was without legal effect. But Judge Sand questioned whether the asserted interest of Spain in applying its registration regulation would be legitimately advanced in this case. It was pointed out that the cited regulation would not necessarily "displace or augment" the provisions of Spanish law governing commercial contracts, and that it was doubtful that the regulation was designed to apply to contracts which specifically exclude performance in Spain.

On the other hand, New York possessed an interest "in insuring that persons who enter into agreements with its citizens which involve the performance of contract obligations within the state abide by their obligations." The application of New York law also would be consistent with the parties' reasonable expectations, and would not undermine the legitimate interests underlying Spain's laws, concluded the court in denying Nickel Odeon's motion for summary judgment.

Stillman v. Nickel Odeon, S.A., 608 F.Supp. 1050 (S.D.N.Y. 1985) [ELR 8:1:16]

Federal District Court grants summary judgment to ABC in defamation action brought by officials of protest group, but allows group to file amended complaint

The April 20, 1983 broadcast of ABC's "World News Tonight," contained a commentary about the 1981 Brinks robbery. At some point during the broadcast, a streamer bearing the name "Republic of New Africa" appeared on the screen. The co-presidents of the Provisional Government of the Republic of New Afrika, a protest group, sued ABC on their own behalf and on behalf of the group, claiming that the streamer was shown as the reporter made a statement about "the most radical, most violent protest groups of the '60's..." The New Afrika group and its officials also alleged the violation of their First and Thirteen Amendment rights, and of rights protected by sections 1981 and 1985(3) of the Civil Rights Act.

Federal District Court Judge Barrington D. Parker first rejected the argument by the New Afrika officials that ABC had breached an affirmative duty to publicize the group's activities. Judge Parker noted that the fairness doctrine does not provide a private right of action for damages, and stated that he was unaware of any alternative constitutional doctrine imposing a duty on the media to report about the activities of any individual or group.

The court then held that the officials were not defamed by the news report because the broadcast contained no explicit reference to them. Judge Parker emphasized that "allegations of defamation by an organization and its members are not interchangeable. Statements which refer to individual members of an organization do not implicate the organization ... By the same reasoning, statements which refer to an organization do not implicate its members."

The Civil Rights Act claims were found to be inadequate; there was not showing of the requisite state action. Neither the fact that the government granted ABC a broadcast license, nor the government's role in regulating the broadcasting industry was sufficient to constitute state action.

ABC also argued that the group's defamation claim should be dismissed because impersonal criticisms of governmental action are absolutely privileged. But the New Afrika group was not a government in the traditional sense, noted the court, and the allegedly defamatory statements about the group thus were now absolutely protected by the First Amendment. The court therefore, while dismissing the remaining causes of action for failure to state a claim, granted the New Afrika group leave to file an amended complaint specifically setting forth the alleged defamatory statements and other relevant circumstances.

Provisional Government of the Republic of New Afrika v. American Broadcasting Companies, Inc., 609 F.Supp. 104 (D.D.C. 1985) [ELR 8:1:16]

Film company is ordered to pay over $8 million in compensatory damages and $500,000 in punitive damages to licensee for alleged breach of contract and fraud in connection with unauthorized licensing of 26 films

In a dispute involving a licensing agreement for the distribution of 26 films in eight European countries, a Federal District Court in New York found that the evidence was uncontroverted that Bernard L. Schubert, the president and sole shareholder of Telewide Systems, Inc., knew when he signed a May 1980 license agreement that he had no authority to license at least 11 of the 26 films for distribution in the specified territory. The agreement purported to convey the exclusive rights to "distribute, rent, exhibit ... or otherwise market..." the films, rights which Schubert and Telewide did not possess. The court rejected Schubert's contention that Dr. Herbert Jovy, acting on behalf of Ostano Commerzanstalt, knew that Telewide did not hold all rights to films such as "Lucky to be a Woman," "Trapped" and "Girl of the Night," and found that Telewide was liable for breach of warranty "from the very inception of the agreement" and also was guilty of fraud and fraudulent representation.

Ostano paid over $512,000 for a worthless license, stated Federal District Court Judge Robert L. Carter, and was entitled to recover that amount, as well as the approximate value of the license in the territory - $3,750,000 - for a total compensatory damage award of about $4.2 million. Judgment also was granted against Schubert and Telewide for fraudulent representation and fraudulent breach of warranty in the sum of $4.2 million.

Judge Carter next found the complained-of conduct was "so blatant and egregious" that punitive damages were mandated. Furthermore, Schubert and Telewide raised a meritless defense and engaged in other activities in connection with the lawsuit which were found to warrant a punitive damages award to Ostano of $500,000 in addition to attorneys fees.

Ostano Commerzanstalt v. Telewide Systems, Inc., 608 F.Supp. 1359 (S.D.N.Y. 1985) [ELR 8:1:17]

Iranian diplomat obtains summary judgment against newspaper publisher in copyright infringement action

Parviz C. Radji, the last Ambassador to Great Britain for the government of the late Shah of Iran, has been granted summary judgment by a Federal District Court in Washington, D.C. in his copyright infringement against the Iran Times Corporation and Javad Khakbaz, the sole owner and editor of the Iran Times.

The Iran Times, a newspaper published in Washington, D.C., allegedly copied and translated, without authorization, substantial excerpts from Radji's 1983 book entitled "In the Service of the Peacock Throne." Portions of the book had been printed in the Sunday Times of London, and the Iran Times purportedly translated into Farsi and reprinted in Farsi and English about 86 percent of the Sunday Times material.

Federal District Court Judge Greene rejected Khakbaz' argument that because the court could not read or understand Farsi, Radji had not provided a basis upon which the court could determine whether the Iran Times articles were substantially similar to the excerpts from Radji's book and whether Khakbaz copied protected expression. But Khakbaz had admitted that the Iran Times articles were composed entirely of translated passages from Radji's book. The fact that translations use a different language than that used in the original publication does not exempt translations from the provisions of the Copyright Act, stated the court - only Radji had the right to translate and reprint his book in Farsi.

The fair use doctrine also was unavailable to Khakbaz because the reprinting of Radji's work presumably was for commercial rather than nonprofit educational purposes, and newsworthiness is not a per se defense to an infringement action; the expression of newsworthy items still is protected from wholesale copying. Furthermore, Khakbaz knew that the material in question was copyrighted and that permission was required from the copyright holder to reprint the material, but failed to obtain such permission. It also was noted that Radji's book was a "highly subjective" account of his experiences and that, despite the inclusion of uncopyrightable factual and historical information, Khakbaz could not "expropriate" the anecdotal expression of the information. And the Iran Times did not reprint the excerpts for purposes of criticism or review so as to perform a different function than the book.

The court concluded by finding that the quantity and quaiity of the copying was substantial, and that there existed a likelihood of harm to the potential market for the value of the copyrighted work since Radji did not complete his own translation of the book into Farsi until late 1983, at which point the Iran Times article had been well circulated. Thus, the sale to another publication of excerpts from Radji's work may have been precluded, and, in all, Khakbaz' reprinting of the excerpts was not a reasonable use.

Radji v. Khakbaz, 607 F.Supp. 1296 (D.D.C. 1985) [ELR 8:1:17]

Federal copyright law preempts state law claims for unfair competition and unjust enrichment arising from alleged misappropriation of Mormon Church literary works, Federal Court of Appeals rules

Gerald and Sandra Tanner acquired unauthorized access to the research works of scholar Andrew Ehat; they edited the works extensively by eliminating the notes and comments Ehat had made while examining a transcript of the William Clayton Journals at the Church of Jesus Christ of Latter-Day Saints archives, and then printed and sold original extracts from the journals themselves.

Ehat brought a federal copyright infringement claim against the Tanners, as well as state common law claims for unfair competition and unjust enrichment. A Federal District Court granted summary judgment to the Tanners on the copyright claim, but entered judgment for Ehat on the state claims.

A Federal Court of Appeals has reversed the District Court's decision on the state claims, ruling that they were preempted by federal copyright law. The court noted that a state law forbidding individuals from copying an article unprotected by a patent or a copyright would interfere with federal policy. The literary materials at issue clearly fell within the subject matter of copyright, since they were original works of authorship fixed in a tangible medium of expression. Since there was no distinction between the state rights asserted by Ehat and the rights encompassed by the federal copyright laws, the court held that Ehat's claims were preempted.

The court also found that the District Court erred in determining that Ehat's state claims were not within the scope of copyright because they were based on his physical ownership of the notes. Ehat had not alleged a state law claim of conversion, noted the court, but sought to recover for damages flowing from the unauthorized reproduction and distribution of his notes. Again, these rights, were equivalent to copyright, and as such, Ehat's claims were preempted.

Ehat v. Tanner, 780 F.2d 876 (10th Cir. 1985) [ELR 8:1:17]

Damage award to NBC in claim against Lyndon LaRouche for interference with business relations is upheld

In January and March 1984, NBC broadcast two news stories about Lyndon LaRouche and his organization; in the March 1984 "First Camera" program, it was stated, in essence, that "LaRouche believes that Jews are responsible for all the evils in the world, that any serious investigation of the LaRouche organization by the IRS would lead to criminal indictment, and that LaRouche once proposed the assassination of President Carter and several of his aides."

LaRouche sued NBC and the Anti-Defamation League of B'nai B'rith for defamation. A Federal District Court jury issued a verdict on behalf of NBC and the ADL on the defamation claim. With respect to NBC's counter-claim against LaRouche for interference with business relations, the jury awarded NBC $2,000 in actual damages and $3 million in punitive damages. However, the District Court granted LaRouche's motion for remittitur to $200,000 on the punitive damages award (ELR 6:10:21; 6:7:21).

On appeal, LaRouche claimed that the District Court erred in refusing to grant judgment notwithstanding the verdict on NBC's counterclaim. In rejecting LaRouche's argument, the Court of Appeals noted that there was sufficient evidence for a jury to find that LaRouche intentionally engaged in misconduct which interfered in NBC's relationship with a news source - Senator Daniel Patrick Moynihan - and caused some injury to NBC.

LaRouche also argued that the District Court erred in refusing to compel NBC to disclose confidential sources and in allowing the broadcaster to rely on those sources at trial. The Court of Appeals pointed out that LaRouche had not exhausted reasonable alternative means of obtaining the information.

Also rejected was the ADL's appeal of the District Court's denial of its motion for sanctions against LaRouche and his attorneys.

LaRouche v. National Broadcasting Company, Inc., 780 F.2d 1134 (4th Cir. 1984) [ELR 8:1:18]

Manufacturer of "Snuggle" teddy bear is denied preliminary injunction in trademark infringement action to enjoin production of "Snuggles the Seal" toy by Mattel

In 1982, "Snuggle" bear was born - the product of a Lever Brothers advertising campaign to market its new fabric softener bearing the same name. Lever registered the term "Snuggle" solely for use in connection with fabric softeners. Due to concerted marketing efforts on Lever's part, including direct mail distribution of toy "Snuggle" bears, public appearances of the "Snuggle" bear character achieved a significant degree of public recognition.

Despite Lever's marketing success, however, a Federal District Court in New York has denied the company's motion for a preliminary injunction on its trademark infringement and unfair competition claims against Mattel, the producer of a plush toy known as "Snuggles the Seal."

According to Mattel, "Snuggles the Seal" was marketed in an effort to capitalize on the public opposition to the slaughter of baby seals. Mattel denied that anyone connected with the seal project was aware of Lever's "Snuggle" fabric softener or its bear.

In denying Lever injunctive relief, Chief Judge Motley first observed that the term "Snuggle" was not associated with a single source of origin, and had been used widely in the toy industry as a name or part of a name or designation for various plush toys, dolls and other products.

Judge Motley next noted that since Lever registered "Snuggle" only as a trademark for fabric softener, the mark enjoyed no presumption of validity when applied to plush toys, including teddy bears. Any attempt by Lever to establish the mark's validity with respect to teddy bears, cautioned the judge, would require Lever to rely on the distinctiveness of the name "Snuggle" alone since the teddy bear itself is a fixture in the stuffed animal field. And there was no showing of a uniquely recognizable "Snuggle" bear.

Furthermore, the term "Snuggle" as a trademark for a teddy bear, was merely descriptive and could not be protected without a showing of secondary meaning. The court recognized that evidence offered by Lever demonstrated Snuggle bear's growing identity and popularity, and admitted that, arguably, "Snuggle" had begun to take on some secondary meaning as applied to a teddy bear. However, the court failed to find that such a secondary meaning was strong enough to give Lever an automatic trademark right to the term as applied to all plush toys.

The court also held that Lever had failed to establish the requisite showing of a likelihood of confusion. Lever possessed, at best, a weak mark in Snuggle as applied to plush toys, the court noted. In addition, Snuggle bear lacked a clear physical identity, and was markedly different in appearance, if not in name, from "Snuggles the Seal." The court also noted that Snuggle was being distributed as a promotional gift or inexpensive premium, while Mattel's seal had been sold in upscale outlets; that no evidence of bad faith had been demonstrated on the part of Mattel; that the customers for Mattel's seal were sophisticated as compared to Snuggle buyers; and that no evidence of actual confusion between the products had been presented.

Finally, the court stated that while there were arguably serious issues going to the merits, the balance of hardships was not in Lever's favor. The company presented only speculative and conclusory testimony of harm, the court held, while noting that a preliminary injunction would render Mattel's investment in promoting the "Snuggles the Seal" name virtually worthless.

Lever Brothers Co. v. Mattel,Inc., 609 F.Supp. 1395 (S.D.N.Y. 1985) [ELR 8:1:18]

Briefly Noted:

Tax.

The Massachusetts Supreme Court has affirmed, in part, an Appellate Tax Board's decision concerning local tax assessments made by the towns of Medford and Everett on the personal property contained in Warner Amex Cable Communications' cable television systems in the towns. The court agreed that the converters placed in subscribers' homes and the "head-end" equipment used to gather television signals and transmit them over the cable distribution systems to subscribers were "machinery" used in the conduct of business and therefore subject to taxation. Also affirmed was the depreciation rate chosen by the board. However, the court reversed the board's ruling that Warner's cables over public ways were subject to local taxation. Although wires and aerial cables were not specifically exempt from local taxation, such property was not automatically taxable, concluded the court in remanding the proceedings for a redetermination of the value of Warner's personal property which was subject to local taxation.

Warner Amex Cable Communications, Inc. v. Board Of Assessors of Medford, 485 N.E.2d 176 (Mass. 1985); Warner Amex Cable Communications Inc. v. Board of Assessors of Everett, 485 N.E.2d 177 (Mass. 1985) [ELR 8:1:19]

Tax.

The United States Supreme Court has dismissed, for want of a substantial federal question, an appeal of a North Carolina Supreme Court ruling upholding the constitutionality of a state tax exemption for certain newspaper sales. The subject provision exempted from sales tax newspaper sales by street vendors, and door-to-door sales of both magazines and newspapers. The North Carolina Supreme Court had rejected the claims of the Village Publishing Corporation that the tax scheme abridged the freedom of the press and violated the Equal Protection Clause in that it singled out one segment of the press for special exemption from taxation. The tax scheme applied to retail sales generally, the state court had noted, and, therefore, the fact that the statute contained an exemption for newspapers did not make it invalid. Only a rational basis needed to be shown for such an exemption, and such a rational basis existed in the difficulty of requiring street vendors and newsboys to collect the sales tax. In a dissenting opinion, Justice White questioned the use by the North Carolina Supreme Court of the "mere rational basis" test, and submitted that the proper test required a determination as to whether the statute appeared to discriminate among members of the press. To Justice White, the North Carolina statute appeared discriminatory, in that it selected newspapers using one mode of delivery for a complete exemption while requiring all others to pay a tax. Such taxes may be suspect even when they do not discriminate on the basis of content and apparently are not designed to suppress speech. The state bears a heavy burden in justifying such a distinction, stated Justice White, and the question of whether the statute could survive such scrutiny was far from insubstantial.

Village Publishing Corporation v. North Carolina Department of Revenue, 105 S.Ct. 2693 (1985) [ELR 8:1:19]

Tax.

The Tax Court has disallowed an investment tax credit claimed in connection with investments in master recordings on the ground that the taxpayers did not have a bona fide objective of making a profit, and has denied the taxpayers' deductions attributable to their master recording activities. The following factors were cited by the court in support of its ruling: the taxpayers had no experience in record distribution; the investment memorandum emphasized the anticipated tax benefits of an investment in master recordings and did not discuss the amount or likelihood of profits; the taxpayers never received an accurate sales history of the record albums derived from their masters; the masters were purchased at "grossly inflated" prices, without a true regard for their potential profitability; and the investors engaged in minimal efforts to monitor their investment.

Cronin v. Commissioner of Internal Revnue, T.C. Memo 1985-83 (U.S.Tax Ct. 1985) [ELR 8:1:19]

Copyright Infringement.

A Federal District Court in New York has denied photographer Harvey Edwards' motion for a preliminary injunction against a greeting card manufacturer. Edwards claimed that the manufacturer used a photograph entitled "Toe Shoes" on its greeting cards which violated his copyrighted photograph entitled "Leg Warmers." Both photographs depicted a ballet dancer, from the kneecaps to the feet, in the "fifth position." Edwards' dancer wore torn leg-warmers, socks and ballet shoes. "Toe Shoes," photographed by Elyse Lewin, depicted a dancer wearing leg-warmers, socks and ballet shoes which were not torn and were completely different in appearance and color from Edwards' photograph. The court found that there was no likelihood of confusion between the two photographs and any similarity which existed was due solely to the common features of ballet dancers in the fifth position. The court also stated that Edwards had failed to produce any direct or circumstantial evidence of copying, and did not meet the standards for a preliminary injunction.

Edwards v. Ruffner, 623 F.Supp. 511 (S.D.N.Y. 1985) [ELR 8:1:19]

Labor Law.

A Federal Court of Appeals affirmed a District Court ruling that a musician lacked standing to bring a hybrid class action against his union and the San Diego

Symphony Orchestra. The musician alleged that his union had breached its duty of fair representation by agreeing with the Symphony that certain musicians could bypass auditions. The musician also alleged that the Symphony had breached the collective bargaining agreement by failing to hold auditions and that the Symphony and the union conspired to eliminate auditioning in favor of certain musicians. The court held that since the musician was [lot employed by the Symphony, he was not a part of the bargaining unit and therefore, the union owed him no duty. The musician also claimed that he had standing to bring an action against the Symphony as a third party beneficiary of the collective bargaining agreement. Since there was no indication that nonemployee union members were to benefit from the collective bargaining agreement, the court held that the musician had no vested right in the agreement, and therefore, no standing to bring an action.

Karo v. San Diego Symphony Orchestra Association, 762 F.2d 819 (9th Cir. 1985) [ELR 8:1:20]

Spectator injury.

A hockey arena owner has a duty to protect the seats behind each goal where the danger is the greatest, a New York Court of Claims has ruled. The installation of tempered glass barriers at the state owned Romney Arena in Oswego, New York, which provided eight and one-half feet of vertical protection behind each goal, was found by the court to be insufficient to meet this duty. Thirteen-year-old Joanne Davis was struck and injured by a puck while watching a hockey game from her seat behind the south goal at Romney. In a negligence action against the state brought on Davis' behalf by her mother Carol Sawyer, it was successfully argued that the state was negligent in failing to notify spectators that the glass barriers were one foot lower than the chain link fences which they had replaced, and also in failing to utilize protective netting. The court rejected claims by the state that Davis had assumed the risk of danger by choosing to sit behind the goal, or that she was at least contributorily negligent. A reasonably prudent person of Davis' years and intelligence might not have fully appreciated the danger, noted the court, adding that Davis had a right to assume that every reasonable care had been taken for her safety. The court awarded Davis $9000 in compensatory damages.

Sawyer v. State of New York, 485 N.Y.S.2d 695 (N.Y.Ct.Clms. 1985) [ELR 8:1:20]

Constitutional Law.

A Federal District Court in New York has dismissed a discrimination complaint brought by the Federation of Turkish-American Societies against American Broadcasting Companies and Columbia Pictures. The controversy involved the 1978 Columbia Pictures movie, "Midnight Express" which depicted the real-life experiences of an American student prosecuted in Turkey for drug smuggling. ABC purchased the television broadcasting rights and has shown the film three times. The Federation claimed the movie was discriminatory against Turkish people and sought an injunction against further distribution of the film. The court stated that the movie was a form of speech absolutely protected by the First Amendment which foreclosed any liability on the part of ABC or Columbia to the Federation.

Federation of Turkish-American Societies, Inc. v. American Broadcasting Companies, 620 F.Supp. 56 (S.D.N.Y. 1985) [ELR 8:1:20]

Gambling Debt.

A New York trial court has granted a motion for summary judgment to a Mr. Toscano in a breach of contract action brought by National Recovery Systems, the assignee of a note given by Toscano to the Riviera Hotel of Las Vegas, Nevada. Toscano did not dispute his indebtedness, but claimed that the loan was made for gambling purposes in Nevada and, as such, was unenforceable under a since-revised Nevada statute. The court held that National Recovery had failed to substantiate its claim that the amount loaned was not for gambling purposes particularly since Toscano claimed that the loan was in the form of gambling chips for use only at the hotel casino.

National Recovery Systems v. Toscano, Jr., N.Y. Law Journal, p.12, col. 1 (N.Y.Cnty., Dec. 19, 1985) [ELR 8:1:20]

Previously Reported:

The following cases, which were reported in previous issues of the Entertainment Law Reporter, have been published: Levin v. Knight, 780 F.2d 786 (7:10:14); Zucker v. County of Rockland, 489 N.Y.S.2d 308 (7:2:16); Presidio Enterprises, Inc. v. Warner Bros. Distributing Corp., 784 F.2d 674 (7:12:12).

As reported in ELR 7:5:18, a Federal Court of Appeals in Washington remanded to a Federal District Court the

question of the constitutionality of a Washington statute prohibiting, on the day of any election, the taking of any public poll within 300 feet of the entrance to a polling place. An amended opinion in Daily Herald Company v. Munro, on the denial of a rehearing and rehearing en banc, has been published at 758 F.2d 350.
[ELR 8:1:20]

IN THE NEWS

Record companies resolve copyright infringement action against Caroline Records and Tower Records

Seven record companies, including CBS, RCA/Ariola, and Warner/Elektra/Atlantic have settled an action against Caroline Records, a major record importer, involving the allegedly unauthorized importation and distribution of copyrighted recordings. In a judgment entered as part of the settlement and signed by a Federal District Court judge in New York, Caroline Records agreed to cease its activities in connection with parallel imports of records and tapes.

The companies' complaint charging that Tower Records, a national record retail chain, purchased and sold some of the unauthorized imported records and tapes, also was settled.

Caroline Records and Tower Records consented to the issuance of an injunction restraining them from importing, selling or distributing records and tapes manufactured outside the United States and covered by United States copyrights or exclusive distribution rights owned by the record companies without written consent from the copyright owner.

For further information, contact Joel M. Schoenfeld, Recording Industry Association of America, Inc.; phone (212) 765-4330. [June 1986] [ELR 8:1:21]

Mistrial is declared in stuntwoman's negligence action arising from injuries incurred during filming of "Cannonball Run"

Los Angeles Superior Court Judge Howard Thelin declared a mistrial in Heidi Von Beltz's $42.5 million negligence action against director Hal Needham and Stuntman, Inc., Needham's loan-out company, after the jury advised the court that it was deadlocked. A new trial will be scheduled in the matter.

Von Beltz was paralyzed in a 1980 stunt car crash on the set of the film "Cannonball Run;" she claimed that Needham knew that the car in which she was a passenger was defective. Needham argued that the driver's error caused the crash.

It was reported that the jurors voted 9-3 that Needham had been negligent, but that only eight jurors believed that his alleged negligence caused the accident; nine jurors would have had to agree on both issues in order to reach a verdict.

Also remaining unresolved was the question of whether Needham was an employee on the production or an independent contractor. California's labor code bars employees from suing fellow employees for job-related injuries; an independent contractor is not entitled to the same protection from liability. [June 1986] [ELR 8:1:21]

California Board of Equalization rejects proposal to apply state sales tax to commercial films and to independent postproduction and special effects companies

The California Board of Equalization has rejected a staff proposal to apply the 6% state sales tax (plus an additional half percent in Los Angeles County) to all commercial, training and educational films produced and delivered in California, and to independent postproduction and special effects companies.

The testimony of individuals representing the leading organizations in the entertainment industry indicated that the likely effect of the tax proposal would be a major loss of jobs and an increase in runaway production. Board of Equalization member William Bennett changed his position and voted against the adoption or further consideration of the proposed revision of tax regulation

1529, citing the longstanding policy exempting commercial, training and educational films from taxation.

According to Leslie Klinger of Proskauer Rose Goetz & Mendelsohn, counsel for the Association of Independent Commercial Producers (and a member of the ELR Advisory Editorial Board), Bennett apparently concluded that no evidence was presented of any changes in the film industry which would serve to justify the revision of the regulation. [June 1986] [ELR 8:1:21]

Federal District Court finds Syufy Enterprises liable for breaching "Cotton Club" exhibition contract with Orion Pictures, but jury declines to award damages to Orion

A Federal District Court in Los Angeles has granted a directed verdict to Orion Pictures in the company's breach of contract action against Syufy Enterprises. Orion claimed that Syufy refused to pay contractual guarantees for showing "The Cotton Club." As a result, Orion refused to exhibit the film at Syufy theaters in six cities, and instead purportedly licensed the exhibition of the film by inferior theaters in those cities. The court also dismissed Syufy's counterclaim alleging that it was defrauded by Orion because, although a print of the film was available for trade screening, the film was blind bid.

Orion's attempt to recover about $250,000 from Syufy-its estimated damages from exhibiting the film in the substitute theaters-was rejected by the jury, which had been instructed to decide only the issue of damages.

In an earlier ruling in the case, Judge Hatter dismissed Orion's claim that Syufy violated federal antitrust laws by allegedly monopolizing first-run exhibition in Las Vegas. [June 1986] [ELR 8:1:21]

National Geographic Society and WQED-TV settle copyright infringement action against Alan Landsburg Productions for unauthorized use of footage from "The Sharks" television program

The 1981 special program "The Sharks," co-produced by the National Geographic Society, was the most popular evening show ever broadcast on public television, according to the National Geographic. The society licensed the exclusive television and broadcast rights to the program to WQED-TV in Pittsburgh. In 1983, Alan Landsburg Productions, Inc., without authorization, used 90 seconds of the program in a commercial television special "Sharks Don't Die: The Making of Jaws 3-D." MCA Television distributed "Sharks Don't Die" to 98 independent television stations.

When the National Geographic and WQED sued Landsburg for copyright infringement, a Federal District

Court in California initially ruled in August 1985 that if "Sharks Don't Die" did, in fact, infringe the National Geographic's copyright, and if the 98 television stations were defendants in the action, then Landsburg and MCA TV would be jointly and severally liable for 98 statutory damage awards.

The National Geographic has announced that a settlement in the matter has been reached "on the eve of trial;" Landsburg admitted its unauthorized use of material from "The Sharks" and will pay an undisclosed amount of cash to the National Geographic. [June 1986] [ELR 8:1:22]

Home Box Office signs Directors Guild agreement

Home Box Office has signed a three year agreement with the Directors Guild of America. The agreement calls for all programs produced by HBO for the HBO and Cinemax pay television services to be subject to DGA minimums, residuals, pension and health and welfare contributions; the agreement does not include sports, or filler and promotional programming.

According to news reports, HBO, which has never been a signatory to a DGA contract, and its outside producers will be entitled to a substantial reduction in the amount of residuals the company must pay Guild members. [June 1986] [ELR 8:1:22]

IATSE and AMPTP agree to eliminate seniority roster system

The International Alliance of Theatrical and Stage Employees and the Alliance of Motion Picture & Television Producers have agreed to eliminate the longstanding seniority roster groupings of the IA's members. Under the seniority groupings, job preference was given to the more senior members of the IA's Hollywood affiliates. All members of the Hollywood locals now are listed on a single Industry Experience Roster, known as "Industry Group One" The IA has the right to terminate the agreement on August 1, 1987 upon giving notice to the Alliance. It is anticipated that the elimination of the seniority roster will assist in the IA's efforts to organize nonunion entertainment industry workers. [June 1986] [ELR 8:1:22]

Attorney Don Engel receives 1986 Roscoe Barrow Memorial Award

Don Engel, a member of the Entertainment Law Reporter advisory Editorial Board, received the 1986

Roscoe Barrow Memorial Award on April 10, 1986. In informing Engel of the award, COMM / ENT, a law journal published by the Hastings College of the Law, cited Engel's efforts to counter "the harmful overreaching and self-dealing practices of many music industry attorney-agents ... the often insidious and unconscionable tactics of the recording companies." [June 1986] [ELR 8:1:22]

DEPARTMENTS

In the Law Reviews:

The ABA Forum Committee on the Entertainment and Sports Industries has published Volume 4/3 of The Entertainment and Sports Lawyer which includes the following articles:

Right of Publicity: Recent Developments in the Wars over the Use of Names, Pictures and Look-Alikes by Richard Kurnit, 4/3 The Entertainment and Sports Lawyer 1 (1986)

Protection of Obscene Parody as Fair Use by Richard J. Greenstone, 4/3 The Entertainment and Sports Lawyer 3 (1986)

The Buffalo Shuffle by Alvin Deutsch, 4/3 The Entertainment and Sports Lawyer 7 (1986)

Defining Entertainment Law by Melvin Simensky, 4/3 The Entertainment and Sports Lawyer 13 (1986)

Tax Planning Issues Affecting International Entertainers and Athletes, 9 Fordham International Law Journal 97 (1985-86)

The Journal of Arts Management and Law (formerly Performing Arts Review) has published Volume 15, Number 4. It may be obtained from Heldref Publications, 4000 Albemarle Street N.W. Washington, D.C. 20016.

Commentary by Valerie B. Morris, 15 Journal of Arts Management and Law 3(1986)

Public Art and Public Policy by Judith H. Balfe and Margaret J. Wyszomirski, 15 Journal of Arts Management and Law 5 (1986)

The Administrative Foundations of American Public Broadcasting by Kevin V. Mulcahy and Joseph Widoff, 15 Journal of Arts Management and Law 31 (1986)

Copyright, Free Speech, and the Visual Arts by Patricia A. Krieg, 15 Journal of Arts Management and Law 59 (1986)

Enterprise in Canadian Museums: Reward or Revocation? by Hannah J. Mestel, 15 Journal of Arts Management and Law 81 (1986)

The Plight of Small Issuers (and Others) Under Regulation D: Those Nagging Problems That Need Attention by Rutheford B. Campbell, Jr., 74 Kentucky Law Journal 127 (1985-86)

Public Access Channels in Cable Television: The Economic Scarcity Rationale of Berkshire v. Burke by Laurel L.F. Garrett, 74 Kentucky Law Journal 249 (1985-86)

The National Basketball Association Salary Cap: An Antitrust Violation? by Scott J. Foraker, 59 Southern California Law Review 157 (1985)

Television Coverage of Trials: Constitutional Protection Against Absolute Denial of Access in the Absence of a Compelling Interest, 30 Villanova Law Review 1267 (1985)

Betamax and Sound Recordings: Is Copyright in Trouble? by Burt A. Leete, 23 American Business Law Journal 551 (1986) (published by Department of Economics and Business Administration, Gettysburg College, Gettysburg, PA 17325)

Judge and Jury in the Law of Defamation: Putting the Horse Behind the Cart by Lee Levine, 35 The American University Law Review 3 (1985)

The Gertz Fault Standard and the Common Law of Defamation: An Argument for Predictability of Result and Certainty of Expectation by Patrick J. McNulty, 3 Drake Law Review 51 (1985-86)

The Trademark Counterfeiting Act of 1984: A Sensible Legislative Response to the Ills of Commercial Counterfeiting, 14 Fordham Urban Law Journal 115 (1985-86)

The Statutory Damages Provision Under the 1976 Copyright Act by Pamela A. Hay, 26 IDEA: The Journal of Law and Technology 241 (1986) (published by The PTC Research Foundation, 2 White Street, Concord, NH 03303)

Beyond Fair Use: Putting Satire in Its Proper Place by Michael C. Albin, 33 UCLA Law Review 518 (1985)

A Cause of Action for Simulation of Sound Recordings? Yes! Reflections on the 1976 Copyright Act, 38 Rutgers Law Review 139 (1985)

Rickless v. United Artists - A Queen's Bench Perspective on Copyright and Performers' Rights by Adrienne Page, 8 European Intellectual Property Review 6 (1986) (published by ESC Publishing Ltd., 2 Beaumont St., Oxford OX 1 2NP England)

Indiana Law Journal has published a Symposium Issue on Antitrust Issues in Amateur Sports with the following articles:

Introduction: Antitrust-The Emerging Legal Issues by John Scanlan, 61 Indiana Law Journal 1 (1985)

The Economic Realities of Amateur Sports Organization by James V. Koch, 61 Indiana Law Journal 9 (1985)

Antitrust and Amateur Sports: The Role of Noneconomic Values by Wendy T. Kirby and T. Clark Weymouth, 61 Indiana Law Journal 31 (1985)

"Don't Talk of Fairness": The Chicago School's Approach Toward Disciplining Professional Athletes by Robert H. Heidt, 61 Indiana Law Journal 53 (1985)

Alternative Broadcasting Arrangements after NCAA by Byron L. Gregory and J. Craig Busey, 61 Indiana Law Journal 65 (1985)

The Last Laugh: To Decide If a Joke Is Defamatory, Look To Its Context As Well As Its Content by James E Brelsford, 6/3 California Lawyer 43 (1986) (published

by The State Bar of California, 555 Franklin St., San Francisco, CA 94102)
[ELR 8:1:23]