BUSINESS AFFAIRS

The Not-So-Mysterious World of Jingle Royalties

by Jeffrey J. Brabec

From Rod Stewart's "You're In My Heart" for Mercury, Stevie Wonder's "I Just Called To Say I Love You" for GTE, "The Pride Is Back" for Plymouth, Phil Collins' "It's In The Air Tonight" for Michelob, "Ain't Nothin' Like The Real Thing" for Burger King and "Lean On Me" for Chevrolet to "Only You" for Wendy's, "9 To 5" for Emery, and Glen Frey's "You Belong To The City" for Pepsi, music is advertising in the 1980s. And whether the owner of such music is the sponsor, advertising agency, jingle writer, production company, music publisher or rock superstar, the business of receiving broadcast royalties from ASCAP and BMI is hardly the mysterious world that many claim it to be.

ASCAP and BMI

ASCAP (a writer and publisher not-for-profit association founded in 1914) and BMI (a broadcaster owned non-profit corporation organized in 1939) are performing rights societies whose principal function is to negotiate license fees with television and radio stations as well as other uses for the right to perform copyrighted music. The primary license agreement used by both ASCAP and BMI is the blanket license which, for a negotiated or court set fee, allows a user of music unlimited access to each society's current repertory as well as any new repertory added during the term of the license agreement. These license fees are then paid out to writers and publishers based upon the number of surveyed performances of their works.

ASCAP has been paying its writer and publisher members for jingles and music used in commercials for over thirtyfive years pursuant to a published formula. BMI has been paying its writers and publishers for such uses since 1980 on an experimental basis according to an unpublished rate schedule.

Types of Advertising Music and Payments

ASCAP pays different royalties for advertising music depending on whether the song being used is a:

(a) "Jingle" - (i) a work that is originally written for a commercial; (ii) a work not originally written for a commercial but with the lyrics changed to fit the advertising message (for example, "Hello Dolly" to "Hello Deli" for

Oscar Mayer); or (iii) a song not originally written for advertising purposes which has only a minimal history of radio and television performances. Most radio and television advertising music is in this category.

(b) "Theme" - any existing song not written for a commercial which has a small history of prior performances. Some album cuts never released as singles might qualify in this category.

(c) "Qualifying Work" - normally a past or current hit song or established standard used either instrumentally or with no change in the original lyrics. For example, if Jan Hammer's "Miami Vice Theme" was used as a background to a commercial or Paul McCartney's "Say, Say, Say" was used with no change in the original lyrics, both songs would be treated as qualifying works.

The ASCAP payment formula for all types of performances is set out in percentage terms rather than actual monetary values. The highest credited performance is a "feature performance" (100% crediting) with all other types of performances (background music, themes, jingles, etc.) credited at less than 100%. For example, if Barbra Streisand sings "The Way We Were" on prime-time network television or Bruce Springsteen's record of "My Home Town" is broadcast on radio, a 100% royalty is paid. Under ASCAP's comparative payment system, jingles receive a 3% crediting value, themes 10%, and qualifying works from 25% to 50% depending upon a particular composition's history of broadcast performances. Incidentally, the current 3% jingle payment represents a 200% increase over the jingle rate in effect prior to July 1, 1981.

In addition, the time of day and day of the week of the broadcast as well as the number of affiliate stations carrying the broadcast affect the value of all network television performances. There is also only one payment for all uses of the same jingle within the first sixty minutes of a two hour period of programming and a minimal payment for all performances during the second hour.

Some examples of recent payments should help translate the ASCAP percentages into dollars. A 3% jingle broadcast on a prime-time network television program with a 200-station hookup was worth approximately $74 in combined writer and publisher royalties. The figure for a surveyed performance of a jingle on a median local television station was approximately $17, with $5 being paid for a median local radio performance. The 50% qualifying work commercial rate (hit song without a change of lyrics), on the other hand, was worth $1,233 for the prime-time television network use, $286 for the local television performance, and $90 for the local radio broadcast.

Unlike the comparative percentage calculations used by ASCAP, BMI distributes royalties pursuant to a printed payment schedule which specifies the minimum dollar amount it is obligated to pay for any type of performance (theme, background music, etc.). At the time of each quarterly distribution, BMI adds bonus monies to certain types of performances thereby raising the minimum payment schedule royalties. In the case of jingles, though, BMI does not list a rate because such uses are being paid on an experimental basis. BMI's most recent combined writer and publisher payments for all advertising music (hit songs with or without a change of lyrics, non-hit songs and jingles alike) was $60 for a network television performance, 75 cents for a local television broadcast, and 2 cents for each local radio performance. Although the BMI performance monies may seem small in comparison to the ASCAP payments, the system used by BMI to pick up commercial performances for non-network television broadcasts will normally result in more royalty generating performances than would occur under ASCAP's sample survey of local radio and television stations.

Documents Needed

To receive credit for jingle performances, ASCAP needs the name of the product, a copy of the lyrics to the jingle, or if the use is instrumental, the advertising text of the commercial. In the case of network television commercials only, the advertising agency must also send a schedule of broadcast performances to the Music Clearance Departments at CBS, NBC and ABC so that the networks can confirm to ASCAP that the performances actually occurred.

In addition, a copy of the contract between the jingle writer and the agency must be sent to ASCAP to determine whether the agency or sponsor has been given a source or direct performance license (or buyout of broadcast rights). If a source or direct performance license has been issued, the writer and publisher will not be entitled to any payment from ASCAP. On the other hand, if such licenses have not been granted, the writer and publisher become eligible to receive royalties.

BMI requires a media schedule of all performances including the identity of the broadcasting station or network, the name of the commercial, the identity of the product or sponsor and the number of broadcasts per day. In addition, a lead sheet and tape (audio or video) of the commercial as broadcast and a written confirmation from the agency or sponsor that a source or direct performance license has not been issued are also required. As with ASCAP, if performance rights have been assigned to the agency, sponsor or broadcaster, no royalty payments will be made.

BMI also requires that advertising music must be the sole sound which is the focus of audience attention for a minimum of 15 seconds. This rule virtually excludes all 15 and 20-second commercials and a large number of 30-second commercials from royalty payments.

Logging of Performances

ASCAP logs 60,000 hours of local radio and 30,000 hours of local television each year and distributes royalties to the writers and publishers whose works are picked up in this survey of performances. Commercial advertising music is logged on a special sub-sample basis with a multiplier added to bring the sub-sample in line with ASCAP's regular performance survey. Network television, however, is logged on a census (or 100% pick-up) basis with payment of royalties subject to confirmation by the Music Clearance Departments at CBS, NBC and ABC.

BMI pays royalties on all commercial performances regardless of whether the broadcast occurs on local radio, local television or network television, provided it receives copies of the media schedules which serve as the sole basis for performance information and distribution of royalties.

Payment Dates

ASCAP pays its writer and publisher members every three months with payments based on performances occurring in prior periods. For example, in August of 1986, writers received royalty statements for October through December performances. In September of 1986, publishers were paid for January through March 1986 performances.

BMI pays its writer and publisher affiliates in February of each year on a separate jingle statement for performances which occurred during the previous July 1 through June 30 period. For example, in February of 1986, advertising music royalties were distributed for commercials broadcast between July 1, 1984 and June 30, 1985. In February of 1987, a royalty distribution will be made for the July 1, 1985 through June 30, 1986 period.

Proposed Revisions in the Licensing of Network and Local Television Commercials

As many advertising agencies and music attorneys are aware, NBC has taken the position that all advertising agencies and/or their clients must secure the necessary performance rights for music used in commercials scheduled for broadcast on or after September 1, 1986. In effect, NBC has made it mandatory that advertising agencies renegotiate and restructure their commercial music licenses to provide that an NBC station does not have to have a performance license with ASCAP or BMI to broadcast the commercial. Currently, such agreements resemble television synchronization licenses in that the advertiser secures permission to utilize a composition in a commercial with the right to broadcast the commercial (the performing right) covered by a station's ASCAP and BMI blanket license. Simply put, NBC has stated that it will not air any commercial containing music unless all rights have been bargained for and granted to the agency or its client. This source licensing demand not only removes ASCAP and BMI from the transaction but it also guarantees that there will be no ASCAP and BMI performance royalties.

Without such performance royalties (which have been in existence almost since the dawn of television), the negotiations for the use of music (especially hit songs) in commercials will certainly take on a different look. This could very well raise the fees paid by agencies for the licensing of music, as well as complicate agency accounting procedures, if publishers begin to demand a logging of performances and per-broadcast royalty payments.

Due to advertising agency complaints, the impossibility of renegotiating current agreements and the difficulty in economically negotiating new licenses which totally change four decades of industry practice, NBC has extended its deadline for source licensing to September 1, 1987 for many advertising agencies.

An additional and more far reaching development in this area was the introduction in the U.S. Senate and House of Representatives of the local television "source licensing" bills-specifically S.1980 and H.R.3521. If these bills had passed in their original form, they would have, in effect, merged the synchronization right and the performance right - two separate and distinct rights under the Copyright Act - into one.

In the case of jingles and music used in commercials, the advertising agency not only would have been required to negotiate the synchronization license (as is currently done) but also a performance license for all commercials broadcast on local television. Under such a scenario, the world of the blanket license, the per program license, the source license and the direct license would be replaced by a single choice-the source license. And, although these bills did not succeed in the past session of Congress, they will most certainly be reintroduced in the 1987 session, with provisions added to counter opposition directed at their lack of continuing royalty payments for continued use.

It remains to be seen how these issues will be resolved but they do have the potential of drastically changing the way commercial music is licensed.

Conclusion

As one can see, there are a number of important decisions to be made and issues to be considered in the proper representation of advertising music. One must consider ASCAP vs. BMI affiliation, direct or source performance licensing vs. reservation or performance rights, sample vs. census surveys, durational vs. non-durational royalty eligibility requirements, extra payments for hit songs without changes vs. the same payment for all advertising uses, per performance payments from advertising agencies vs. a buyout of performance rights, etc. The choices are many but the current procedures governing royalty payments for music used in commercials are straightforward and readily available if one takes the time to look into them.

The future, however, is another story, and the music attorney is well advised to become familiar with the payments, procedures and philosophy of the current system in order to fully appreciate the significant changes in music licensing being proposed by NBC and the local television industry.

Jeffrey Brabec is the Director of Business Affairs for The Welk Music Group in Santa Monica. He is a graduate of New York University School of Law, and lectures frequently at music business conferences and meetings.
[ELR 8:5:3]

Self-Publishing, Etc.: A Rejoinder

by Don Biederman

This is the "do-it-yourself" era. There are (and have been for some time) kits available from which you can build your own TV set, a boat, a car, even a house. One of my proudest achievements, being unhandy in the extreme, is the backyard playhouse I built many years ago for my then-infant daughter "from scratch" - including a real shingle roof.

It is perfectly feasible to record, manufacture, distribute and promote your own records, although it is likely to be time-consuming, expensive, and probably unprofitable at the end of the day.

You can act as your own publisher. Back in l97l, the young Blue Oyster Cult - concluding (correctly, as it happened, as to at least their first four LPs) that no one would ever "cover" (i.e., record a second or subsequent time) their songs or play them on the radio and that the bulk of their publishing income would consist of mechanical royalties to be paid by CBS Records on their own recordings - decided to forego a piddling advance (the only advance offered at the time) and act as their own publishers.

You can buy books on how to handle your own divorce, your own will, and other legal matters. You could negotiate your own recording and publishing agreements. However, most of us realize that in this highly complex and multinational-conglomerate-dominated modern world of records and music, you are likely to be a lot better off if you engage someone of the recognized intelligence, education, experience and stature of Jeffrey L. Graubart.

It is, as Mr. Graubart pointed out in last month's "Business Affairs" article ["Self Publishing and the

Songwriter/Music Publisher Agreement" (ELR 8:4:3)], a matter of needs and priorities, a cost/benefit analysis. I have no quarrel with Mr. Graubart on this, and I (and all the other legitimate publisher representatives I know) heartily agree that you shouldn't be involved with a publisher unless you need a publisher or, for whatever reasons of your own, you want to be affiliated with a publisher. You can, in a manner of speaking, buy a kit or do it yourself (or with the aid of your lawyer, business manager, personal manager, spouse or retinue). The problem is identifying and quantifying the need and then the cost of benefits of the service. Unfortunately, Mr. Graubart's commentary contains a number of what appear to me to be undoubtedly unintentional half-truths and misstatements, which cloud the issues. Let's look at a few of these:

1. "[A]n 'established' music publisher ... will customarily charge the creator 50% or more for its services [whereas] a manager, attorney, accountant, or other professional administrator [will] undertake the task for a charge to the creator usually no greater than 15% and often less than that..."

Except in very limited circumstances (e.g., a nonperforming Nashville writer on weekly advance, with no previous track record, in a shrinking country record market and shaky and unpredictable country radio market), I know of no major publisher demanding 50% of the income (i.e., 100% of the publishing). We don't sit around with our competitors discussing such things, but I believe that except in rare cases, the publisher's end is much less than Mr. Graubart suggests. Indeed, if you have a substantial cash flow and don't require substantial advances, a full-service publisher (I use this term in preference to "established publisher" since Mr. Graubart gives no clue as to what his term is meant to define) will often administer your catalog domestically on a relatively short-term basis for 15% rather than the 15% to 25% Mr. Graubart suggests (although there are of course deals in between). While some attorneys, business managers, etc. are quite expert at the publishing business, they are essentially reactors rather than actors; they may be able to handle what comes in (although they may lack the detailed information available to the full-service publisher dealing with a wide range of accounts), but they are unlikely to be able to go after or enhance business. This was irrelevant to the young Blue Oyster Cult; is it for you or your clients?

2. "`[E]stablished' music publishers invariably insist on controlling compositions for as long as possible under U.S. copyright law."

This is of course true in those limited situations in which the full-service publisher acquires 100% of the copyright of your songs, and in the more common situations in which the full-service publisher acquires an ownership interest of 50% (or some other fraction less than 100%) as your co-publishers. Typically, you must give up ownership where you present an unacceptably high business risk, i.e., where you have no track record or a poor track record but you require substantial advances unlikely to be recouped (if at all) for a long time. If all you require is help with your cash flow, and you have an acceptable credit history, you can borrow from a bank (but, of course, the bank will not be willing to eat the shortfall if your cash doesn't flow as strongly as you hope). If all you require are administrative services, it is perfectly feasible for you to conclude an administration or collection agreement for anywhere from one to three years (and I know one good, smaller company, which works on a shorter-term arrangement - just a few months; it is kind of a guerrilla operation specializing in the avant garde).

Why one to three years? Full-service publishers maintain staffs of people to perform copyright, royalty and professional services. They have expenses like computers, rent, heat, light, photocopying (our company makes several million photocopies every year, for example), parking validations, etc. It is not worth the while of most full-service publishers to set up files for you and put you on the computer, service your songs to foreign sub-publishers, and perform the various other tasks that fall to them to perform, if they are only going to have your catalog for a short while. It's not cost-efficient.

Sure, ideally we'd love to have your catalog for the full term of copyright; but "insist"? - I doubt it. There is simply too much competition to take such a high-handed position.

The foregoing analysis also, I believe, disposes of the startling claim by Mr. Graubart that "the agent's term hardly ever exceeds a period of seven years while publishers continue to demand terms of 35 years or more." This statement truly mixes apples and oranges. What agent of sound mind invests in the acts he/she represents? What agent in his/her right mind agrees that his/her compensation on contracts secured during the agency term ends at the end of that term? Agents routinely include in their agreements - even in California, where agents' contract forms are subject to review by the California Labor Commission for fairness - that they are to receive compensation for the life of the contract where the contract is entered into during the term of the agency agreement, sometimes where the contract is entered into after the term as the result of negotiations undertaken during the term.

3. "Publishers have been accused of no longer providing the creative, promotional and marketing functions for which they were once famous. They also have been charged with maintaining a function that has become heavily administrative and clerical only: the same functions now performed by others for a fraction of the charge and a fraction of the required contractual time."

First of all, let's not sneer at the administrative and clerical functions; they are not simple, and they can be costly and extremely time-consuming. And let's not minimize the financial element; a lot of people enter into agreements with publishers in order to obtain advances, and a full-service publisher such as Warner Bros. Music may have a proportionately far greater burden of advances than a major record company, without the enhanced profitability attendant upon economies of scale in the case of a major hit record. Our per-copy mechanicals don't increase as sales go up.

Secondly, the right to confront one's accusers is a basic tenet of American jurisprudence. I know and respect Mr. Graubart; he has his axe to grind, just as I have mine. But who are the other unnamed accusers, what do they know, and what interest are they promoting?

It is no secret that the music business has undergone several mighty upheavals since the turn of the century. Talents such as George Gershwin and Jerome Kern were once heard paying piano in music stores to encourage the sale of sheet music, then a principal source of publishing income, not increasingly vestigial (and standards-oriented; the big sellers are inspirational songs and songs you can play at weddings, with the smash pop sheet hit a rarity). Great artists such as the Andrews Sisters in the 30s and Frank Sinatra in the 40s had very little control over what they recorded; I've seen their contracts from that era, and the record company's A&R staff basically told them what to sing. Mitch Miller had a lot to say about what was recorded when he was head of A&R at Columbia Records; he was available to song pluggers. In the 60s, a whole host of artists recorded "covers" and outside songs extensively (if not exclusively): Columbia Records, for example, had Andy Williams, Jim Nabors, Vikki Carr, Percy Faith, Ray Conniff (don't laugh: Ray had sold over 20,000,000 LPs for CBS by the mid-70s), Andre Kostalanetz, Robert Goulet and Steve Lawrence & Eydie Gorme (not to mention a rising young star by the name of Barbra Streisand).

That's all changed now. Cover records and outside-song placements are much harder to come by; they are truly targets of opportunity. There are some great stars who write little or none of the songs they sing (Kenny Rogers, Diana Ross, Miss Streisand, to cite a few), but the vast majority of today's pop stars write what they sing, and use little or no outside music. A full-service publisher will maintain a professional staff. (Warner Bros. Music, for example, has five full-time professional managers in Los Angeles, and four in Nashville, and several executives also spend a great deal of their time in this area.) How many lawyers, managers, or accountants can make that statement?

Do we advertise and promote? In the traditional sense, not much. That, too, is a reflection of changed realities. Given the fact that radio airplay and video clips are the principal promotional vehicles in today's market, independent promotion and advertising are beyond the financial resources of even the largest full-service music publishers. Our efforts must of necessity be behind the scenes. For example, we have commissioned several promotional books for circulation to film and TV producers, ad agencies, and others to enhance our synchronization-licensing business. We have people who call and visit artists, managers, record producers, ad agencies, film and TV companies and others who might use our music. As a percentage of income, the cost of these activities is quite high.

4. "Typically, under [a foreign sub-publishing] agreement, each . . . 'subpublisher' retains 50% of all revenue generated in its own territory, remitting the remaining 50% to the parent music publishing company."

This startling statement follows the assertion that "in most instances" these self-same foreign subpublishers "are nothing more than paper creations having no offices, staff or presence except in file cabinets."

Again, of whom does Mr. Graubart speak? Our colleagues in London, Paris, Amsterdam, Stockholm, Milan, Sydney and Munich will be surprised (as will the counterpart operations of our competitors) to learn that they don't exist. They will also be delighted to learn of the sudden increase in the percentage of income which they are entitled to retain. Mr. Graubart can anticipate many grateful cards and letters.

There is no doubt that there are many contracts outstanding which do not require calculation "at the source" (a phrase meaning that the ultimate split of revenues in the U.S. is unaffected by any reduction due to the retention of the shares of foreign subpublishers, a phrase which a fine lawyer like Mr. Graubart would insist on including in any deal he negotiated), which provide for 50/50 splits, and which run for life-of-copyright. For many decades, such contracts were the custom of the industry, and they were fair when they were entered into on a negotiated basis. It is axiomatic that whether or not a contract is fair is essentially to be determined at the time the contract is entered into, and many of these agreements were contracted at a time when the business was far smaller in dollar volume and riskier because of the absence of multinational record company and publisher networks and the earlier stage of development of performing and mechanical rights societies, among other reasons. It is a well-known fact that Ty Cobb never made more than $10,000 a year as the greatest baseball player of all time, yet died a multi-millionaire because of his investments in Coca-Cola stock. Should we have said, on the one hand, that we should retroactively renegotiate his player contracts because .250 hitters now earn six-figure salaries, or, on the other, that because his investments in Coca-Cola had paid off thousands of times over, he'd earned enough and his shares should now be voided (or their dividend entitlements reduced)?

To put the matter differently, the house my wife and I sold when we moved from Long Island to Los Angeles ten years ago is now worth six times what we got for it; are we entitled to a portion of the appreciation in value?

The items quoted above are merely the major misstatements; time and space and reader stamina would be sorely (if not already) tested by a response on each and every point.

American vs. British Law

Mr. Graubart proceeds to discuss a number of English decisions (Schroeder, Clifford Davis, O'Sullivan, Elton John) to show that English courts are more concerned than American courts with the fairness of publisher/songwriter agreements. However, this analysis fails to take account of a very significant difference between English and American jurisprudence in this general area.

In the landmark case of Wood v. Lucy, Lady DuffGordon, 222 N.Y. 8 (1917), the New York Court of Appeals observed that there is in every contract an implied covenant of good faith and fair dealing. Wood and Lucy entered into an agreement appointing Wood as her exclusive agent to secure merchandising licenses. The agreement recited that Wood had an organization capable of doing the job, and provided for a split of earnings, but there was no affirmative undertaking by Wood to do anything at all. Nonetheless, observed the Court, the existence of an obligation to account and pay if royalties were earned, and the recital concerning Wood's organization, were sufficient to raise an implied obligation on Wood's part to make reasonable efforts to generate income.

A similar result was reached in Mandel v. Leibman, 100 N.E.2d 149 (NY 1951), in which Max Leibman, producer of TV's landmark variety program "Your Show of Shows" (on which Sid Caesar and Carl Reiner, among others, came to prominence), attempted to discharge his manager using an argument similar to that advanced by Lucy, with the same result.

Likewise Bonner v. Westbound Records, 394 N.E.2d 1303 (Ill. 1979), in which the Ohio Players attempted to justify their jump to Mercury Records during the term of their agreement with Westbound on the grounds that the Westbound agreement lacked mutuality due to the presence of a clause which stated that Westbound had the right to refrain from releasing any records. There, the Court observed (1) that Westbound had made significant contractual advances and expended substantial sums to manufacture, distribute and promote the group's records, (2) that Westbound had made extracontractual advances to bail the group out of some personal financial difficulties, and (3) that these facts showed compliance by Westbound with the implied covenant of good faith and fair dealing.

More recently, Zilg v. Prentice-Hall Inc., 717 F.2d 671 (2d Cir. 1983), rejected the idea that a book publisher had "privished" rather than "published" an author's book where the publisher reduced the initial press run and advertising budget in the face of negative reaction from the DuPont family (the subject of the book, a muckraking expose) and a book club which had initially agreed to take the work. The publisher could not be said as a matter of law to have done too little to constitute compliance with its obligation to publish. In addition to the publisher's actual activities in support of the book, the Second Circuit observed that "up-front money... provides a token of the publisher's seriousness" although "up-front money alone cannot fully reconcile the conflicting interest of the parties." There are of course fundamental differences between book publishing and music publishing; we need not discuss them here. The Court's comments concerning advances, however, underscore what I have said previously about the interplay between the amount you receive by way of advances and the rights you are in turn required to grant to the publisher.

Beyond the implied covenant of good faith and fair dealing, American courts (in cases too numerous to cite or discuss) have certainly applied the doctrines of undue influence, breach of fiduciary relationship, economic duress, and other formulations similar to those employed by the English courts in order to aid those of whom advantage has been taken. Every legitimate publisher respects and applauds the availability of these principles. No legitimate publisher condones oppression or overreaching. The arguments raised by Mr. Graubart and others on his side of the equation will always be there, and Mr. Graubart and his confreres and we and our colleagues will, hopefully, continue to beat up on each other to our mutual benefit for many years to come.

Don Biederman is Vice President, Legal & Business Affairs, Warner Bros. Music, and an Adjunct Professor at Pepperdine University School of law and at Southwestern University School of Law. He is a member of the New York and California bars and of the Advisory Editorial Board of the Entertainment Law Reporter.
[ELR 8:5:6]

RECENT CASES

"Life's Most Embarrassing Moments" did not infringe Dick Clark's "TV's Censored Bloopers" program, rules Federal Court of Appeals

"Life's Most Embarrassing Moments," as difficult as they may be, were not substantially similar to "TV's Censored Bloopers," a Federal Court of Appeals has ruled. The court affirmed a District Court ruling granting summary judgment in favor of Alan Landsburg Productions, the producer of the Embarrassing Moments television show, in a copyright infringement action brought by the dick clark company, inc., the producer of the Bloopers programs. (It should be noted that the court announced that the disposition of the case was "not appropriate for publication and may not be cited to or by the courts" of the circuit except as provided by court rules.)

It was first noted that Clark's claim that there remained genuine and material issues of fact requiring an evidentiary hearing was not well taken. After discussing the applicable standard of review, the court stated that the District Court's finding "that these outtake-type programs can only be presented in a limited number of ways" was not clearly erroneous. The scope of copyright protection available to Clark in the format of the

Blooper shows was very limited; to hold otherwise would enable Clark to achieve a monopoly over the production of this type of television program. Although copyright protection would extend to identical copying of the Blooper program, there was no contention that Landsburg directly copied Clark's program, and the District Court's ruling was affirmed accordingly.

The Dick Clark Co., Inc. v. Alan Landsburg Productions, Inc., Case No. 85-6080 (9th Cir., Sept. 9, 1986) [ELR 8:5:9]

Television game show producer is denied injunctive relief in action involving Goodson-Todman Enterprises' show "To Tell the Truth"

In March 1986 Goodson-Todman Enterprises notified Barris/Fraser Enterprises that if Barris/Fraser's proposed television game show entitled "Bamboozle" infringed on Goodson-Todman's copyrighted program "To Tell the Truth," Goodson-Todman would "take all steps necessary to restrain and/or recover damages for any infringement of its rights."

Barris/Fraser, the producer of the pilot for Bamboozle, brought an action seeking a decree that Goodson-Todman's letter tortiously interfered with the producer's contract with ABC to produce the pilot, and that the Barris/Fraser show did not infringe To Tell the Truth.

A Federal District Court in New York has denied Barris/Fraser's request for a preliminary injunction because no irreparable injury was shown. Barris/Fraser did not present any evidence that linked Goodson-Todman's letter with any action that was taken or might be taken by ABC. The Bamboozle parties argued that the letter might prevent the sale of the show to ABC by making it difficult to acquire contractually-required insurance for the show. But it was not shown that Barris/Fraser could not obtain the insurance, or that the producer would suffer irreparable injury from the alleged loss of profits from the syndication and exploitation of ancillary rights in the show-the latter claim, again, depended upon the as yet unproven allegation that Goodson-Todman's letter would cause ABC to reject the Bamboozle show.

Barris/Fraser also did not establish that litigation over Bamboozle would tarnish the company's reputation and destroy its goodwill; indeed, ABC continued to deal with the producer even after receiving the letter.

Given the lack of proof that Goodson-Todman's letter created an immediate threat of irreparable injury, Barris/Fraser's motion for a preliminary injunction seemed to Judge Edward Weinfeld to be an effort to obtain an advisory opinion from the court that the producer's show did not infringe To Tell the Truth. But a full trial on the merits was required on this issue, concluded the court.

Barris/Fraser Enterprises v. Goodson-Todman Enterprises, Ltd., Case 86 Civ. 5037 (S.D.N.Y., July 8, 1986) [ELR 8:5:9]

Creator of "Cabbage Patch Kids" obtains injunction barring Topps Chewing Gum from distributing "Garbage Pail Kids" merchandise

In May 1985, Topps Chewing Gum, Inc. began distributing "Garbage Pail Kids" stickers. The stickers depict characters with features similar to the "Cabbage Patch Kids" dolls, but in "rude, violent and frequently noxious settings." Of course the stickers soon became very popular in the seven to twelve year old target market - more than 800 million stickers were sold - and Topps started licensing Garbage Pail Kids products, such as T-shirts and school notebooks.

Original Appalachian Artworks, Inc., the manufacturer of the Cabbage Patch Kids dolls, sought a preliminary injunction in a Federal District Court in Georgia alleging trademark and copyright infringement. Judge G. Ernest Tidwell first found that Original Appalachian owned valid copyrights in the Cabbage Patch Kids works and in derivative products, and that there was substantial evidence of direct intentional copying by Topps.

Topps argued that the Garbage Pail Kids were a parody or satire of the Cabbage Patch Kids and a noninfringing "fair use." But Judge Tidwell noted that the stickers were not similar to a cartoon or editorial in a satirical work such as Mad Magazine. And Topps' primary purpose was to capitalize on the Cabbage Patch Kids craze and to compete in many of the same markets as Original Appalachian; Topps therefore was likely to harm the potential market for or the value of Cabbage Patch Kids products.

Judge Tidwell distinguished Fisher v. Dees, 794 F.2d 432 (ELR 8:4:13) a case relied on by Topps, in that Topps intentionally capitalized on Original Appalachian's works for commercial gain, there was evidence of potential economic impact, and "graphic imaginative" works were involved. The case of Walt Disney Productions v. Air Pirates, 581 F.2d 751, was more analogous to the instant action, according to the court, because in Walt Disney Productions, a fair use defense was denied where Disney cartoon characters "were placed in incongruous settings and engaged in activities anithetical to accepted Disney values." Topps' bad faith also precluded the availability of the fair use doctrine, with the result that Original Appalachian sufficiently demonstrated a likelihood of success on the merits of its copyright infringement claim.

In turning to Original Appalachian's trademark and unfair competition claims, Judge Tidwell found as follows: the marks were similar with respect to "sight, sound and meaning;" the licensed products (albeit not the primary products) were similar; the retail outlets for the products were distinct, but a substantial part of the market for the goods was similar; Topps intended to copy Original Appalachian's trademark and follow it as closely as possible; and there was some evidence of actual confusion about the relationship between the parties' products. The court concluded that Original Appalachian made a sufficient showing of a likelihood of confusion as to the origin or endorsement of the Garbage Pail Kid products and established a likelihood of success on its trademarks and unfair competition claims.

Original Appalachian also met the requirements of the Georgia anti-dilution statute by showing that the marks in question were similar and that the contested use was likely to injure the company's commercial reputation or dilute the distinctive quality of its marks. There was evidence that Topps' use of the Garbage Pail Kids mark would create an " undesirable, unwholesome, or unsavory mental association," i.e., tarnish, Original Appalachian's mark.

Original Appalachian did not impermissibly delay in bringing its action, and any damage to Topps was outweighed by the wrongful appropriation of Original Appalachian's rights and by the public interest, concluded fudge Tidwell, in granting the requested injunctive relief.

Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc., Case No. C86-483A (N.D.Ga., Aug.29, 1986) [ELR 8:5:9]

Video cassette retailer's rental of in-store viewing rooms infringed producers' right to authorize public performances of copyrighted works, rules Federal Court of Appeals in Pennsylvania

A Federal Court of Appeals in Pennsylvania has affirmed a District Court decision (ELR 7:9: 11) granting partial summary judgment to several motion picture producers in a copyright infringement action against Aveco, Inc.

The District Court found that Aveco's business of renting video cassettes of motion pictures in conjunction with renting private viewing rooms in the store violated the producers' exclusive rights to publicly perform and to authorize the public performance of their copyrighted works.

As described by Federal Court of Appeals Judge Stapleton, Aveco customers could rent a room and also rent a video cassette for viewing in that room, rent a room and bring a video cassette obtained elsewhere to play in the room, or rent a video cassette for out-of-store viewing (the latter activity was not challenged by the producers). At one location, Aveco had thirty viewing rooms, each containing seating, a video cassette player and a television monitor; customers had complete control, subject to a time limitation, over the playing of the cassettes. The store owner claimed that it did not permit unrelated groups of customers to share a viewing room while a video cassette was being playedindividual customers could be accompanied only by members of their families and friends.

Judge Stapleton stated that there was no question that "performances" of copyrighted works took place at Aveco's stores. And although Aveco's customers actually placed each video cassette in the player and operated the controls, Aveco, by enabling its customers to perform the video cassettes in the viewing rooms authorized the performances.

In considering whether the performances at issue were infringing public performances, the court referred to its decision in Columbia Pictures Industries v. Redd Horne, 749 F.2d 154 (1984; ELR 7:9:11). In Redd Horne, a company known as Maxwell's Video Showcase, Ltd. placed video cassette players in a central area of the store. After a Maxwell's customer selected a video cassette from the store's stock and rented a viewing room, Maxwell's employees would play the video cassette for the customer; the motion picture was transmitted from the centrallylocated player to the television monitor in the viewing room. The court concluded that the performances at Maxwell's were occurring at a place open to the public, i.e., the entire store, including the viewing rooms.

Aveco argued that the performances at its stores - the playing of the video cassettes - occurred in the private viewing rooms, as distinguished from a public lobby area. But the court disagreed, stating that "the Copyright Act speaks of performance at a place open to the public. It does not require that the public place be actually crowded with people." It was the availability of cassettes and of viewing rooms that made Maxwell's stores public places, not the coincidence that the video cassette players were situated in the lobby area of the stores. Declaring that Redd Horne was indistinguishable from the case before it, the court found that Aveco's operations constituted the authorization of public performances of the producers' copyrighted works.

The first sale doctrine did not preclude Aveco's liability for copyright infringement - the doctrine prevents a copyright owner from controlling future transfers of a particular copy of a work after the "material ownership" of the work is transferred to another. Even assuming that the producers waived their distribution rights, and that there was a valid transfer of ownership of the video cassette during the rental period, the first sale doctrine was "irrelevant" - the producers' exclusive right to authorize public performances was not affected by any purported transfer of ownership in a particular copy of a work.

Aveco's rental of rooms to the public for viewing copyrighted video cassettes obtained from any source was appropriately enjoined, concluded the court.

Columbia Pictures Industries, Inc. v. Aveco, Inc., Case No. 85-5608 (3d.Cir., Sept. 4, 1986) [ELR 8:5:10]

Television executive obtains damages of about $375,000 in wrongful termination action against Worldvision Enterprises

In April 1980, Harold Golden was hired by Worldvision Enterprises in the capacity of Vice-President in charge of domestic affairs. Golden was to receive one percent of the domestic sales of the company and a draw of $100,000 against the sum to be earned; his five year contract included a termination clause which stated: In the event in the judgment of the Company, the Employee fails to perform his duties in accordance with the provisions of this Agreement, the Company may permanently terminate the Employee's employment for the entire remaining term of this Agreement.

After Golden began working for Worldvision, the company's annual domestic sales, which had been in the $15-20 million range rose considerably. As Golden's potential annual earnings approached $900,000, two Worldvision officials asked Golden to consider renegotiating his contract ' In October 1981, Golden entered a new four year contract whereby he was to receive $3,000 per week and a bonus of $44,000, for a total of $200,000; the new contract retained the termination clause. As of January 1982, Golden was promoted to the position of Executive Vice President in charge of world-wide sales, with additional responsibilities in new market development. On September 1, 1982, Golden was fired-the reasons cited for the firing were Golden's comments about nepotism in the company and his telephone call to a Lorimar executive about the sale of the television show "Dallas" to the BBC. Golden had not been warned that he would be fired, and a letter of dismissal gave no reason for the termination.

In response to Golden's action for wrongful termination of employment, New York County Justice Walter M.

Schackman awarded the executive a judgment of about $450,000 against Worldvision. Justice Schackman stated that Worldvision did not establish a sufficient basis for firing Golden. The court pointed out that under New York law "a contract of employment for a definite term may not lawfully be terminated by the employer, prior to the expiration date, in the absence of just cause." The termination clause in Worldvision's contract did not permit firing at will, and Golden's firing was unjustified, concluded the court.

Golden mitigated his damages to the extent of earning $37,000 during the period between October 1, 1982 and September 30, 1985. However, the court found that because Golden had 35 years of experience he reasonably could have been expected to obtain employment at a salary of $75,000 per year, and therefore awarded Golden $200,000 (plus interest) per year for the remaining three years of his contract less $75,000 per year in mitigation for a total of about S375,000.

Golden v. Worldvision Enterprises, Case No. 77627 (N.Y.Cnty., July 3, 1986) [ELR 8:5:11]

Producer was required to plead and prove special damages in false light invasion of privacy action against the National Enquirer, rules California Supreme Court

Pleading and proof of special damages are required when a false light invasion of privacy action is based on a publication that is defamatory only by reference to extrinsic facts, the California Supreme Court has ruled, in reversing an appellate court decision in Arthur Fellows' action against the National Enquirer (ELR 7:2:14).

The August 17, 1982 edition of the Enquirer included a photograph of Fellows and actress Angie Dickinson; the caption read: 'Angie Dickinson dating a producer," and the accompanying article state "Gorgeous Angie Dickinson all smiles about the new man in her life - TV producer Arthur Fellows. Angie's steady-dating Fellows all over Tinsel Town, and happily posed for photographers with him as they exited the swanky Spago restaurant in Beverly Hills."

Fellows demanded a correction from the publication, asserting that the article was false in that he had never dated Dickinson, and indeed, had been married to Phyllis Fellows for eighteen years. The Enquirer rejected the retraction request, and Fellows sued the publication for libel, false light invasion of privacy, and intentional and negligent infliction of emotional distress.

Fellows' libel cause of action alleged defamation based on facts extrinsic to the article, i.e., individuals who knew of Fellows' marital status might understand the article to mean that the producer was engaged in improper and immoral conduct. The privacy claim was based on the same allegations and asserted that the article placed Fellows before the public in a false light by referring to him as the "new man" in Dickinson's life. It was alleged that the Enquirer published the article with knowledge of its falsity or with reckless disregard for whether it was false. Both causes of action sought general damages for Fellows' loss of reputation, shame, mortification, and hurt feelings. And it was alleged that Fellows suffered special damages to his business as a film producer by a decline in anticipated new work and by impairing his business relationships with members of the film industry.

During the trial court proceedings, Fellows conceded that he had not suffered any special damages; thus, a second amended complaint did not assert a cause of action for libel. However, Fellows continued to allege a claim for false light invasion of privacy. The Enquirer again demurred to all remaining causes of action arguing that the failure to plead special damages barred the false light claim. The trial court agreed and dismissed the complaint.

The appellate court reversed the trial court's dismissal on the ground that the special damages requirement in extrinsic-fact libel cases did not apply to an action for false light invasion of privacy.

California Supreme Court Judge Broussard began his review of the matter by tracing the history of the false light cause of action, noting, in particular, the various statutory and common law restrictions on libel and slander actions which have been applied in non defamation cases where defamatory language nonetheless was at issue. Judge Broussard observed that the appellate court's holding was contrary to the "overwhelming" weight of authority in California and other jurisdictions, which authority holds that "the limitations on liability for defamatory speech should be enforced irrespective of the theory of liability" Even if the appellate court was correct in its initial premise that invasion of privacy and defamation are concerned with different interests, stated Judge Broussard, any conceptual difference would not justify making an otherwise protected statement actionable when a complaint is based on an allegedly defamatory publication.

The court also disagreed with the appellate court's "narrow interpretation of the policy embodied in the special damages requirement of California Civil Code section 45a-a requirement manifesting "a legislative determination that liability imposed for a publication which affords no warning of its defamatory nature, and has not caused actual pecuniary injury, would place too great a burden on the editorial process and would hamper the free dissemination of news." The asserted injury to Fellows' sensibilities did not outweigh the burden on a free press of allowing recovery in this case, declared Judge Broussard.

The court then recalled the position taken by Justices Black, Douglas and Goldberg in New York Times v. Sullivan; the concurring justices did not agree that an actual malice standard was sufficient to protect First Amendment values. And many states, in addition to California, have extended additional protection to publishers through a special damages requirement.

Judge Broussard concluded that the public policy served by section 45a was equally applicable to an action for false light invasion of privacy based upon a defamatory publication. Furthermore, since almost every published defamation would support an action for false light invasion of privacy, exempting such actions from the requirement of proving special damages "would render the statute a nullity" (In a footnote, the court cautioned that its holding would not apply to a false light claim involving the public disclosure of private facts.)

In a concurring opinion, Chief Justice Bird emphasized the need for maintaining a free press, especially in instances when official acts are commented upon or criticized.

Fellows v. National Enquirer, Inc., 228 Cal.Rptr. 215 (Ca. 1986) [ELR 8:5:11]

Gross irresponsibility standard is applied to preclude summary judgment in action under New York Civil Rights Law involving newspaper's unauthorized publication of private individual's photograph

In 1981, the Enlightenment Press, publisher of the weekly newspaper, the Chelsea-Clinton News, published an article on child pornography. A photograph of a young woman accompanied the article - the words "rated X" were printed on Ketty Fils-Aime's face. The picture, which had been taken in 1972 when Fils-Aime's was a high school student, was used to illustrate an article about the 1972-1973 school year, and then remained in the newspaper's files until it was selected for use in connection with the child pornography story. The publisher claimed that the printer had been instructed to obliterate the face in the picture, leaving only the printed rating, but that the printer failed to follow the publisher's instructions.

When Fils-Aime sued the publisher for libel and for violating sections 50/51 of the New York Civil Rights Law, the trial court ordered a trial of the libel claim, but granted Fils-Aime's motion for summary judgment on the privacy claim. A New York appellate court has reversed the trial court's ruling on the privacy cause of action.

It was noted that the publisher's use of the photograph was a use for trade within the meaning of the Civil Rights Law, since Fils-Aime had no connection with the subject matter of the article, and the use of the photograph with the article was obviously false and misleading. But the standard of care required of the publisher in this type of privacy case has not "judicially crystallized," noted the court, and there was a substantial question whether the actual malice test of Time, Inc. v. Hill, 385 U.S. 374 was the governing constitutional standard in Civil Rights Law privacy cases involving private individuals.

The prevailing standard in New York in private party defamation actions involving newsworthy communications is the "gross irresponsibility" test of Chapadeau v.

Utica Observer-Dispatch, Inc., 30 N.Y.2d 196 which provides: Where the content of the articles is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition, the party defamed may recover; however, to warrant such recovery he must establish, by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering the dissemination ordinarily followed by responsible parties.

Given the similarity of the issues raised in defamation and privacy claims, stated the court, particularly as they implicate First Amendment concerns, applying the same standard of fault would be appropriate in both types of cases. And in view of the high degree of fault to be proved, it would be the rare case where summary judgment would be readily granted against a media party. Since factual questions existed as to whether the publication of Fils-Aime's photograph amounted to gross irresponsibility, and whether the publisher's methods of publication and verification of copy deviated substantially from accepted standards of practice, this was not such a case, concluded the court.

In a companion ruling relating to the trial of the libel claim, the appellate court affirmed the trial court judge's decision to require a new trial and to set aside a $75,000 jury verdict (after reducing it from $225,000). The jury had awarded Fils-Aime $100,000 in compensatory damages for invasion of privacy, $75,000 in compensatory damages for libel, and $50,000 in punitive damages for libel. But the trial court judge found that a new trial was required because of "deliberate and material" omissions by Fils-Aimes' expert witness concerning his qualifications and background, and the appellate court agreed.

Fils-Aime v. Enlightenment Press, Inc., N.Y. Law Journal. p.11, col. 4 (N.Y.App., Sept. 24, 1986) [ELR 8:5:12]

Jury verdict awarding damages of $1.5 million to publisher Robert Guccione in his libel action against Hustler Magazine is upheld

In October 1985, a Federal District Court jury awarded Penthouse Magazine publisher Robert Guccione $1.00 in compensatory damages and $1.5 million in punitive damages in his libel action against Hustler Magazine, Inc. and Flynt Distributing Company, Inc. Federal District Court Judge Robert Sweet has rejected Hustler's motion for judgment notwithstanding the verdict or for a new trial.

In its November 1983 issue, Hustler published an article which falsely stated: "considering he is married and has a live-in girlfriend, Kathy Keeton ... we wonder if he [Guccione] would let either of them pose nude with a man." Guccione had obtained a divorce from his wife in 1979 and has not remarried. The statement was libel per se because under New York law, adultery is an indictable crime. The Hustler parties unsuccessfully argued that adultery should not be considered a crime for the purposes of libel law. Guccione therefore was not required to prove special damages (actual damage to his reputation) in order to maintain his action, noted the court.

Judge Sweet, in reviewing whether clear and convincing proof of actual malice had been presented by Guccione, described the preparation of the article and the Hustler parties' knowledge of the truth or falsity of the statement at issue. In 1980, a prior libel action brought by Guccione against Flynt was tried in an Ohio state court; during the trial, Guccione testified that he had obtained a divorce from his former wife. This testimony, along with other evidence, was found probative as to the Hustler parties' knowledge of the falsity of the statement in the article.

Furthermore, there was additional evidence, including a series of hostile Hustler publications directed against Guccione, to support a jury verdict based on the Hustler parties' reckless disregard for the truth or falsity of the challenged statement. In deposition testimony given by publisher Larry Flynt in another case, Flynt was asked "Do you think with respect to adults you can say anything you want about their private sexual activities, whether it's real or fancied or not? A: Yes Q: No matter how horrible it may be to the average ordinary person" A: Yes Q: And you think you can do that in a magazine and get away with it, don't you? A: Yes." These admissions, together with the lack of any specific source for the Hustler article, the animosity exhibited toward Guccione, and the apparent rush to print the article were sufficient to support the jury verdict, stated Judge Sweet.

And the evidence was sufficient to establish with convincing clarity that the alleged defamatory statement was published by Hustler Magazine and Flynt Publishing with actual malice. Evidence of Flynt's "malicious ill-will" toward Guccione was properly admitted and did not prejudice First Amendment values since "the personal animus between Flynt and Guccione provided a direct motive to falsify... not otherwise linked to any journalistic policy or practice." The case did not involve an ambiguous source for which an editorial misstatement would be an "understandable mistake."

The court rejected the Hustler parties claims that their article was substantially true (Guccione conceded that he lived with Keeton beginning in 1966), and that Guccione was libel-proof with respect to any statement concerning an alleged adulterous relationship. And the $900,000 damage award against Hustler and the $600,000 award against Flynt Distributing, were not required, under New York law, to be proportionally related to actual harm suffered by Guccione; the damages did not " shock the conscience of the court:' given the evidence presented, and were reasonably related to the wealth of the Hustler parties.

Guccione v. Hustler Magazine, Inc., 632 F.Supp. 313 (S.D.N.Y.1986); Guccione v. Flynt, 617 F.Supp. 917; 618 F.Supp. 164 (S.D.N.Y.1985) [ELR 8:5:13]

National Basketball Association's refusal to reinstate former referee is upheld; in separate action, former executive director of National Association of Basketball Referees is unsuccessful in claim concerning disposition of union dues

An appellate court in New York has held that the National Basketball Association did not discriminate against a former referee, Manny Sokol, by refusing to rehire him. In 1977, Sokol suffered a myocardial infarction and was declared permanently disabled. Five years later, when his disability payments were coming to an end, Sokol sought reemployment as an NBA referee. When the NBA refused to reinstate him, Sokol filed a complaint with the New York State Division of Human Rights charging the NBA with discrimination. The NBA contended that it refused Sokol his old job because his manner of officiating did not conform to the approved standard, not because of his disabled condition. The Commissioner of the Human Rights Division found that the NBA did reject Sokol based upon his medical condition, and also that Sokol's condition did not actually prevent him from performing the duties of a referee.

The appellate court vacated the Commissioner's finding and held that one doctor's hearsay allegation that Sokol's medical condition would not affect his duties as a referee was insufficient to prove that Sokol was physically fit. The court also found sufficient proof that the NBA's refusal to rehire Sokol related to-grounds other than his medical condition.

Another action involving basketball referees was brought by the National Basketball Association; in its interpleader action, the NBA stated that it had received conflicting instructions from representatives of the National Association of Basketball Referees as to the disposition of dues paid by union members. In September

1984, the union, in accordance with a newly-adopted constitution, elected an Executive Board. The Executive Board authorized the opening of a bank account in New York City for the deposit of union funds, including all check-off dues money.

Jack Madden, who had been the Executive Director of the Union prior to the adoption of the new constitution, claimed that he had the exclusive power to control the union's business affairs, including the disposition of checkoff dues. Madden had instructed the union's counsel to advise the NBA to deposit check-off money with a Philadelphia bank.

In May 1984, Federal District Court Judge Sprizzo issued a temporary restraining order directing the NBA to deposit into the Registry of the Court all of the then-held and subsequently collected check-off dues money; at the time of the interpleader action, the Registry held approximately $98,000.

Federal District Court Judge William C. Conner, in granting summary judgment to the members of the Executive Board rejected Madden's argument that the Board members' activities leading to the adoption of the new constitution amounted to an improper attempt to divest the court of jurisdiction to decide the dues dispute. Rather, stated Judge Conner, it appeared that the Board members "were pursuing their legitimate rights as union members to participate in the governance of the union."

After finding that the members of the Executive Board possessed the legal capacity to move for summary judgment, Judge Conner ruled that the Secretary of Labor was the proper authority to consider Madden's contention that his discharge as Executive Director prior to the expiration of his four year term of office violated the Labor Management Reporting and Disclosure Act of 1959.

Judge Conner concluded by observing that the union's leaders had a fiduciary duty not to waste or misuse the check-off dues, and that Madden's unsupported claim that the Board members might dissipate union funds did not warrant a denial of the motion for summary judgment, or of the issuance of an order directing the payment to the union's treasurer of all but $20,000 of the funds held by the Registry of the Court. The NBA's motion for an award of costs and attorneys fees was referred to a magistrate for a report and recommendation.

In re National Basketball Association, 495 N.Y.S.2d 904 (N.Y.App. 1985); National Basketball Association v. National Association of Basketball Referees, 620 F.Supp. 672 (S.D.N.Y. 1985) [ELR 8:5:13]

Publisher of the magazine "Inc." was not entitled to injunctive relief in trademark infringement action against publisher of "Manhattan, Inc.," rules Federal District Court in New York

The publisher of the magazine "Manhattan, Inc." did not infringe the trademarked magazine title "Inc.," a Federal District Court has ruled. Judge Haight first determined that "Inc." was a relatively strong mark. However, the word "Manhattan" in the title Manhattan, Inc. and the different presentation of the magazine logos substantially reduced any potential for confusion. And although the magazines were the same size, appeared monthly, dealt in a general sense with the world of business and appealed to a sophisticated readership, there were significant differences (as revealed in the court's extensive comparison of several issues and all eleven competing covers) in the editorial content of the works.

In all, the differences in editorial content, style, geographical distribution and audience appeal were "significant and readily apparent" and reduced the likelihood of confusion as to the source of the competing publications.

Judge Haight next found that the publishers of Inc. did not establish that they planned to publish regional editions of the magazine, or that any such editions would resemble the "celebrity-conscious" content of Manhattan, Inc. And no confusion was shown as to the source of the magazine among advertisers, subscribers or newsstand purchasers, particularly since survey evidence submitted by Inc. was found lacking in probative value as evidence of actual (or likely) confusion.

Furthermore, Manhattan, Inc. selected its title in good faith, and the sophistication of the buyers of both magazines was not contested. Judge Haight therefore denied

Inc.'s application for a permanent injunction and an accounting, and dismissed the complaint.

Inc. Publishing Corporation v. Manhattan Magazine, Inc., 616 F.Supp. 370 (S.D.N.Y. 1985) [ELR 8:5:14]

United States Supreme Court upholds constitutionality of local ordinance regulating location of adult theaters

In 1981, the community of Renton, Washington prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, single or multiple family dwelling, church, park or school. The term adult motion picture theater was defined as "an enclosed building used for presenting motion pictures, video cassettes, cable television, or any other such visual media distinguished or characterized by an emphasis on matter... relating to 'specified sexual activities" or 'specified anatomical areas'..."

In 1982, Playtime Theatres, Inc. acquired two existing theaters in Renton with the intention of using the theaters to exhibit feature length adult films; the theaters were located in an area proscribed by the ordinance. When Playtime sought a declaratory judgment that the Renton ordinance violated the First and Fourteenth Amendments, a Federal District Court ruled in favor of Renton and denied the requested permanent injunction. The District Court found that the ordinance did not substantially restrict First Amendment interests, that the city was not required to show specific adverse impact from the operation of adult theaters, that the purposes of the ordinance were unrelated to the suppression of speech, and that the restrictions on speech imposed by the ordinance were no greater than necessary to further the governmental interests involved.

A Federal Court of Appeals reversed the District Court's decision. The Court of Appeals concluded that the ordinance did restrict First Amendment interests because the city did not adequately establish the existence of substantial governmental interests in support of the ordinance, and the interests which were asserted by the city had not been shown to be unrelated to the suppression of expression.

In reversing the Court of Appeals decision, United States Supreme Court Justice William Rehnquist stated that the resolution of the case was "largely dictated" by the court's decision in Young vs. American Mini Theatres, Inc., 427 U.S. 50 (1976). The Renton ordinance did not place a total ban on adult theaters and was a valid, content-neutral, time place or manner regulation, stated Justice Rehnquist; the city's exercise of its zoning power forwarded governmental interests - such as preventing crimes, protecting retail trade and maintaining property values - which were unrelated to the suppression of free expression. And the city was not required to conduct studies focusing on its particular problems or needs, held the court; Renton was entitled to rely on the experience of, and studies produced by, the city of Seattle as to the potential secondary effects caused by the presence of adult theaters in a neighborhood. The ordinance also allowed for "reasonable alternative avenues of communication" since about five percent of the land area of the city remained available to owners of adult theaters. Playtime had argued that there were no commercially viable theater sites within the remaining land area, and the Court of Appeals had agreed that the area was not truly "available" land. But Justice Rehnquist concluded that the fact that Playtime would have to "fend for itself" in the real estate market did not give rise to a First Amendment violation.

Justice Brennan, joined by Justice Marshall in dissent, expressed the view that Renton's ordinance selectively imposed limitations on the location of movie theaters based exclusively on the content of the films shown in the theaters, and that the ordinance therefore was not correctly analyzed as a time, place or manner restriction. Furthermore, stated Justice Brennan, both the language of the ordinance and its "dubious" legislative history suggested that the suppression of free expression was involved in the passage of the ordinance. It was pointed out that other forms of adult entertainment such as bars, massage parlors and adult bookstores were not subject to the same restrictions and that the city did not justify treating adult movie theaters differently from other adult entertainment businesses. And Justice Brennan questioned the city's purported "findings" as to the secondary effects of adult theaters, as well as the majority's holding that Renton was entitled to rely on the experiences of other cities. It was not clear that Renton actually had reviewed the studies conducted by Seattle and Detroit, and in any event, Renton eventually adopted a regulation which differed from the ordinances adopted by those cities. Even if the ordinance were to be characterized as a content-neutral, time place or manner regulation, Justice Brennan would have found it unconstitutional because it did not further the city's allegedly substantial interest in "preserving the quality of urban life." The restrictions imposed by the ordinance meant that Playtime was not provided with a reasonable opportunity to operate adult theaters in the city, concluded Justice Brennan.

City of Renton v. Playtime Theaters, Case No. 84-1360 (U.S.Sup.Ct., Feb. 25, 1986) [ELR 8:5:14]

Puerto Rico statute restricting advertising of casino gambling is upheld by United States Supreme Court

Puerto Rico's statute and regulations restricting the advertising within Puerto Rico of casino gambling have been upheld as constitutional by the United States Supreme Court.

Posadas de Puerto Rico Associates, doing business as Condado Holiday Inn Hotel and Sands Casino, sued the Tourism Company of Puerto Rico seeking a declaratory judgment that the statute suppressed commercial speech in violation of the First Amendment and violated constitutional guarantees of equal protection and due process. The trial court held that the advertising restrictions had been unconstitutionally applied to the hotel's past conduct, but, after adopting a narrowing construction, held that the statute was constitutional. One of the "narrowed" regulations stated, in part: Advertisements of the casinos in Puerto Rico are prohibited in the local publicity media addressed to inviting the residents of Puerto Rico to visit the casinos.

The Supreme Court of Puerto Rico dismissed the hotel's appeal, and this ruling has been upheld by the United States Supreme Court.

Judge Rehnquist first pointed out that the case involved commercial speech, which is entitled to a limited form of First Amendment protection as long as such speech concerns a lawful activity and is not misleading or fraudulent. In this case, the restriction was enacted to further a "substantial" government interest in the health and safety of Puerto Rico's citizens, stated Justice Rehnquist; the challenged restrictions "directly advanced the legislature's asserted interest in reducing the residents' demand for games of chance, in particular, casino gambling; and the restrictions were no more extensive than necessary to serve the government's interest." The hotel's First Amendment claim thus was correctly rejected, concluded the court.

It also found significant that Puerto Rico could have entirely prohibited casino gambling by Puerto Rico residents, the legislature therefore possessed the included lesser power, stated the court, to ban the advertising of casino gambling. Also rejected was the argument that the restrictions were unconstitutionally vague in violation of due process or equal protection guarantees.

Justice Brennan, with whom Justice Marshall and Justice Blackmun joined in dissent, first noted that neither the statutory language at issue, nor the applicable regulations defined what would constitute "advertising or otherwise offering gambling facilities to the public of Puerto Rico." The dissent also referred to the trial court's initial determination that the Tourism Board had applied the statute in an arbitrary and confusing manner. However, even if the Tourism Board engaged in enforcing the regulations in an nonarbitrary manner under the narrowing interpretation provided by the trial court, Justice Brennan would have declared that the statute was unconstitutional as involving the suppression of truthful commercial speech in order to discourage participation in a lawful activity.

Justice Brennan questioned the majority's failure to subject the statute to strict scrutiny, suggesting that the majority, while "tipping its hat" to the substantial government interest standard, essentially deferred to the apparent determination by Puerto Rico's legislature that a ban on casino advertising aimed at residents was reasonable. But neither the statute on its face, nor the legislative history, indicated that the legislature thought serious harm would result if residents were allowed to engage in casino gambling (Puerto Rico residents are allowed to patronize the casinos), and other forms of gambling are freely advertised to residents and non-residents alike. In all, the Tourism Board did not show that a substantial government interest supported Puerto Rico's ban on protected expression, stated Justice Brennan; that a ban on advertising aimed only at residents would directly advance the Commonwealth's interest on controlling the harmful effects allegedly associated with casino gambling; that such interests could not have been protected by more limited regulation of the hotel's commercial expression; or that alternative measures would have inadequately safeguarded the Commonwealth's interests. Justice Brennan concluded that upholding the statute meant "dramatically shrinking the scope of First Amendment protection available to commercial speech, and giving government officials unprecedented authority to eviscerate constitutionally protected expression."

In a footnote, Justice Brennan disagreed that a ban on casino advertising was "less intrusive" than an outright prohibition of gambling activity, for "the constitutional doctrine which bans Puerto Rico from banning advertisement concerning lawful casino gambling is not so strange a restraint - it is called the First Amendment."

Justice Stevens, also joined in dissent by Justice Marshall and Justice Blackmun, declared that Puerto Rico's "rather bizarre restrictions on speech" were plainly forbidden by the First Amendment. The statute discriminated on its punishment of speech, stated Justice Stevens, depending on "the publication, audience and words employed," and "established a regime of prior restraint and articulated a standard that is hopelessly vague and unpredictable." Publications native to Puerto Rico will be subject to a far more rigid system of restraints on casino advertising. Justice Stevens questioned the majority's willingness to uphold a regulation that applies one standard to the New York Times and another to the San Juan Star. And singling out the use of the word "casino" for official sanction raised grave First Amendment concerns for Justice Stevens, particularly since the Tourism Board did not justify "the disfavor in which that particular six-letter word is held."

Furthermore, granting the Tourism Board the authority to approve the text of advertisements was an invalid prior restraint, according to Justice Stevens, and it did not appear that there were any predictable standards for suppressing particular kinds of speech. In all, Puerto Rico's regulation of speech was "grotesquely flawed," in that the sanctions for speech should not be "as unpredictable and haphazardous as the roll of dice in a casino," concluded Justice Stevens.

Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico. Case No. 84-1903 (U.S.Sup.Ct. 1986) [ELR 8:5:15]

Administrative Law Judge rules that R.J. Reynolds Tobacco Company did not violate Federal Trade Commission Act in distributing advertisement concerning smoke and health

R.J.Reynolds Tobacco Company's advertisement "Of cigarettes and science" was clearly an editorial and was not commercial speech "by any stretch of the imagination," an Administrative Law Judge has ruled in dismissing a complaint brought against the company under the Federal Trade Commission Act.

The complaint alleged that the advertisement, which concerned the issue of smoking and health, contained false or misleading claims, and, as commercial speech, was subject to government regulation. Administrative Law Judge Montgomery K. Hyun, however, concluded that the Commission lacked subject matter jurisdiction because the advertisement was fully protected by the First Amendment.

ALJ Hyun found it significant that the Reynolds advertisement did not name any brand name or list prices; did not discuss desirable attributes of any product or state where the product might be purchased; and did not contain any express promotional language. Rather, the advertisement expressed the company's opinion about a clinical study of heart disease mortality.

It was argued that the classification of the advertisement required consideration of extrinsic evidence such as expert opinion and Reynolds' internal documents relating to the company intent in issuing the advertisement. According to the complaint, Reynolds material was "a cleverly conceived cigarette ad ... targeted to smokers and designed to persuade them not to quit and thereby to prevent decrease in cigarette sales." ALJ Hyun found these arguments unpersuasive and further observed that the language of the advertisement was uncomplicated and would be understood by any reasonable reader as an op-ed type piece, not a cigarette advertisement - a reader would expect to encounter an expression of opinion, not a "fair and balanced exposition" of the issues raised. And an editorial advertisement does not turn into a cigarette commercial or lose the full protection of the First Amendment simply because the advertisement is self-serving or may not be entirely accurate or complete - the Reynolds piece did not contain any express falsehood or misleading claims.

ALJ Hyun emphasized that corporations are entitled to the same First Amendment protection as that accorded to individuals, and the fact that the corporation's comments may promote its economic interests does not diminish that protection. The Reynolds advertisement, again, was not a promotional message "in the guise of an editorial." And extending the jurisdiction of the Federal Trade Commission Act to reach editorial advertisements might chill the free expression of opinions on public issues of concern to businesses, cautioned ALJ Hyun.

Since Reynolds no longer was publishing the challenged advertisement, and it was unlikely that the company would resume any such publication during the pendency of the FTC proceeding, ALJ Hyun granted Reynolds' motion to dismiss the complaint and stayed further proceedings in the matter pending the Commission's determination.

In the Matter of R. J. Reynolds Tobacco Company, Inc. before Federal Trade Commission, 51 Antitrust and Trade Reg.Rep. (BNA) 219 (F.T.C. 1986) [ELR 8:5:16]

Property owner's consent was not required before cable television transmission lines were installed on utility easement, rules California appellate court

Mary Witteman's property in Playa del Rey was subject to two easements - the first easement, which was acquired by the city of Los Angeles in 1929, granted the city a right-of-way over the rear four feet of the property to construct, maintain, and operate equipment for the transmission of electricity. In 1978, Los Angeles enacted an ordinance granting Jack Barry Cable TV a cable television franchise covering a portion of Playa del Rey and permitting Barry to use the city's easement over Witteman's property (among others) to install and maintain cable television equipment.

The second easement was created in 1957 when Witteman's predecessor in interest quitclaimed to General Telephone an easement over the rear five feet of the property for the purpose of constructing and maintaining pole lines for electricity and for telephones. Witteman acquired title to the property in 1958; the deed included a specific reservation with respect to the General Telephone easement.

In July 1979, General Telephone and Barry entered into a pole lease agreement whereby General Telephone granted Barry permission to attach its cable television wires to General Telephone's poles in return for a rental fee for each pole. Barry proceeded to string cable wire across Witteman's property and to attach the wire to General Telephone poles located on the properties of adjacent landowners; the wire was located within the boundaries of the easement and was one of numerous wires crossing Witteman's property and attached to General Telephone's poles.

Witteman, relying in part on Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (ELR 1:5:7), sued Barry and General Telephone contending that the installation of the cable wire without her consent constituted trespass.

In rejecting Witteman's claim and granting summary judgment to Barry (General Telephone obtained summary judgment in an earlier proceeding), California Court of Appeal Judge Hanson declined to distinguish the decision in Salvaty v. Falcon Cable Television, 165 Cal.App.3d 798 (ELR 7:1:13). In Salvaty, the Court of Appeal held that "a homeowner's consent was not required before cable television equipment could be installed on a television pole situated on the homeowner's property because the cable equipment use was `within the scope of the casement which the telephone company apportioned to the cable company.'" The Loretto decision was distinguished because it did not involve an easement.

Judge Hanson next pointed out that in California, easements involving the right-of-way are considered "easements in gross" which create a burden on the land upon which the easement was granted, are exclusive vis-a-vis the grantor, and thus are apportionable. The fact that Witteman's property was subject to two easements did not negate the "exclusive" character of the easements or render them nonapportionable, as argued by Witteman. Barry had received permission from the city and from General Telephone before installing cable transmission wire. And the relevant state statute recognized the importance of public easements to the cable television industry and authorized the type of apportionability adopted by Los Angeles in extending cable television franchise rights.

The Salvaty holding that cable television transmissions were a part of the "natural evolution of communications technology," and thus were within the scope of the easement at issue in that case also was approved by Judge Hanson. And since no extrinsic evidence had been submitted concerning the meaning of the deeds and documents before the court, the trial court properly granted Barry's motion for summary judgment, concluded the court.

Witteman v. Jack Barry Cable TV, Case No. 2 Civ. No. B016024 (Ca.Ct.App., July 29, 1986) [ELR 8:5:17]

California tax officials rule that out-of-state National Hockey League teams must pay minimum franchise tax

In 1974, the California Franchise Tax Board advised out-of-state teams in the National Hockey League that they were subject to the minimum state franchise tax and were required to apportion a part of their net income to California. When the Boston Bruins challenged the requirement, the California State Board of Equalization sustained the action of the Franchise Tax Board. The Bruins then sued for a refund in Los Angeles Superior Court, and in 1981 the court ordered the refund of all taxes which the hockey team had paid; this judgment was affirmed on appeal and the California Supreme Court denied the Franchise Tax Board's petition for a hearing.

The fifteen other NHL teams contended that the doctrine of collateral estoppel prevented the Franchise Tax Board from imposing the minimum tax against them. The teams argued that because the courts had ordered the refund of the taxes paid by the Bruins, the courts must have determined that the team was not doing business in California, and therefore was not subject to any franchise tax, including the minimum tax.

But the California State Board of Equalization has found that the issue of whether the minimum tax under section 23151 of the Revenue and Tax Code could be applied to out-of-state teams that play games in California was not "actually litigated and determined" by the courts involved in the Boston Bruin proceeding. The appellate court apparently considered only whether the hockey team could be subject to tax on the basis of the unitary business concept, and did not rule on whether the Bruins were engaged in interstate commerce or were doing business in California. The Board of Equalization proceeded to find that the hockey clubs indeed were doing business in California and were liable for the payment of the minimum tax imposed by the Franchise Tax Board.

Appeals of Atlanta Hockey, Inc., etal., CCH California Tax Reports, Para. 401-153 (California State Board of Equalization 1985) [ELR 8:5:17]

Briefly Noted:

Copyright Infringement.

A Federal District Court in Kentucky has granted summary judgment to Broadcast Music, Inc. in its copyright infringement action against Lyndon Lanes. The court rejected the argument that BMI had not qualified to do business in Kentucky and therefore lacked the capacity to maintain a cause of action in the state and in the federal courts sitting in the state. Kentucky's "door-closing" statute did not apply because federal question jurisdiction was present under the Copyright Act.

Lyndon Lanes also argued that two compositions - "Billy Jean" and "We Can Work It Out" - were not publicly performed by the jukebox at the establishment. The court pointed out, however, that the establishment had stated that it did not keep a record of the titles of the compositions available for public performance on the date at issue. And the president of Lyndon Lanes was found jointly and severally liable for the infringement because he had the right and ability to supervise the infringing activity and personally participated in the infringements by entering into the agreement to purchase the jukebox in question. Statutory damages of $250 per infringement were assessed for a total damage award of $2250 along with attorney fees and costs. Injunctive relief also was granted by the court.

Broadcast Music, Inc. v. Lyndon Lanes, Inc., Case No. C84-1003 (W.D.Ky., Oct. 2, 1985) [ELR 8:5:18]

School Sports.

The New York Court of Appeals has affirmed an appellate court ruling that a state public high school athletic association's rule limiting participation in club and interscholastic athletics was rational, and did not violate any fundamental constitutional right of family autonomy.

Eastern New York Youth Soccer Association v. New York State Public High School Athletic Association, Inc., 499 N.Y.S.2d 671 (N.Y. 1986) [ELR 8:5:18]

Obscenity Ordinance.

A Federal District Court in Arkansas has ruled that an obscenity ordinance adopted by the city of Stamps was "hopelessly vague and overbroad" and therefore unconstitutional. The court declined to abstain from deciding the case because no saving construction was possible and because the court's decision would not interfere with the formulation or implementation of state policy. And although the operator of a local store for the rental and sale of videocassettes had not been prosecuted under the ordinance, a letter from the city attorney was "a thinly-veiled threat of prosecution" if the store owner did not cease distributing 22 named tapes. The store owner thus had sufficient standing to bring an action challenging the ordinance. Furthermore, the ordinance did not require that the proscribed material depict any kind of sexual conduct; did not state that the subject material would lack any literary, artistic/political or scientific value; referred to material that would appeal to the prurient interest without defining "prurient interest;" and, in all, created the possibility that a party could be subject to criminal prosecution for the sale or exhibition of otherwise protected material. The store owner was entitled to proceed to seek damages, concluded the court.

Marjak, Inc. v. Cowling, 626 F.Supp. 522 (W.D.Ark. 1985) [ELR 8:5:18]

Contracts/AFM Arbitration.

A Federal Court of Appeals has ruled that promoter Donald Taylor's motion to vacate an arbitration award in favor of performer Willie Nelson was not filed within the three month period set forth in the Federal

Arbitration Act and has remanded the matter to a Federal District Court for the entry of an order granting Nelson's motion to confirm the arbitration award.

As described in ELR 7:6:9, Nelson contracted with Taylor to perform at a music festival. When Nelson failed to appear at the festival, Taylor sued the performer in a Federal District Court in Virginia. Eventually, an arbitration proceeding was conducted and an award was issued by the executive board of the American Federation of Musicians in favor of Nelson. However, the District Court vacated the arbitration award on the ground of evident partiality.

After determining that it possessed jurisdiction over Nelson's appeal, the Court of Appeals pointed out that Taylor's motion to vacate the award was filed about five months after the award was filed; the tolling and due diligence exceptions cited by the District Court were "questionable," and in any event, did not excuse Taylor's failure to make a timely motion to vacate.

Taylor v. Nelson, 788 F.2d 220 (4th Cir. 1986) [ELR 8:5:18]

Subscription Television.

When California Satellite Systems sent two form settlement demand letters to about 8700 residents of Sacramento seeking subscriber payments from recipients (via microwave signals) of the company's ON-TV programming, Marian Fuhrman did not comply with California Satellite's request, but rather brought a class action suit against the company alleging duress and the infliction of emotional distress. A California trial court ruled that the letter was absolutely privileged under Califor nia Civil

Code section 47 and sustained the company's demurrer without leave to amend. The trial court's decision has been affirmed in part and reversed in part by an appellate court.

The appellate court noted that Fuhrman raised a serious question, not properly resolved in a ruling on a demurrer, as to whether California Satellite sent its letters in good faith and in serious contemplation of litigation so as to qualify for the statutory privilege accorded to prelitigation communications. However, the appellate court agreed that Fuhrman's complaint did not qualify as a class action. And since Fuhrman did not pay the fees demanded by the company, she did not sustain the damages required to assert a cause of action for duress; the demurrer on this cause of action therefore was properly sustained, as was the demurrer to a claim under the federal Fair Debt Collection Practices Act.

Fuhrman v. California Satellite Systems, 225 Cal.Rptr. 140 (Ct.App. 1986) [ELR 8:5:18]

Cable Television.

A Federal District Court in Massachusetts has held that an action by the Town of Norwood to enjoin a rate increase by its cable television licensee, Adams-Russell Co., Inc., was removed improvidently and without jurisdiction from a state trial court. The trial court had denied Norwood's request for a preliminary injunction against the increase and granted Adams-Russell's petition to remove the case to federal court. When Norwood moved to remand the case, the District Court noted that Norwood's complaint presented claims based upon state common and statutory law and that federal law was relevant only by way of Adams-Russell's defense of preemption. The court also relied upon the fact that no federal cause of action was available to Norwood to obtain the relief it requested in the complaint, and therefore its suit did not "arise under" any statute granting original jurisdiction to the federal courts.

Town of Norwood v. Adams-Russell Co., Inc., 627 F.Supp. 742 (D.Mass. 1986) [ELR 8:5:19]

Trademark Infringement.

In 1985, radio station WKSE-FM sought a preliminary injunction against radio station WNYS, alleging that WNYS's use of the term "Music Marathon" in connection with the promotion of its new music format infringed WKSE's state-registered service mark. A Federal District Court in New York has held that

WKSE's use of "Music Marathon" to describe a 30 minute commercial-free music segment was a descriptive mark without secondary meaning. The court determined that WKSE did not establish that "Music Marathon" meant anything other than the playing of music for an extended or unusual length of time. Therefore, WNYS' use of the term to describe its plan to broadcast three days of commercial free music did not infringe upon any trademark or suggest any association between the two stations. The court further determined that the mark lacked sufficient distinctive meaning to justify protection under New York's antidilution statute, and that WKSE failed to sufficiently support its claim of unfair competition.

Porter Broadcasting Corp. v. Pyramid Broadcasting, 635 F.Supp. 37 (W.D.N.Y. 1985) [ELR 8:5:19]

Constitutional Law.

A Federal District Court in Colorado has held that the City of Denver unconstitutionally infringed upon the free speech rights of Laurie Pensack, the owner of Le Bakery Sensual. A zoning administrator had denied Pensack a permit to operate a bakery in Denver on the ground that the bakery made and sold cakes with sexual themes, and therefore constituted an adult bookstore under the Denver zoning ordinance. Pursuant to the ordinance, adult bookstores must be located more than 500 feet from any residential area; the location at which Pensack sought to operate her bakery was within 500 feet of a residential district.

The court first noted that many of the cakes sold by Le Bakery Sensual were sexually explicit. However, the court found that as applied to Le Bakery Sensual, the adult bookstore restrictions of Denver's ordinance were overbroad and constituted a denial of due process. There was no adequate notice to Pensack as to what the law restricted, and there was no way to avoid the chilling effect on speech that would result from the uncertainty. And the law was overbroad because it would also deny the bakery the opportunity to bake and sell children's birthday cakes. The court held that Pensack had established a violation of her constitutional rights by the City of Denver and ordered further proceedings as to her remedy.

Pensack v. City and County of Denver, 630 F.Supp. 177 (D.Colo. 1986) [ELR 8:5:19]

State Action.

A Federal Court of Appeals has determined that by enforcing a contract provision between a concert promoter and musical performers that prohibits cameras in the auditorium during performances, employees of the Providence Civic Center engaged in action "under color of state law" or "state action" within the meaning of 42 U.S.C. sec. 1983. The Providence Civic Center is a public facility operated by the Providence Civic Center Authority, a public corporation. The Civic Center Authority leased the center to Frank Russo, a concert promoter, who contracted with performers to appear at the Center. Even though it did not arrange the performances, the Civic Center Authority provided the staff and security personnel for the Center. Arthur D'Amario, a freelance photographer, sued the Civic Center Authority and Russo claiming that the enforcement of the "no camera rule" at Civic Center concerts violated his free speech rights as guaranteed by the First Amendment. The Court of Appeals noted that although the Civic Center did not participate in negotiating the no camera provision, the Center's employees were "wholly responsible for enforcing the rule;" this conduct was sufficient to constitute state action. In reaching its determination, the court reversed and remanded the District Court's grant of summary judgment in favor of the Civic Center.

In his dissent, Judge Irving Hill noted that the no camera policy originated not from the Civic Center or Russo, but, if at all, from the booked talent. Since the Civic Center's employees were enforcing a contract provision between Russo and certain performers, not Civic Center policy, the employees' conduct did not amount to state action, according to Judge Hill.

D'Amario v. Providence Civic Center Authority, 783 F.2d 1 (1st Cir. 1986) [ELR 8:5:19]

IN THE NEWS

Woody Allen settles lawsuit involving advertiser's use of "look-alike" performer for $425,000

Woody Allen has agreed to settle his lawsuit involving the use of a look-alike performer in advertisements for a chain of video rental stores (see ELR 7:5:7; 6:2:19). Just prior to the beginning of the trial of the matter, National Video agreed to pay Allen $425,000; Ron Smith (doing business as Ron Smith Celebrity Look-A-Likes) and Phil Boroff, the look-alike performer, will not be required to make any payments to Allen. However, Smith previously had agreed to include a disclaimer in any future advertisement stating that Woody Allen did not appear in, or endorse, the advertisement. [Oct. 1986] [ELR 8:5:20]

Performer Laura Branigan was not liable for copyright infringement in connection with the song "How Am I Supposed to Live Without You," rules New York jury

A Federal District Court jury in New York has found that Laura Branigan and two songwriters did not have access to a song written by Gary William Friedman entitled "Promise Me I'll Feel This Way Tomorrow;' and that the creators and distributors of the song "How Am I Supposed to Live Without You" therefore did not infringe Friedman's work. (No written opinion was issued in the matter.) 2[Oct. 1986] [ELR 8:5:20]

Casting Society of America prohibits members from charging fees for attending actors' showcase performances of prepared scenes

The Casting Society of America has adopted new bylaws prohibiting casting directors from accepting any fee from a performer in exchange for viewing a showcase performance of prepared scenes. A member who commits one infraction of the bylaws will be subject to censure; a second infraction will subject the casting director to the payment of a fine equal to the amount of the fee accepted; a third violation will result in expulsion from the Society.

The prohibition on accepting fees or honorariums for attending actors prepared-scene showcases does not extend at present to a casting director's attendance at cold-reading showcases. 2[Oct. 1986] [ELR 8:5:20]

Republic of Korea announces plans to enact copyright law

The Republic of Korea, in response to a trade action brought by the United States, has announced plans to enact a copyright law in mid-1987.

The proposed law, which was drafted with the assistance of the International Intellectual Property Alliance, will provide a twenty year term of protection for sound recordings, commencing on the date of publication of the work. Korea also has agreed to comply with the Geneva Phonograms Convention, an international treaty which recognized the rights of creators and producers of sound recordings. And, according to the Recording

Industry Association of America, it is anticipated that Korea will be enforcing both its new law and its existing Phonograms Law so as to prevent the reproduction of sound recordings, or other intellectual property, without a valid license. [Oct. 1986] [ELR 8:5:20]

NCAA announces drug-testing program for championship teams

The National Collegiate Athletic Association has announced that it will be conducting drug-testing of athletes on championship teams in all NCAA sports. Banned drugs include not only illegal substances, such as cocaine, heroin and marijuana, but also substances such as anabolic steroids and high levels of caffeine. The testing is part of a wide-ranging anti-drug program which includes drug education. [Oct. 1986] [ELR 8:5:20]

Paramount and talent guilds reach agreement on cable television residuals

The Writers Guild of America and the Directors Guild of America have reached an agreement with Paramount on residual payments for the studio's series "Sanchez of Bel Air." The series was produced for the USA Cable Network, a cable service owned in part by Paramount. Although the specific terms of the agreement have not been disclosed, and the agreement must be confirmed by the guilds' boards, news reports indicate that there will be a fixed residual, but that the residual will take into account the lower number of households reached by cable than by free television. [Oct. 1986] [ELR 8:5:20]

DEPARTMENTS

Book Review:

"Sweetie Baby Cookie Honey" (a novel) by Freddie Gershon

Reviewed by Martin Silfen and Janna Glasser

"Sweetie Baby Cookie Honey" ("SBCH") is a first novel by Freddie Gershon, world-renowned lawyer, producer, deal-maker and member of the entertainment world's power elite. The title itself is indicative of the superficial, vapid side of the entertainment world, in this case, rock and roll.

SBCH is set in a world where values are questionable, temptations are great, and exploitation of creative talent shocking. It is a world populated by the idealistic and the naive, the ruthless and the greedy, and one where the performer is always subject to exploitation and the attorney's role all important. SBCH is a must read for attorneys practicing in the area of entertainment law.

In this world, Gershon, a former practicing attorney and the founder of the Practising Law Institute program on Counseling Clients in the Entertainment Industry, creates the character of David Barry. One can only assume that David Barry is a composite of entertainment attorneys known to Gershon, including himself. Barry is an attorney who not only protects the legal rights of his clients but who also insulates and educates the clients, helping them to resuscitate and revive their careers, while building his own career at the same time. As candidly portrayed by Gershon, Barry is less than lily white at times and he can "play ball" with the system. The mortar which holds SBCH together is the role the attorney plays in the music business.

Sometime in the mid-50s, the music business became more sophisticated. With the advent of rhythm and blues, so-called "black music" became accepted by the white listening public, with Elvis Presley being the most famous proponent of this. At some point in 1964, the Beatles invaded America. This became the Golden Age of Rock and Roll, but it also signaled the death knell for many established rock and roll performers whom we had grown to know and love (viz: Frankie Avalon, Bobby Rydell, Neil Sedaka, etc.). How they coped with success and the deterioration of their careers is a vital part of this book. It is a human and compassionate story. Gershon portrays the role of the attorney as not just someone who negotiates the contracts, but lives and experiences the ups and downs of his clients' dance with fame and success. Gershon explores the interplay of the relationships among the attorney, the artist and the record company, and how those relationships impact on what the public sees and hears. The novel follows Barry as he is involved in the rise, fall and resurrection of several composite artists' careers.

Gershon touches on the prospective conflicts between the attorney and the artist with respect to contingent fee compensation, as well as representing two, three and four clients in making deals with each other. The best part of SBCH is that none of its lessons is told as a lecture, a speech or a treatise. Gershon has written an enjoyable, readable, fastpaced, fun novel which you know after you've read it was written by an insider. And indeed, "Freddie, the lawyer" as and is as "inside" as one can get in the entertainment business.

Gershon graduated from Columbia Law School in 1964, the year the Beatles invaded America. Within two years, Gershon was practicing law in New York, letting his hair grow long, and becoming involved in the music of the times. During that period, Gershon represented artists such as Chicago, Van Morrison, Dr. Hook and the Medicine Show, Neil Sedaka, Peter Allen, Phil Ochs, Bette Midler, songwriters such as Marvin Hamlisch and Carole Bayer Sager, and record producer James William Guercio. He established some semblance of notoriety by taking on the Beatles themselves when he represented Pete Best, their former drummer. Gershon was involved in the production of "Jesus Christ Superstar" and subsequently with financing the motion picture "Tommy." He became closely associated with Robert Stigwood and RSO Records, and was a key player in the success of "Saturday Night Fever" and "Grease." As Gershon now says, from that point on, continuing to work became an option. He "retired" in 1981 at the age of 42.

The more one knows about Gershon's professional career the easier it is to try to place the characters and events in SBCH. There are familiar groups, names, artists, managers and impresarios, as well as others who appear to be composites of well-known people, but none of them is clearly identifiable. For all of those who have grown up with music in their lives, who have wondered what entertainment attorneys do, how they make their money or what really goes on after the curtain comes down, SBCH is highly recommended.

(SBCH is published in the United States by Arbor House Publishing Company and in Canada by Fitzhenry & Whiteside Ltd. The book is available in bookstores.)

Martin Silfen and Janna Glasser are partners in the New York City firm of Silfen & Glasser, P.C., where they specialize in entertainment law. Mr. Silfen is the chairman of the annual Practising Law Institute program on

Counseling Clients in the Entertainment Industry. Ms. Glasser is a member of the Advisory Editorial Board of the Entertainment Law Reporter.[ELR 8:5:21]

In the Law Reviews:

Loyola University Law School of Los Angeles has published Volume 6 of the Loyola Entertainment Law Journal which contains the following articles:

A Memorial Tribute to Melville B. Nimmer by Lionel S. Sobel, 6 Loyola Entertainment Law Journal 1 (1986)

Obscenity and Film: An Empirical Dilemma by Jef I. Richards, 6 Loyola Entertainment Law Journal 7 (1986)

The Plight of the American Musician: A Study of Comparative Copyright Law and Proposed Performers' Protection Act by Gary A. Greenberg, 6 Loyola Entertainment Law Journal 31 (1986)

Soviet and Chinese Copyright: Ideology Gives Way to Economic Necessity, 6 Loyola Entertainment Law Journal 53 (1986)

Antitrust Law: FTC Overdubs Merger by Recording Giants, 6 Loyola Entertainment Law Journal 73 (1986)

Constitutional Law: Long Live Rock ... and the First Amendment, 6 Loyola Entertainment Law Journal 85 (1986)

Contract Law: Film Directors and Editing Rights for Television, 6 Loyola Entertainment Law Journal 95 (1986)

Contract Law: New Media and Old Licenses, 6 Loyola Entertainment Law Journal 115 (1986)

Copyright: Who's Sorry Now?, 6 Loyola Entertainment Law Journal 125 (1986)

Copyright Infringement: Small Booths Lead to Big Trouble for Video Stores, 6 Loyola Entertainment Law Journal 147 (1986)

Defamation: "Mouthpiece" Libel Claim Fails to Speak for Itself, 6 Loyola Entertainment Law Journal 161 (1986)

Defamation and Invasion of Privacy: Piggie Porn in the Fifth Circuit, 6 Loyola Entertainment Law Journal 167 (1986)

Employment Contracts: New York Law Is No Shield for Brooke, 6 Loyola Entertainment Law Journal 177 (1986)

First Amendment: Zoning of Adult Business No Cure-All, 6 Loyola Entertainment Law Journal 183 (1986)

Joint Venture: Be Careful, You May Have Created One, 6 Loyola Entertainment Law Journal 191 (1986)

Labor Law: Are Creative Artists Independent Contractors or Employees?, 6 Loyola Entertainment Law Journal 199 (1986)

Pay Television Piracy: Do Pirates Walk the Plant?, 6 Loyola Entertainment Law Journal 207 (1986)

Protecting News Sources: Playboy Extends Publisher's Rights, 6 Loyola Entertainment Law Journal 221 (1986)

Sports Law: Antitrust Suit Fails to Knock Off NBA's Salary Cap, 6 Loyola Entertainment Law Journal 231 (1986)

Tax Law: Sense and Sensibility in Film and Sound Recording Depreciation, 6 Loyola Entertainment Law Journal 243 (1986)

Television Advertising: And Now a Word for Our Sponsors, 6 Loyola Entertainment Law Journal 265 (1986)

Trademark Infringement: No Royalties for K-Tet's False Kingsmen, 6 Loyola Entertainment Law Journal 275 (1986)

Columbia University School of Law and Volunteer Lawyers for the Arts have published Volume 10, Number 3 of Law and the Arts with the following articles:

Music Performing Rights Organizations in the United States of America: Special Characteristics, Restraints, and Public Attitudes by John M. Kernochan, 10 Columbia-VLA Journal of Law and the Arts 333 (1986)

Exposing the Suspicious Foundations of Society's Primacy in Copyright Law: Five Accidents by Gary Kauffman, 10 Columbia-VLA Journal of Law and the Arts 381 (1986)

Museum Copyright Licensing Agreements and Visual Artists by Scott M. Martin, 10 Columbia-VLA Journal of Law and the Arts 421 (1986)

The Performers' Plight in Sound Recordings - Unique to the US.: A Comparative Study of the Development of Performers' Rights in the United States, England and France by Judy A. Kim, 10 Columbia-VLA Journal of Law and the Arts 453 (1986)

Communications and the Law, Volume 8, Number 4, has been released by Meckler Publishing Corporation, 11 Ferry Lane West, Westport, CT 06880, and contains the following articles:

Frontiers in Communication Law Research by Everette E. Dennis, 8 Communications and the Law 3 (1986)

Degrees of Freedom: Parameters of Communication Law Research by Jeremy Cohen, 8 Communications and the Law 11 (1986)

Mass Communication of the Law: Toward Theoretical Understanding of Journalists' Interaction with Judicial Sources by Robert E. Drechsel, 8 Communications and the Law 23 (1986)

Impact Analysis of the Law Concerning Freedom of Expression by F. Dennis Hale, 8 Communications and the Law 35 (1986)

A New Paradigm for Legal Research in Mass Communication by David Pritchard, 8 Communications and the Law 51 (1986)

Legal Historians and the Press Clause by Jeffrey A. Smith, 8 Communications and the Law 69 (1986)

Hastings College of Law, San Francisco, has published Volume 7, Number 4 of Comm/Ent, Hastings Journal of Communications and Entertainment Law. It contains the following articles:

Attorneys and the California Athlete Agencies Act: The Toll of the Bill by Adam B. Nimoy and Jackson D. Hamilton, 7 Comm/Ent 551 (1985)

California Extends the Right of Publicity to Heirs: A Shift from Privacy to Property and Copyright Principles by Susan G. Bluer, 7 Comm/Ent 575 (1985)

Peanuts and Potatoes: The FCC's Diversification Policy and the Antitrust Laws by Dennis M. Cusack, 7 Comm/Ent 599 (1985)

Intra-Corporate Conununications: Sufficient Publication for Defamation or Mere Corporate Babbling? by Daven G. Lowhurst, 7 Comm/Ent 647 (1985)[ELR 8:5:22]