BUSINESS AFFAIRS

The Role of Completion Guaranty Bonds in Independent Motion Picture Production Financing

by Bette L. Smith

Although completion guaranties have been in use in the motion picture business more or less continuously for the last 35 years, it is only in recent years that their use has become relatively widespread. In this country, film production was historically dominated by the major studios and there was little or no requirement for completion guaranties.

In Europe, on the other hand, where true independent producers (producers who relied on sources of financing other than major distributors) were more common and where coproductions involving entities in several countries were also becoming prevalent, the need arose for financially responsible parties to guarantee non-studio sources of financing in order that films that such sources had financed would actually be completed.

In particular, the increasing involvement of European banks in production financing as lenders against collateral consisting of films subject to distribution presales or negative pickups increased the need for guarantors to guarantee that the "collateral," in this case the completed film, would actually be created.

Completion guarantors initially guaranteed only lower budgeted films which was sufficient, at the time, to meet the needs of European producers who, by and large, were not dealing with very expensive productions. Thus, in securing reinsurance, the initial entrants into the completion guaranty field typically had limits on their reinsurance which were not adequate to enable them to operate in the U.S. market where budgets were typically much higher.

In recent years, however, the increasingly diverse methods used for financing films both here and in other countries have led to an increasing need for completion guaranties.

The advent of substantial foreign presales, cassette presales, network television pre-buys (when they were available) and the use of privately and publicly sold limited partnerships to finance films has created the need for completion guaranties to protect investors, financiers and lenders who might otherwise have no means of controlling the use of funds they have advanced for a particular production.

The willingness of banks, particularly domestic banks, to lend against distribution negative pickups, foreign presales, cassette deals, etc., has also created need for completion guaranties as most, if not all, banks in these situations insist on a completion guaranty.

There are presently more than a dozen companies throughout the world offering to provide completion guaranties on films and television productions. As not all guarantors are created equal, it is appropriate to look at what a completion guaranty does and doesn't do and factors to consider when evaluating a guarantor and its guaranty. For purposes of discussion, motion pictures and television productions will be collectively referred to as "films" or "film."

Completion Guaranty Function

In its simplest terms a completion guaranty is more or less what it says it is-a guaranty that a film will be completed and delivered to the appropriate party. The completion guaranty, of course, goes beyond this simple statement to indicate that the completion guarantor will:

(a) Cause the producer to complete and deliver the film;

(b) Itself complete and deliver the film and, if required, advance any sums in excess of the budget required to complete and deliver the film; or

(c) Abandon production and repay the financier of the film its out-of-pocket expenditures with respect to the film.

In defining what completion and delivery of the film means, the completion guaranty will typically provide that the film will be produced in accordance with a screenplay that has been approved by all parties and will be delivered in accordance with the requirements of one or more distribution agreements, including time of delivery requirements, if any.

By combining an acceptable completion guaranty with one or more distribution agreements which call for payment upon delivery of the film, a producer is able to go to a bank or other source of financing and borrow against a relatively solid package of collateral. Obviously, a distribution agreement which calls for payment upon delivery of the film is worthless as loan collateral unless there is some assurance from a financially responsible party that the film will in fact be completed and delivered to the distributor.

In addition to their use in connection with bank financed film production, completion guaranties are also used on occasion even by the major studios in situations, for example, in which they have some cause for concern as to their ability to control the cost of production of a particular film.

Thus, in dealing with a director who is notorious for being uncontrollable in the area of fiscal responsibility, a studio may elect to engage a completion guarantor to act as the "heavy" in its dealings with the director. Thus, the studio can preserve its creative relationship with the director by letting the guarantor be the one who says "no" to his more outrageous demands.

There are also some producer-distributors who are required as a condition of their overall loan facilities to have completion guaranties on all of their films. Some publicly sold film production limited partnerships, such as the first Silver Screen partnership and the Lorimar Film partnership, have provided in their agreements as an inducement to investors that completion guaranties will be obtained on all films produced using partnership money.

Choosing a Completion Guarantor

The completion guaranty business has been increasingly competitive in the last four or five years with, as indicated above, approximately a dozen completion guarantors currently operating in the U.S. and various other countries. The word "approximately" is used because some guarantors seem to go into and out of business on a relatively regular basis and others seem to write completion guaranties on a very infrequent basis. Some completion guarantors operate only within limited territories and others seem to operate on a worldwide basis.

While it is generally the producer who selects the completion guarantor, in selecting the guarantor the producer must be cognizant of the needs and requirements of the financier who is typically the beneficiary of the completion guaranty. For example, depending upon the size of the budget, some completion guarantors may not be acceptable to many financiers.

In the case of many films, the more sophisticated banks making production loans and requiring completion guaranties have a very limited list of acceptable completion guarantors, sometimes numbering only two or three. A preliminary step for a producer requiring a completion guaranty, therefore, may be to check with the financier in order to determine whether the financier has a predetermined list of acceptable completion guarantors.

In determining which completion guarantor to use, one of the things one must look at is the ability of the completion guarantor to pay off in the event of a loss. Historically, many of the completion guarantors who were reinsured by Lloyds of London carried a blanket policy, often in the aggregate amount of $10,000,000, which was applicable to all of the films guaranteed by the guarantor on a yearly basis.

Obviously, the aggregate exposure of a completion guarantor at any given time could be many times the

$10,000,000 aggregate limit; and therefore in these situations even a guaranty which on its face purported to have no limits had, in fact, an actual limit which was some portion of the $10,000,000 aggregate limit. In addition, Lloyds' reinsurance policies typically provide for a deductible of $250,000 to $500,000 (in some instances, more) which is borne by the guarantor itself before the reinsurance comes into effect.

Obviously this raises, or should raise, questions in the mind of the party selecting the completion guarantor as to the completion guarantors ability to meet the deductible in the event of a loss. Since the deductible is on a per-picture basis, in order to evaluate the guarantors ability to handle a given loss, one must look at the guarantor's current financial condition and the aggregate exposure of the completion guarantor at any given time. Unfortunately, such facts are not generally available.

In order to meet these last two problems, many sophisticated financiers, particularly banks, began requiring completion guarantors reinsured by Lloyds to provide a separate policy with an appropriate limit for their individual film. In addition, particularly in the case of smaller completion guarantors, financiers began requiring guarantors to furnish a letter of credit or other evidence of ability to meet the deductible. Unlike the Lloyds reinsured completion guarantors, The Completion Bond Company is wholly reinsured by the Fireman's Fund Insurance Companies and is reinsured on a per-film rather than aggregate basis.

As evidence of reinsurance, completion guarantors reinsured by Lloyds provide a "cut through endorsement" which indicates that the guarantor has reinsurance with Lloyds (and, in the case of reinsurance arranged on a per-film basis, also indicates the limit with respect to the film involved) and indicates that Lloyds will pay under the terms of that reinsurance policy in the event of a claim.

In order to evaluate the protection that is afforded, one would have to closely examine the reinsurance policy between the completion guarantor and Lloyds, as the Lloyds cut-through does not indicate that Lloyds will pay pursuant to the completion guaranty rather than pursuant to its reinsurance arrangements with the guarantor.

Guarantor Operation Methods

Once a producer is satisfied with the strength and acceptability of the would-be completion guarantor, the next consideration is the method of operation of the completion guarantor.

Other completion guarantors involve themselves in detailed analysis of the production elements, consult with the producer, director and other creative elements, and stay involved in the production on a day-today basis.

Some producers find the involvement of the completion guarantor on a continuing basis helpful, because completion guarantors usually maintain very experienced production personnel on staff who could be of invaluable assistance to the producer. In any event the producer would be required to provide the guarantor with cost statements, progress reports, estimates of costs to complete and other pertinent information on a regular, current basis.

Typical Fees

As the completion guaranty business is very competitive, the rates charged by the various completion guarantors are pretty much the same. Typically the fee is 6% of the budget with a 50% rebate in the event there are no claims. All completion guarantors, in addition, require the budget to contain a 10% contingency factor.

Some completion guarantors may charge considerably more than this because they are taking only the highest risk or lowest budgeted films available. As in any business, from time to time discounts are given on these rates for volume, because a higher than normal 10% contingency has been offered, or for other reasons which reduce the risk to the completion guarantor.

Analysis of Elements

The guarantor's analysis of a film's elements typically includes the normal production-related elements (budget, screenplay, production and post-production schedules, story boards, etc.). It will also include the agreements with the key personnel rendering services on the film, such as the director, producer, major cast and others deemed necessary because of the particular nature of the film (such as special effects experts).

In reviewing the budget, screenplay and schedule, the guarantor's major concern is to determine whether or not the film can be contained within the budget without substantial invasion of the contingency and whether or not the film can, in fact, be completed and delivered by the earliest contractually required delivery date, if any.

A thorough completion guarantor will sit down with the elements and with the production personnel, producer, director and production manager in order to discuss the manner in which the film is to be produced and in order to satisfy itself that the production's personnel have adequately prepared the film for production. The producer, director and production manager will be asked to sign off on the production schedule, budget and screenplay so that all parties are in agreement that their intention is to produce the film in accordance with the elements.

Evaluation of Track Records

Prior to meeting with production personnel, a thorough completion guarantor will have undertaken a reasonable investigation of their credits, capabilities and reputation with respect to adherence to budgets and schedules. If the completion guarantor profiles the film and its director, as one requiring strong production controls (as in the case of a neophyte director or a director with a spotty track record), the guarantor may insist on adding to the production's staff a knowledgeable production person to assist in controlling the director.

Once the guarantor has satisfied itself that the film can be produced within the parameters of its budget and schedule, the guarantor, or its counsel, will review not only the agreements for the production personnel but also the financing and distribution agreements in order to determine that these documents are consistent with the budget and schedule, are internally consistent, and are consistent with each other.

Financing Not Guaranteed

As will be seen below in the discussion of the terms of completion guarantees, the guarantor is not liable if all of the required financing is not available as and when required. Nevertheless, thorough guarantors will review the financing documents, because they do not wish to be involved with a production which grinds to a halt as a result of a failure of the financing.

As is often the case, the financing may be coming from several different sources which may, in addition to everything else, require the creation of an inter-party agreement among the financiers whereby each of the financiers agrees that if the other financiers put up their portions of the budget it will put up its portion of the budget.

Where banks are involved in providing a portion of the financing, the guarantor will review the loan documentation in order to be sure that the rights taken by the bank will not interfere with the completion guarantor's rights and obligations. For example, in line of credit or revolving loan situations in which a bank may be providing financing for day-to-day corporate operations or for more than one film, loans are often cross-collateralized; as a result, the bank technically might have the right to foreclose on the film in which the completion guarantor is involved because of a default with respect to another unrelated loan to the same production entity.

Employment Agreements Reviewed

In reviewing the documentation with respect to the film, the completion guarantor will be looking at producers' and directors' agreements in order to ensure itself that it is not precluded (other than to the extent it is otherwise precluded by the Directors Guild Agreement) from replacing the director or producer to the extent that may be required should the film get into trouble.

As is sometimes the case, a distributor who is advancing funds with respect to a film, or who has committed to make a negative pickup payment upon delivery of the film, may require that a particular director is "of the essence" of the agreement. In such a situation, the guarantor would want the distribution agreement to provide that the director may be replaced if necessary and, in the case of "bankable" directors, that the director may be replaced from a preapproved list of replacement directors.

As a practical matter, it is very difficult, time-consuming and expensive to replace a director in midproduction, particularly when one is locked into a pre-approved list. Typically the names that appear on such a list are the names of directors who wouldn't consider taking over somebody else's film in midstream, even if they were available, and even if you could pay the astronomical price they would probably want to do so.

In addition, as indicated above, the Directors Guild Agreement provides fairly substantial restraints on replacing a director, particularly after a substantial portion of principal photography has been completed. Thus a completion guarantor faced with a director with a track record of consistently going over budget and falling behind schedule might have to impose additional restrictions upon the production company, additional controls with respect to the meeting of schedules, and might insist on either a larger than normal contingency or might, in evaluating the budget and schedule, insist that the schedule and budget accommodate the director's shooting style and speed.

Other Factors Considered

In addition to the foregoing, the guarantor would consider other aspects of the production which might impact upon the producer's ability to bring the film in on budget and on schedule. Is the location one which is risky because of inclement weather, political instability, or other problems? Can these problems be covered by cover sets or weather insurance and political risk insurance, or is it better to consider another location?

In the case of foreign productions and films with foreign sources of financing, the guarantor must consider fluctuations in foreign currencies which may adversely impact the cost of the film or the value of the foreign financing. In this situation, the guarantor may require the production company to purchase futures in an appropriate foreign currency and would typically require that budgets be prepared in the local currencies (as well as dollar budget if appropriate).

Having considered all of the elements and aspects of production, assuming the completion guarantor has determined to go ahead, it is appropriate to look at what the guaranty covers and what it does not cover.

Completion Guaranty

In its simplest form the completion guaranty is a guaranty that the production will be completed on budget and on schedule; if it is not, the completion guarantor will pay the over budget amount necessary to complete the film or, at its election, determine to abandon the production and repay the financiers their investment in the film.

The guaranty is usually conditioned upon the completion guarantor's approval of all of the production and related elements as well as the agreements referred to above, the payment of its fee, and all of the production financing required to complete the film being available as and when required.

Thus, for example, in the case of a distribution agreement which provided for advances during production on a pre-established schedule, the completion guarantor would require preparation of a cash flow schedule comparing the cash needs of the film with the advances under the agreement; and if they didn't track, the guarantor might require that the producer or guarantor (in the event of takeover) have the right to accelerate this payment schedule should funds be required to meet the needs of the production.

Although a completion guarantor would check the payment schedule against the cash flow needs of the production, it would generally also retain for itself the right to accelerate the payments in the event the cash flow projections turned out to be inaccurate.

Some completion guarantors spell out a limit on their liability (both in the case of over budget expenditures and in the case of a payoff as the result of abandonment), while others do not. In comparing completion guarantors it is important to remember that all reinsurance contains limits, whether or not the guarantor has seen fit to inform the producer of this fact.

As mentioned, some completion guarantors have a blanket policy which covers all of the films they guarantee during a given time frame; others obtain reinsurance on a filmby-film basis. In the case of the blanket reinsurance, there is almost no way to determine what coverage has been provided without knowing exactly what other films the guarantor has guaranteed during the applicable time frame and what its potential exposure is on each one.

Clearly the better course is to require the guarantor to produce a reinsurance policy which is applicable to your film only. In the case of Lloyds reinsured guarantors, such a policy may be obtained. A cut-through endorsement also may be obtained from the reinsurers indicating that the film has been covered by such a policy up to a limit which is therein specified.

The Completion Bond Company, reinsured by Fireman's Fund, provides a letter from Fireman's Fund which is not a cut-through endorsement, but is rather a letter from the Fund indicating that if The Completion Bond Company doesn't pay pursuant to the guaranty, the Fund itself will. This has one major advantage over a cut-through endorsement as it does not make the beneficiary of the guaranty subject to the specific provisions of the reinsurance arrangements.

The guarantor typically conditions its liability on its approval of all of the elements, its receipt of its fee and all of the financing being available as and when required. It is important to remember that the guarantor is not in any way guaranteeing the availability of financing and, accordingly, it is incumbent upon each of the financiers to satisfy itself that the other financiers are going to advance their respective shares of the cost of production as and when required.

As indicated above, this often results in the need for an inter-party agreement among the financiers, confirming this fact, and may also require individual financiers to satisfy themselves as to the credit worthiness of their co-financiers.

Production Account

The guaranty customarily provides that all of the funds advanced for the production of the film will be deposited in an identified production account and will be drawn out of the account only to be used in connection with the production of the film. In some situations, the guarantor may insist that its representative be a required cosignatory with respect to the production account.

In any event, the guarantor will insist that it has the right to take over the production account and require its representatives to either be a necessary cosignatory or the sole signatory on the account in the event the guarantor takes over production of the film.

In some situations (as in the case of a producer whose financial condition is somewhat precarious), the guarantor may not wish to leave significant sums on deposit in a production account in the name of the producer. In this situation the guarantor may arrange to have the production financing advanced into a production account in the name of the guarantor with this account tied, on a zero balance basis, to the operating account in the name of the production entity. Thus, there is never a balance in the account which is in the name of the production entity.

To the extent that the completion guaranty provides for delivery by a certain date it will also usually contain a "force majeure" clause which permits a later delivery in the event of an occurrence of force majeure. Typically, the force majeure clause will also contain a provision with respect to an outside date by which the film must be delivered even if an event of force majeure occurs. It is obviously important to make sure that the dates provided in the completion guaranty, including the outside date in the force majeure clause, track the required delivery dates in the applicable financing and/or distribution agreements.

Exclusions

All completion guaranties contain certain exclusions, i.e., costs for which the completion guarantor is not responsible. In addition to the exclusions that are specifically set forth in the completion guaranty, in situations where the reinsurer provides, by a cut-through endorsement, that it will respond to claims under the completion guaranty in accordance with the provisions of its reinsurance policy with the completion guarantor, there may be exclusions provided for in the reinsurance arrangements which are not set forth in the completion guaranty. In those situations, the provisions of the reinsurance arrangements should be reviewed, specifically in the area of additional exclusions.

Virtually all completion guaranties exclude rights claims in one form or another, and while many of these types of claims can be covered by errors and omissions insurance, it is important to remember that such insurance does not cover what are essentially contract claims in the rights area, nor does the normal E&O policy cover injunction claims.

While many completion guaranties specifically exclude coverage for war risk and certain specified nuclear perils, other guaranties do not specifically mention these exclusions. This is an area that is almost universally excluded in insurance policies; and thus not only would the guarantor's reinsurance policy typically exclude claims in these areas, but the cast, negative and other insurance policies with respect to the film would also exclude these perils.

Another area that is typically excluded is the artistic content of the film. The guarantor is agreeing to deliver a film which is technically correct, i.e., one that follows the script, is shot in 35mm and in color (if specified) and is otherwise suitable for exhibition in first-class theaters.

Beyond that, the completion guarantor is not guaranteeing the artistic content of the film or that it will be an artistic or commercial success.

It is important to remember that the completion guarantor has no "up side" potential with respect to the production of the film. Therefore, the completion guarantor looks very hard at any expenditures which reduce the contingency, or might even exceed the contingency, which have to do with enhancements or other improvements in the overall production of the film.

The guarantor starts with the expectation that the film will be shot by the producer in accordance with the budget and schedule and that scenes will not be added, improved or enhanced.

Recoupment

Completion guaranties typically provide that the completion guarantor has a right to recoup any sums advanced or expended by it in connection with the completion and delivery of the film. Customarily, this recoupment occurs after the cost of production of the film has been recouped, and in those situations in which the financiers wish to have their interest covered under the completion guaranty and pay a fee on the amount of the interest, after recoupment of the financiers' interest as well.

The completion guaranty agreement, when read together with the distribution agreement(s), should mesh so that all of the requirements of the distributor under the distribution agreement are addressed in the completion guarantee and the guarantor has agreed to deliver a film which will be acceptable under the distribution agreement. Certainly a bank or other financier providing production loans with respect to a film will have to be satisfied that there are no gaping holes between the distribution agreement and the completion guaranty which will leave the financier with impaired collateral.

Producer's Agreement

While the documents vary somewhat from guarantor to guarantor, typically the completion guaranty package includes the completion guaranty or agreement between the completion guarantor and financier as well as a separate agreement between the completion guarantor and the producer of the film which gives the completion guarantor certain rights and creates certain obligations on the part of the producer with respect to completion of the production and delivery of the film. While some guarantors call this latter document a "producer's agreement," others refer to it as a "security agreement" because it also deals with the creation of a security interest in the film on the part of the completion guarantor.

By whatever name it is called, the intention of the document is to create a situation in which the completion guarantor is able to exercise certain rights in order to assure production, completion and delivery of the film in accordance with the completion guaranty.

The producer's agreement is a fairly straightforward document which essentially requires the producer to do his job. Thus, provisions which call for the producer to cast a budget, to make deals for living expenses which conform to the budgetary provisions, to obtain appropriate insurance to produce the film in accordance with the provisions of the distribution agreements, and to base the production of the film on the approved screenplay are nothing more than the things that a reasonably competent producer would do anyway.

Take Over Provision

All producer's agreements provide that the completion guarantor has the right to take over production of the film if at some point during production the completion guarantor determines that production is not proceeding in a satisfactory manner.

Some producer's agreements are very specific as to the point at which the guarantor's right to take over occurs and others are somewhat vague. The consensus of interpretation (on the part of guarantors at least) with respect to the vague language is that the language gives the guarantor the right to take over the production of the film at any point at which it becomes nervous.

There obviously are conflicting interpretations of this language and for that reason some guarantors have chosen to be more specific as to the triggering mechanism for a takeover of production. The average producer reading the producer's agreement becomes most concerned about the takeover clause. There are even distributors who become very concerned about the takeover clause and the impact it might have on the creative content of the film if the guarantor were to take over production and complete and deliver the film.

As a practical matter, regardless of the right that the guarantor may have to take over the film in the event it gets into difficulties, very few films are actually taken over by completion guarantors. To the extent that overages and delays in production result from forces beyond the control of the producer, in many events a completion guarantor would not be able to do much better.

If it rains, it rains, and assuming the producer has taken appropriate steps to have cover sets available, there may not be anything that the completion guarantor can do that the producer has not already done. Therefore, taking over production at that point makes very little sense.

If, however, as is sometimes the case, the producer cannot control a difficult director, that may be exactly the situation in which a completion guarantor may wish to take over production in order to get the film back on track and on schedule.

Exactly what the completion guarantor will do in the event of takeover varies from guarantor to guarantor and from film to film. In some situations, the guarantor may wish only to exercise administrative controls over the film, i.e., controls over expenditures and the bank account rather than control over the day-today operation of the production company. In this event, the line producer would be left in charge of production provided he cooperated with the completion guarantor and basically did what he was told.

This is often a face-saving arrangement for the producer and is preferable to having the guarantor actually step in and run the entire production. As indicated, if the producer is cooperative, this system can work to enable the continued production of the film and to avoid the disruption that might occur with the replacement of the producer.

Security Interest Provision

Another clause in the producer's agreement which also is sometimes the subject of some discussion is the clause which gives the completion guarantor a security interest in the film and all its constituent parts. Particularly in the case of films which are being financed with the aid of bank loans, it may become necessary to prepare an additional document which orders the competing security interests of the financiers and the completion guarantor.

If the film is going to utilize Screen Actors Guild members, the further competing security interest of the

Screen Actors Guild must also be dealt with. In this connection, various guarantors, banks and the Screen Actors Guild have worked out a form of subordination agreement which deals with the competing security interests of the various parties.

A producer's agreement will also contain a recoupment provision which works more or less as was described above. Either separately or as an exhibit to the producer's agreement, the producer will execute an assignment from the producer to the completion guarantor of certain proceeds derived with respect to distribution of the film in order to permit the completion guarantor to recoup any advances or expenditures made by it with respect to the film, in some cases with interest.

The completion guarantor may also require, again as part of a producer's agreement or separately, that the producer execute a letter giving the guarantor the right to take over the production bank account and may also require the producer to sign a short form takeover agreement, so that in the event of takeover the completion guarantor has a document to show interested third parties without requiring that the entire agreement between the producer and the guarantor be displayed every time a question arises during a takeover period.

The completion guarantor will also require some sort of a letter agreement with the producer and the laboratory processing the film in order to assure the completion guarantor access to the film and the right to preclude the producer from having access in the event of takeover. To protect its recoupment position, completion guarantors also often require the producer to sign a financing statement for filing with the appropriate government entity.

The producer's agreement will require the producer to furnish production information to the guarantor on a current basis in order to enable the completion guarantor to monitor the production of the film closely so that the guarantor can be aware of deviations in the anticipated cost of production. Since a budget is, at best, an estimate of what production will cost, some deviations are expected and the guarantor will often try to profile the deviations in order to determine their causes.

To the extent increased costs result from unforeseen events, there is probably little a guarantor would be able to do that isn't already being done. Cost increases and delays in production resulting from added scenes, enhancements of production or other deviations from the approved schedule or screenplay might cause the guarantor to tighten controls of the film and, depending upon their impact, might result in the guarantor taking over production.

The guarantor, in reviewing the cost and progress reports, may make its own analysis, particularly in the area of " estimated cost to complete" to assure itself that estimates it is receiving are accurate. It may also track the scenes being shot in order to assure itself that the entire screenplay is being photographed and that scenes are not being postponed or dropped without the financier/distributor's consent.

Although the producer's agreement provides the completion guarantor with numerous rights and imposes upon the producer various obligations with respect to the production of the film, it is important to remember that in the vast majority of cases the films that are guaranteed are completed and delivered without any overt involvement on the part of the completion guarantor in their production.

Unlike a studio, which has a major interest in the creative content of a film, the guarantor will not take over a film or otherwise tell the producer how to make the film if it doesn't like the dailies. In evaluating and selecting a completion guarantor, it is important to get some idea of the completion guarantor's philosophy with respect to the films it is guaranteeing and to understand that in the majority of cases the completion guarantor will act as an additional resource for the producer in order to enable the smooth and timely completion of production of the film involved.

Conclusion

As methods of financing film production continue to change, it is likely that even greater use will be made of the completion guaranty as a tool to enable more creative types of financing to be used in film production. The completion guarantor is another resource to be used by producers and financiers in evaluating proposed films and in controlling their production.

The use of completion guaranties has enabled many films that otherwise could not be financed to be produced and has helped significantly in controlling their production cost.

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[ELR 8:7:3]

RECENT CASES

Logo of Columbia Pictures' "Ghostbusters" did not infringe Harvey Cartoons' copyright or trademark rights in characters featured in "Casper, The Friendly Ghost" comic books

"Fatso," "Fusso" and "Lazo" are the names, not of goldfish or wrestlers, but of three cartoon ghosts who materialized in the "Casper, The Friendly Ghost" comic books. Each member of the "Ghostly Trio" was represented by an outline drawing and by some internal lines indicating an evil or mischievous facial expression. According to Harvey Cartoons, the former publisher of the Casper comic books, the logo of Columbia Pictures' 1984 film entitled "Ghostbusters" infringed Harvey's copyright and trademark rights in the Fatso character. The Ghostbusters logo depicted a cartoon ghost behind the international sign of prohibition; the ghost had (as did Fatso) a "billowy" exterior contour with a knotted forehead and jowly cheeks.

Calling upon Federal District Court Judge Peter K. Leisure to grant summary judgment in the matter, Columbia pointed out that Harvey's copyrights in the pre-1956 Casper comic books had expired and were not renewed. Harvey's later publications, which still were protected by copyright, contained a pictorial representation of the Fatso character which was nearly identical to the character's appearance in 1955.

Judge Leisure, in accordance with the principle that copyright protection extends generally only to those elements of a work which are original, stated that Harvey's copyrights on its derivative works, i.e., the post-1956 Casper comic books did not serve to protect the artwork included in the underlying works which were in the public domain. The court therefore found that the pictorial representation of Fatso, as the ghost appeared in Harvey's comic books with expired copyrights, had entered the public domain and that the alleged similarities between the Ghostbusters logo and Fatso involved only non-copyrightable elements of Harvey's works.

While declaring that it was not necessary to decide the issue of substantial similarity between the spirits, the court, in a lengthy footnote, observed that Harvey's copyright infringement claim most likely would have been dismissed on this ground as well, given both the very limited ways available to draw the figure of a cartoon ghost, and certain differences in the drawings.

With respect to Harvey's claim that the Ghostbusters logo was confusingly similar to Harvey's trademark in "The Ghostly Trio," Judge Leisure determined that the trademark and the logo were largely dissimilar - the fact that both involved ghosts did not establish confusing similarity. Columbia did not appropriate any of the indicia of "Fatso" such as his name, storyline or exact image. Furthermore, the differences in the "total concept and feel" of the logo and the trademark precluded a finding of infringement, as did the lack of confusion as to the source of the film. Judge Leisure stated that "a finding of general association, that the "Ghostbusters" logo is reminiscent of "Casper" characters, does not mean the prospective movie-goer in purchasing a ticket for "Ghostbusters" thinks that he is going to see a "Casper" cartoon. Neither does it mean that he will think that "Ghostbusters" is derived from "Casper" cartoons or that it is sponsored by the same source as "Casper. "

In granting Columbia's motion for summary judgment dismissing Harvey's complaint, the court concluded by finding that Harvey's unfair competition cause of action was preempted by section 301(a) of the Copyright Act.

Harvey Cartoons v. Columbia Pictures Industries, Inc., Case No. 84 Civ.8274 (S.D.N.Y., Oct. 28, 1986) [ELR 8:7:10]

Walt Disney Productions may proceed with copyright and trademark infringement claims arising from Filmation Associates' proposed series of animated feature films; triable issue as to substantial similarity between Filmation's production material and Disney's copyrighted character depictions precluded summary judgment

In early 1985, Filmation Associates announced its intention to produce and distribute a "New Classics Collection" of feature length animated films, including "The New Adventures of Pinocchio," "Alice Returns to Wonderland," and "The Continuing Adventures of the Jungle

Book." Walt Disney Productions filed suit against Filmation alleging the violation of Disney's copyright and trademark rights in the "Disney Classics" series of films, including "Pinocchio," "Alice in Wonderland," and "The Jungle Book."

Filmation responded that the materials created during the production of the as yet unreleased Pinocchio work, such as the script, story board, story reel, models and promotional trailer, were "transitory steps en route to a fixed product" and thus could not be the subject of a copyright infringement action.

Federal District Court Judge Stotler, in denying Filmation's motion for summary judgment, stated that the items created by Filmation were material objects in a sufficiently permanent form to constitute copies for purposes of the Copyright Act, even if the items were prepared only for the use of Filmation's animators. A copyright owner's right of reproduction affords protection against an infringer even if the allegedly infringing work is not distributed, noted the court. And neither the fact that Filmation's materials were in a different medium than Disney's Pinocchio film, nor the absence of a story context for the cartoon characters would preclude a finding of infringement.

Judge Stotler next rejected Filmation's alternative argument-that its material was not substantially similar to Disney's copyrighted works (in a footnote, the court accepted Disney's position that the "works" which allegedly were infringed included both the company's individual character depictions as well as its films). Disney and Filmation agreed that there was substantial similarity in the ideas involved since all of the disputed creations were taken from specific literary characters within the public domain. And a triable issue of fact existed on the question of the substantial similarity between Disney's copyrighted character depictions and

Filmation's work, declared the court. Although it was less clear that Filmation's proposed Pinocchio work was substantially similar to Disney's Pinocchio film, the motion for summary judgment as to the film also was denied.

Judge Stotler then found that a triable issue of fact was present on Disney's claim that Filmation infringed Disney's copyright through advertising and promotional materials distributed for several of Filmation's planned productions, and on Disney's various claims under section 43(a) of the Lanham Act (and derivative state law claims) involving Filmation's alleged misappropriation of Disney's titles and character depictions to advertise and solicit sales of the "New Classics Collection." The evidence presented was sufficient to show that consumers of Filmation's goods might be confused by the advertisements and, contrary to Filmation's argument, proof of actual damages (including diversion of sales) was not required in order for Disney to obtain relief for the purported false description of a product.

Walt Disney Productions v. Filmation Associates, 628 F.Supp. 871 (C.D.Ca. 1986) [ELR 8:7:10]

Play entitled "Amos 'n' Andy Go To The Movies" infringed CBS' copyrights in post-1948 Amos 'n' Andy radio programs, rules Federal District Court in New York, but issue of substantial similarity between character in play and in CBS' television programs and issue of trademark abandonment precluded summary judgment on broadcaster's remaining counterclaims

Are characters that are in the public domain in a literary work protectable copyright in an audiovisual presentation? Yes, answered Federal District Court Judge Goettel, for the "visual representation of these characters, recorded on film, is the expression of an idea that goes beyond the word portraits in the public domain scripts and is, therefore, protectable by copyright."

The lawsuit in which the above "novel issue" arose concerned author Stephen M. Silverman's use of parts of certain "Amos 'n' Andy" radio programs in a Broadway musical comedy entitled "Amos 'n' Andy Go To The Movies' " (The title of the play subsequently was changed, first to "Amos 'n' Andy in Hollywood," and then to "Fresh Air Taxi," and considerable revisions were made in the script.)

The Amos 'n' Andy Show was created by Freeman F. Gosden and Charles J. Correll; in 1948, they assigned all of their rights in the programs to CBS. Gosden and Correll continued to create new scripts for CBS, and the company broadcast the show on radio until 1955. CBS presented an Amos 'n' Andy television series from 1951 until 1953; nonnetwork syndication of the series continued until 1966.

In 1985, Silverman sought a declaration that the Amos 'n' Andy radio programs broadcast from 1928 to 1948 were in the public domain, and that Silverman was free to use any part of the programs in his play. CBS asserted counterclaims against Silverman for infringing the company's copyrights in the radio shows broadcast after 1948 and in the Amos 'n' Andy television programs, and for trademark infringement and unfair competition.

Judge Goettel first discussed CBS' contention that although the scripts of the 1928-1948 radio programs may have entered the public domain when the copyright registrations were not renewed, the broadcasts of the programs remained protected by common law copyright. The radio broadcasts of the Amos 'n' Andy programs were not publications, agreed the court, and did not divest Gosden and Correll of their common law copyrights; CBS, as the assignee of Gosden and Correll, therefore was entitled to prohibit the unauthorized copying, distribution or exhibition of sound recordings of the radio programs. And while Silverman did not plan to include any recordings of the broadcasts in his play, Judge Goettel declined to declare that Silverman might freely use the programs in other ways "including but not limited to, their title, characters, format, structure, themes, plots, characters names and physical embodiments, characterizations and character relationships." The "free use" of the enumerated items might subject Silverman to liability for trademark infringement or unfair competition. Thus, stated Judge Goettel, Silverman was free to use the public domain 1928-1948 programs only if the author did not infringe other property rights of CBS.

In turning to the post-1948 radio programs, the court found that CBS held valid copyrights in the scripts although they were not registered with the Copyright Office until early 1985, and that Silverman's unauthorized reproduction of parts of the post-1948 radio programs infringed CBS' copyright. Summary judgment was granted to CBS and Silverman was enjoined from reproducing or distributing the script entitled "Amos 'n' Andy Go To The Movies" and ordered to pay damages in an amount to be determined at a later time.

(In a footnote, Judge Goettel rejected the argument that Silverman's use of the copyrighted material was a permissible fair use, apparently relying on two cases in which the deciding factors were, respectively, a more-than-de minimus use and a non-parody use.)

The question of whether Silverman's play infringed CBS' copyrights by copying the appearance and costumes of the Amos 'n' Andy characters and the stage settings used on CBS' television shows called forth the statement by Judge Goettel cited at the outset of the report. In discussing the television programs, Judge Goettel found that CBS had valid copyrights in the programs, notwithstanding Silverman's claim that many of the programs were "published" without a copyright notice prior to the date of publication set forth in copyright registration statements. CBS listed the date of publication on most of the registration statements as June 1, 1953, when the Amos 'n' Andy series was syndicated for exhibition on non-network television stations. Some of the programs may have been broadcast without copyright notice prior to syndication, but distributing copies of the programs for national broadcast, even to non-affiliate stations did not amount to general publication in this case, because CBS did not "manifest a purpose to surrender all rights in the works and allow the public to copy them."

In turning to the "much debated issue" of the copyrightability of the characters in a copyrighted work, Judge

Goettel noted Silverman's argument that even if the Amos n' Andy characters were sufficiently delineated to be copyrightable, the characters were contained in works which had entered the public domain and therefore could be freely used in a derivative work. Judge Goettel stated that the duplication of the characters as they appeared on the television programs would infringe CBS' copyrights. However, summary judgment was not available to CBS on its counterclaim for infringement of the television programs, for until Silverman presented his characters on stage, stated the court, it was impossible to determine the issue of substantial similarity.

CBS also asserted a trademark infringement claim based on its purported rights in the term Amos 'n' Andy as well as in about fifteen other related character names, words, and phrases such as "The Mystic Knights of the Sea." Judge Goettel found that the name Amos 'n' Andy and the other character names and distinctive features of the Amos 'n' Andy radio and television programs were protectable marks. And although the words and phrases for which CBS claimed trademark protection were not so distinctive as to constitute trademarks in their own right, "if used in an attempt to recreate the characters," the words and phrases would aid in determining whether the character marks had been infringed.

Given the above, the court noted that CBS had not used the trademarks associated with Amos 'n' Andy for twenty years. The company argued that it intended to use the marks in the future, but the court ordered further findings on the issue of whether CBS had abandoned its trademarks and denied a motion for summary judgment on the counterclaim for trademark infringement.

Summary judgment also was not available on CBS' counterclaims for unfair competition and dilution. Judge Goettel agreed that "distinctive literary and entertainer characterizations can be protected under the law of unfair competition," but the question of whether Silverman's production would evoke the "nostalgia" of the Amos 'n' Andy radio and television programs and, in its portrayal of the characters, would deceive the public as to the source of the play, were issues of fact. The resolution of the dilution counterclaim also required consideration of Silverman's "finished product."

CBS did not engage in harassment in filing its motion, concluded the court in declining to impose the sanctions requested by Silverman, and Judge Goettel cautioned Silverman that the author would not be allowed to prolong his action indefinitely while revising his script in order to avoid any further liability to CBS.

Silverman v. CBS Inc., 632 F.Supp. 1344 (S.D.N.Y. 1986) [ELR 8:7:11]

J.D. Salinger fails to obtain preliminary injunction restraining distribution of a biography quoting his unpublished letters

A Federal District Court in New York has refused to grant author J.D. Salinger's request for a preliminary injunction restraining Random House from distributing a biography by Ian Hamilton entitled "J.D. Salinger: A Writing Life."

During the course of his research, Hamilton discovered several series of letters written by the reclusive Salinger. In order to gain access to the letters, copies of which had been donated by their recipients to research libraries at Harvard, Princeton and the University of Texas, Hamilton agreed not to publish the documents without the permission of the universities and of the copyright holders. The manuscript for the biography contained substantial quotations from about 70 letters.

After Salinger obtained a copy of the galleys of the book, he "caused" the letters to be registered for copyright in his name, and demanded that the book not be published unless and until all of the unpublished material was deleted.

Hamilton revised the biography, in part by limiting the quotations to no more than ten percent of any one letter; the revised proofs included between 200-300 words which were directly quoted from the correspondence. And Hamilton eliminated all direct quotations from the letters which were available at the university libraries in response to the libraries' decision to refuse permission to the author to quote from those letters. Nonetheless, Salinger sued Hamilton and Random House for copyright infringement.

In declining to grant a preliminary injunction, Federal District Court Judge Pierre Leval first considered Salinger's contention that the unauthorized use of copyrighted material involved more than 200-300 quoted words and extended to lengthy paraphrasing. After reviewing 59 cited instances of alleged infringement, the court determined that "the vast majority of the material taken by Hamilton from the letters [was] not copyright protected" And "unprotected information of this nature includes far more than the where, when and with whom. Information as to the subject's thoughts and feelings is vital historical fact for the biographer and belongs in the unprotected categories ... so long as the biographer does not ... [take] the author's craftsmanship."

In this case, virtually all of the material challenged by Salinger reported a historical fact, including information concerning the author's resentment against literary critics, his evaluation of Hemingway, and his determination at one point to write for Hollywood. Certain unoriginal phrases used by Salinger also did not qualify for copyright protection.

Judge Leval then cited several instances where Hamilton reproduced "an image, a literary device, metaphor or choice of words" that was protected - in all, there were about 30 letters from which a few words of protected material were quoted or paraphrased. Hamilton's use of the copyrighted material constituted a fair use, ruled the court.

Salinger argued that the privilege of fair use did not apply to unpublished work. In considering this issue, the court referred to a series of New York trial court decisions in the case of Estate of Hemingway v. Random House, Inc. in which Hemingway's wife and estate sought to enjoin the publication of a biography of the author, claiming a common law copyright in Hemingway's unpublished letters. In 1968, the claim based on common law copyright was dismissed after the court had considered all of the fair use factors subsequently set forth in section 101 of the Copyright Act; the court found it significant that the author of the biography did not quote verbatim from the letters; that the book was a biography; and that there appeared to be no harm to the market for the letters. According to Judge Leval, the Hemingway court did not base its ruling, as argued by Salinger, only on the ground that the copying was de minimis, but rather made a finding of fair use.

Judge Leval went on to characterize as "exaggerated and unreasonable" Salinger's argument that there may be no fair use of an unpublished work. The fair use protection extended to quotations from an unpublished work would not be so extensive as to deprive the creator of the right to exercise "reasonable control over his own artistic reputation and over the initial presentation of his work" But if those interests were not affected by the proposed use, i.e., if the use did not unfairly interfere with the creator's "reasonable enjoyment of his rights of literary property," it would be permitted.

In the instant case, a finding in Hamilton's favor was warranted for the following reasons: "Hamilton's use of Salinger's copyrighted material is minimal and insubstantial; it does not exploit or appropriate the literary value of Salinger's letters; it does not diminish the commercial value of Salinger's letters for future publication; it does not impair Salinger's control over first publication of his copyrighted letters or interfere with his exercise of control over his artistic reputation. The biographical purpose of Hamilton's book and of the adopted passages are quite distinct from the interests protected by Salinger's copyright ... [and] it is a serious, carefully researched biography of an important literary figure (of whom little is known); its publication is of social and educational value."

Judge Leval conducted an extensive review of the fair use factors and observed, with respect to the extent of Hamilton's appropriation, that most of the information taken from the letters was not protected by copyright, that none of the material was at the heart of Salinger's letters, nor of Hamilton's book, that the copyrighted material added "color and accuracy of detail" to the portrait of Salinger, and again, did not interfere with Salinger's control over initial publication.

The market effect factor prompted the court to state that "if Hamilton's book revealed the literary content of Salinger's letters to such degree that any appreciable number of potential purchasers ... would be dissuaded from buying the letters, feeling that they had already read them in Hamilton that would argue strongly against a finding of fair use." But Hamilton's use of the copyrighted material was so slight that it did not diminish the marketability of Salinger's letters among the author's readers, concluded the court.

The factor of commercial or educational use favored Hamilton, stated Judge Leval - the book was not an act of "commercial voyeurism," but was a "serious, wellresearched history" of a figure of public interest. The case of Harper & Row v. Nation Enterprises (ELR 7:2:6) was distinguished by the court. In that case, the Nation purportedly deprived a copyright licensee of commercial value by the magazine's early publication of an excerpt from the memoirs of former President Ford; the excerpt contained the "heart" of the copyrighted work, with the result that the market for the copyrighted work was seriously affected-these factors were not present in this case.

Salinger further argued that Hamilton's disregard of the agreements with the libraries would disqualify the biographer from receiving the equitable benefits of the fair use doctrine. The court, however, stated that even if it were assumed that Hamilton was "cavalier" about the need to obtain permission from the libraries, that did not justify enjoining the distribution of the book as revised.

Before turning to the question of trademark infringement, Judge Leval chose to point out that fair use was so clearly established, that he did not find it necessary to reach a finding on whether, if fair use were not available, any copyright infringement would be so insignificant as to warrant the denial of a preliminary injunction. The court did state that Hamilton in all likelihood would prevail on this issue because his use of copyrighted expression was so minimal that it would be difficult to find any harm to Salinger. The trademark infringement claim was based on the argument that the biography's quotations and paraphrases were likely to mislead a reader into believing that Salinger was interviewed for, and sponsored, the biography. This contention was "without merit," stated Judge Leval, who noted that Salinger's "reclusive unavailability" was one of the major themes of the biography; there was no pretense that Hamilton interviewed Salinger; and there was no showing of distortion that would give rise to a Lanham Act claim.

Salinger has appealed Judge Leval's decision and a Federal Court of Appeals has stayed the publication of the biography pending arguments before the court.

Salinger v. Random House, Inc., Case No. 86 Civ. 7574 (S.D.N.Y., Nov. 5, 1986) [ELR 8:7:12]

G.P Putnam's obtains directed verdict on copyright and trademark infringement claims brought against publisher in connection with book entitled "Nureyev"

The 1982-1983 annual edition of "Books in Print" and the September 1982 issue of "Forthcoming Books" erroneously listed G. P. Putnam's Sons as the publisher of the book "Nureyev" by Clive Barnes. Putnam's had been negotiating publishing rights in the book with its copyright owner, Helene Obolensky, but the negotiations terminated in July 1982. Obolensky thereafter published and distributed the book independently. When the trade publications printed the incorrect information about the publisher of the Nureyev work, Obolensky sued Putnam's for breach of contract, negligence, misappropriation, tortious interference with contract, copyright infringement and misidentification of goods in interstate commerce.

After the case was tried to a jury, Federal Court of Appeals Judge Edward Weinfeld granted Putman's motion for a directed verdict as to Obolensky's federal copyright claim. Obolensky had contended that Putnam's interfered with her right of first distribution and publication by listing the incorrect publication information or causing it to be listed in the two trade works. Judge Weinfeld noted that during the time when the parties still were engaged in negotiations, Putnam's, with Obolensky's knowledge and consent, listed the Nureyev book in two of the company's sales catalogs, presented the book at a May 1982 sales conference and registered the book with the Library of Congress, indicating that the book was to be published by Putnam's. However, when the negotiations terminated, Putnam's notified its sales force to stop selling the book and canceled all outstanding orders. The November 1982 and January 1983 issues of Forthcoming Books listed the Nureyev book as "...canceled. Putnam's."

The court pointed out that Putnam's never copied the book; never sold any copies of the book; and never had possession, custody, or control of any copies of

"Nureyev" and thus did not interfere with the copyright in the work.

Judge Weinfeld also granted Putnam's motion for a directed verdict on Obolensky's cause of action under section 43(a) of the Lanham Act which prohibits the false designation of the origin of goods in interstate commerce. According to Obolensky, Putnam's listed the book in the trade publications after the negotiations ended and therefore misidentified the origin of the book, to Obolensky's detriment. Putnam's denied that it provided the trade publications with the information that the book was the company's product. In any event, Putnam's did not cause any copies of the book to enter interstate commerce.

The court, while noting that a four day trial of the matter had been held, observed that since the case presented primarily state common law claims, dismissal of these pendent claims, for lack of federal subject matter jurisdiction, was "fully warranted"

Obolensky v. G.P Putnam's Sons, 628 F.Supp. 1552 (S.D.N.Y. 1986) [ELR 8:7:13]

Expenses incurred by author in writing a book were subject to capitalization requirement of Internal Revenue Code, rules Tax Court

Under a 1972 contract with Random House, author Lloyd McKim Garrison received an advance of $2500 in connection with the proposed publication of a book entitled "Still a Distant Drum." Garrison received another advance of $2500 in 1978; the book has not as yet been published. During 1980, Garrison incurred expenses of $3,055 with respect to his writing, including sums for rent, utilities, business entertainment and office supplies, and claimed deductions for these expenses. The Internal Revenue Service disallowed the deductions on the ground that, under section 280, Garrison was required to capitalize the deductions and depreciate them under the income forecast method.

Garrison argued that section 280 was intended to apply to tax shelters and not to authors. But Tax Court Chief Judge Sterret noted that on its face, the language of the statute was unambiguous in providing that in the case of an individual, amounts attributable to the production of a book must be capitalized and deducted over the life of the income stream generated from the production activity. Although Congress may have enacted the section in an attempt to regulate motion picture tax shelters, there was no evidence that tax shelters were the exclusive object of the section. Furthermore, the statute applied to Garrison although he began writing "Still a Distant

Drum" in 1972, several years before the section's effective date, stated Judge Sterret; the Commissioner therefore properly disallowed Garrison's deductions.

Garrison v. Commissioner of Internal Revenue, T.C. Memo 1986-48 (U.S.Tax Ct. 1986) [ELR 8:7:14]

Manager of musical group Alabama was required to provide accounting of his net profits to group's former exclusive corporate booking agent, rules Tennessee Supreme Court

According to the Tennessee Supreme Court, an exclusive agency contract entered into in May 1980 between the musical group Alabama and the International House of Talent was a contract with the corporation although the parties contemplated that Dale Morris (a fifty percent stockholder and a director of the corporation) would provide his personal services advising and managing the bookings for the group. Morris subsequently discontinued booking through International House of Talent, but Alabama continued to seek his services; in mid-1981, the group severed its relationship with the corporation.

International House of Talent (whose other stockholder was musician Billy Wayne ("Crash") Craddock) sued the group and Morris for breach of the exclusive agency agreement and for breach of fiduciary duty.

The court found that Alabama was not liable to the corporation since the agency no longer was able to provide Morris' personal services, upon which the group had relied.

But Justice Harbison found that Morris wrongly engaged in competition with International House of Talent without first having sought to dissolve the corporation or to obtain other appropriate relief. It was noted that for more than a year the parties had treated the contract as having been made with the corporation, and not with Morris personally. And Morris, having remained on the board of directors of the corporation, was required to account to International House of Talent for the profits he made from booking Alabama from May 1981 through the remainder of the corporation's contract with the group, concluded the court.

International House of Talent, Inc. v. Alabama, 712 S.W.2d 78 (Tenn. 1986) [ELR 8:7:14]

Washington Motion Picture Fair Competition Act's regulation of film exhibition bidding procedures applies to licensing by negotiation as well, rules Washington Supreme Court

The State of Washington's Motion Picture Fair Competition Act included provisions prohibiting blind bidding and requiring that all bids to distributors be submitted in writing. When Seven Gables Corporation, a theater owner, sued MGM/UA Entertainment Co., claiming that the company's licensing practices violated the act, the distributor argued that the act regulated licensing by bidding, but did not regulate the licensing of films by negotiation.

A trial court granted Seven Gables' motion for summary judgment and enjoined MGM/UA from further violating the act; this decision has been upheld, and broadened, by the Supreme Court of Washington.

Chief Judge Dolliver first explained that the legislature defined "bid" as an offer or proposal either written or oral, which responds to an invitation to bid. And an invitation to bid was defined as including a solicitation or invitation either written or oral "to bid for" a license or "to... negotiate for" a license. Exempting the negotiation method of licensing from the procedures set forth in the act would serve to defeat the purpose of establishing fair and open procedures for bidding and negotiation, stated the court. Negotiation was not prohibited by the act, but exhibitors' offers would have to be submitted in writing prior to the licensing of a film.

Judge Dolliver went on to reverse two "provisos" in the trial court's ruling, finding that the court incorrectly exempted distributors from the regulatory procedures in instances when the distributor did not solicit more than one exhibitor with respect to licensing a film at a particular theater, and improperly released distributors from the bidding regulations if the distributor received no written bids in response to an "invitation to bid"

The court also found that the act was not void for vagueness. MGM/UA claimed that the act did not clearly include negotiations within the scope of its regulations, but the court determined that the legislature intended that the licensing procedures would apply both to bidding and to negotiation, and that MGM/UA had fair notice of the purpose and scope of the act.

The constitutional issues raised by the distributor did not preclude the granting of summary judgment, concluded the court, given that no issues of material fact were present. And the trial court's order awarding attorney fees of $35,000 was upheld.

Judge Andersen, in a lengthy dissent, expressed the view that the act applied only if a distributor solicited bids, but did not apply to the negotiation process. Licensing films by negotiation enables distributors to set exhibition terms relatively quickly. But the majority's analysis appeared to eliminate the distinctions between negotiating and bidding, stated Judge Andersen, and the "time and money saving advantages" of negotiation would be lost if written negotiations, i.e., bids, and the attendant regulations on bidding were required. Characterizing the majority's decision as a "sweeping and uninvited incursion into private business relationships," Judge Andersen decried the substitution of "an unwieldy and impractical set of guidelines" for the flexibility of negotiation.

The dissent also reviewed the Pennsylvania and Ohio statutes regulating motion picture competition, discounting, as the majority did not, certain variations in the wording of the statutes. Several sentences in the purpose provisions of the Washington and Pennsylvania acts were identical and all three acts contained similar definitions of "bid" However, the majority determined that since a bid in Washington, unlike bids in the other two states, did not have to set forth the terms of exhibition, a "bid" therefore encompassed negotiation.

Judge Andersen pointed out that despite the absence of explicit language in the Washington act, it was obvious that a bid had to contain the terms under which an exhibitor would agree to exhibit a film. And although Washington's definition of "bid" did not state that a bid might be made in response to an invitation to bid or negotiate, the definition of an "invitation to bid" did refer to both licensing methods, as did other provisions of the act. The act's primary concerns were the prohibition of blind bidding and the procedures to be followed when bids were solicited, concluded the dissent, and applying the written bid requirement to licensing negotiations did not serve to further these concerns.

Seven Gables Corporation v. MGM/UA Entertainment Co., 721 P.2d 1 (Wash. 1986) [ELR 8:7:15]

Lease agreement between Wyoming theater operators was unenforceable because essential terms were indefinite

Under the terms of a 1968 lease agreement, Rialto Theatre rented various theater properties located in the Casper, Wyoming area to Commonwealth Theatres, Inc. As part of the agreement, Rialto and Commonwealth warranted that they would not own or operate any theaters within 25 miles of Casper without the prior written consent of the other party. Furthermore, if either Rialto or Commonwealth decided to build another theater in Casper, it was agreed that both companies would construct any such theater.

In 1982, Commonwealth, after lengthy unsuccessful negotiations with Rialto, entered into an agreement with a developer to build a new theater in the Casper area. Rialto filed a lawsuit alleging breach of the lease agreement and seeking injunctive relief preventing Commonwealth from leasing or operating the new theater.

A jury, although returning a verdict which found that Commonwealth had violated the lease agreement, assessed only nominal damages of one dollar.

On appeal, Commonwealth argued that the trial court erred in not ruling, as a matter of law, that the lease provision concerning the operation of new theaters was unenforceable.

The Supreme Court of Wyoming, after upholding the trial court's dismissal of Rialto's request for injunctive relief, found that Commonwealth correctly argued that the noncompetition provision at issue was an agreement to agree in the future, and that the essential terms of such agreement were not defined with reasonable certainty. The trial court therefore had erred in not granting Commonwealth's motion for a directed verdict and allowing the matter to go to the jury, concluded the court.

In a special concurrence, Chief Justice Thomas stated that he found an additional reason for the reversal of the jury verdict in that the challenged lease provision amounted to an effort by the parties to create a monopoly in the movie theater business in the Casper area in violation of the state constitution and statutes.

Rialto Theatre, Inc. v. Commonwealth Theatres, Inc., 714 P.2d 328 (Wyoming 1986) [ELR 8:7:15]

Baseball player Dave Parker's dispute with the Pittsburgh Pirates concerning payment of deferred compensation was not subject to arbitration, rules Federal District Court

Dave Parker's motion to dismiss a lawsuit brought by the Pittsburgh Pirates involving his 1979 contact with the club has been denied by a Federal District Court in Pennsylvania.

The Pirates employed Parker from 1970 to 1983; in its action, the club sought a determination that a 1979 contract with Parker was null and void from its inception and that the club was under no further obligation to pay Parker deferred compensation in an aggregate amount of $5.5 million (payable during the period from 1988 to 2007). The Pirates alleged that prior to the execution of the player contract, Parker willfully concealed from the club the facts concerning his use of cocaine from 1976 to 1982; that Parker knew or should have known that such facts were important and material and would have affected the club's decision to negotiate and execute the contract; that Parker was under a duty to disclose to the Pirates, prior to executing the contract, the facts concerning his cocaine use; and that if the Pirates had known this information, the club would not have executed the contract. The club's complaint set forth causes of action for fraudulent concealment, fraudulent inducement, fraudulent misrepresentation and material failure of consideration.

Parker argued that his dispute with the Pirates involved a breach of contract claim which was subject to arbitration, and that the court lacked jurisdiction of the matter.

The court, after reviewing the grievance and arbitration provisions of the uniform player contract and the Basic Agreement between the American and National Leagues and the Major League Players Association, found that Article X of the Basic Agreement was not intended to apply to all disputes between a player and a club and was limited to complaints involving the "interpretation of or compliance with" a player contract. But the Pirates claimed that Parker's contract was void because of acts and failures to act, i.e., Parker's use of cocaine and failure to disclose that fact, occurring prior to the formation of his contract. It was found that the causes of action stated by the Pirates were not "artfully" disguised claims for breach of contract; did not fall within contractual grievance procedures; and could not be converted to breach of contract claims by Parker's "desire to arbitrate" Parker's motion to dismiss the action or to stay the proceedings was denied accordingly.

Pittsburgh Associates v. Parker, Case No.86-1084 (W. D. Pa., Aug. 5, 1986) [ELR 8:7:16]

Thoroughbred horse breeding syndication agreements were not securities under federal or state laws, rules Federal District Court in Kentucky

Syndicate agreements entered into by Bonnie Brae Farms divided the ownership of three thoroughbred stallions into fractional interests for breeding purposes. For each fractional interest owned, the buyer was given the right to breed a mare to one of the stallions (a "nomination"). Owners of the mare held sole ownership of any foal; the expenses of maintaining the stallions were shared pro-rata by the purchasers of the fractional interests.

The buyers, who owned the mares, alleged that Bonnie Brae engaged in a fraudulent scheme to sell the fractional shares by representing that Bonnie Brae would sell the buyers' nominations to other breeders. When Bonnie Brae did not sell the nominations, the buyers alleged that the representations converted the fractional shares into securities regulated by federal and state statutes; and that Bonnie Brae breached its duty of disclosure under the statutes and fraudulently induced the sale of the fractional interests.

Federal District Court Judge Wilhoit first found that the syndication agreements in this case were not securities; a common venture was not present because each purchase of a fractional interest was "unitary in nature" The profits of the owners primarily depended on the quality of the mare, the individual owner's efforts and skill in training, and the good fortune of the foal. So "... . an increase in the value of the nomination, will not lift all boats to the same height," observed the court.

Furthermore, the syndication agreements stated that the syndicate manager would furnish a list of breeders who inquired as to the availability of nominations; selling the nominations was the job of each owner.

The buyers' securities claims under Kentucky state law also were dismissed, as were causes of action under the Racketeer and Corrupt Organizations Act.

Kefalas v. Bonnie Brae Farms, Inc., 630 F.Supp. 6 (E.D.Ky. 1985) [ELR 8:7:16]

Christie, Manson & Woods improperly deducted legal fees from proceeds of auction of Disney art work, rules Federal District Court in New York; in separate matter involving auctioneer's sale of allegedly stolen Picasso lithograph, Illinois court refuses to grant injunction to prevent disbursement of auction proceeds

When an auction of Disney celluloids, sketches and drawings collected by John Basmajian, a former studio animator, was held in December 1984, the works were sold by Christie, Manson & Woods for almost $500,000. Christie's paid Basmajian $432,000, after deducting commissions, insurance premiums and legal fees

- the legal fees were incurred in connection with a lawsuit brought by Walt Disney Productions in an unsuccessful attempt to enjoin the auction (ELR 7:5:17). Basmajian claimed that by withholding the amount of the legal fees, Christie's violated its contractual and fiduciary duties.

A Federal District Court in New York has ruled on behalf of Basmajian. The consignment contract between the parties, while allowing Christie's to deduct certain legal fees from the auction proceeds, did not contain an express agreement by Basmajian to indemnify Christie's for the expenses involved in an action brought by a third party claimant such as Disney, noted Judge Robert L. Carter. And Basmajian, by establishing in the preliminary Disney proceeding that he owned the consigned art, made it less likely that Disney would be able to prevail on the merits of the case. Christie's decision to hire its own counsel was not fairly chargeable to Basmajian on the basis of any other contract provision, concluded the court; summary judgment therefore was granted to Basmajian on the breach of contract claim, along with damages of $34,000.

In a separate matter, Christie, Manson & Woods found itself a party in an action involving its sale of a lithograph by Pablo Picasso entitled "La Femme au Tambourin." Harry Torao Ichiyasu alleged that Kenneth Hodorowski had stolen three pieces of art, including the lithograph, from Ichiyasu's home; that Hodorowski hired art dealer B.C. Holland to sell the lithograph and that Holland consigned the work to Christie's New York office. The piece was sold in November 1984 for about $85,000; the money ultimately was distributed to Hodorowski.

After the lithograph was sold, Ichiyasu discovered the alleged theft of his property and demanded the return of the piece. Christie's rescinded the sale, but retained possession of the lithograph. Ichiyasu then sued Christie's, among others, seeking the return of the piece and damages for any loss in value.

Christie's filed a third party complaint against Holland, alleging that Holland breached implied and express warranties of good title which were contained in the consignment agreement between Christie's and Holland. Holland, in turn, filed a cross claim against Hodorowski, arguing that should Holland be found liable to Christies', Hodorowski was required to indemnify him for any damages owed to Christie's.

A Federal District Court in Illinois has declined to grant Holland's motion for injunctive relief seeking to prevent Hodorowski from disposing of the proceeds of the November 1984 auction. The court declared that Holland did not establish irreparable harm-allegations of Hodorowski's "impending insolvency" were conclusory and did not show a likelihood of success on the merits.

Furthermore, Hodorowski contended that the lithograph was a gift from Ichiyasu's wife, and Holland had not presented facts to support the allegation that Hodorowski was likely to be found guilty (at a pending criminal trial) of stealing the lithograph.

Basmajian v. Christie, Manson & Woods International, Inc. 629 F.Supp. 995 (S.D.N.Y. 1986); Ichiyasu v. Christie, Manson & Woods International, Inc., 630 F.Supp. 340 (N.D.Ill. 1986) [ELR 8:7:17]

Likelihood of confusion between High Society Magazine's "L.L. Beam's Sex Catalog" and L.L. Bean sporting goods catalog precluded summary judgment in trademark infringement action

The October 1984 issue of High Society magazine contained a bogus advertisement for "L.L. Beams Sex Catalog" L.L. Bean, Inc., the publisher of a well-known mail order catalog of clothing and sporting goods, sued Drake Publishing for trademark infringment, unfair competition, deceptive trade practices, interference with prospective business advantage and trade libel. L.L. Bean sought damages and injunctive relief.

Federal District Court Judge Gene Carter granted Bean's motion for injunctive relief under Maine's trademark dilution statute and Drake's motion to dismiss Bean's claims of tortious interference with business and trade libel, but denied both parties' motions for summary judgment on the counts of trademark infringement, dilution, unfair competition and deceptive trade practices.

With respect to the trademark infringment claim, Drake conceded that the terms "Beam's" and "L. L. Beam's" were "colorable imitations" of the Bean trademark.

Drake contended, however, that the term "L. L. Beam" used in conjunction with the name High Society magazine was not likely to be confused with the real L. L. Bean catalog. Bean submitted evidence suggesting that certain potential customers could be confused as to the source of the sex catalog. The court concluded that there existed genuine issues of material fact on the likelihood of confusion and denied both parties' motions for summary judgment.

In addition, Bean sought relief under section 43(a) of the Lanham Act, which imposes liability on anyone who uses a false designation of origin or false representation of trademark in connection with any product or service. Drake argued that because Bean was not in direct competition with Beam's sex catalog, no claim could be raised. The court, however, found it sufficient that Bean advertised in magazines and that the format of the sex catalog was that of a magazine advertisement. Thus, summary judgment was not available due to the question of fact on the likelihood of confusion between the two catalogs.

Summary judgment also was denied on Drake's unfair competition claim and its claim under Maine's Deceptive Trade Practices Act. However, because Bean established the distinctive quality of its trademark and presented evidence that its mark would be tarnished by the sex catalog, the court granted Bean's motion for injunctive relief under Maine's trademark dilution statute, noting that such relief would not offend Drake's First Amendment rights, because the state has a strong interest in protecting distinctive trademarks, such as L.L. Bean's, from harmful uses.

In closing, the court held that Bean's claim for trade libel was essentially the same as its claim for tortious interference with business relations. Because Bean did not allege fraud, malice or intimidation in its action against Drake, the court rejected these claims.

L.L. Bean, Inc. v. Drake Publishing, Inc., 625 F.Supp. 1531 (D.Me. 1986) [ELR 8:7:17]

Policy of extending preferential treatment to female applicants for FM radio stations in comparative evaluation proceedings exceeded statutory authority of Federal Communications Commission, according to Federal Court of Appeals

A Federal Court of Appeals in Washington, D.C. has ruled that the Federal Communications Commission exceeded its statutory authority in adopting a policy granting preferential treatment to female applicants for FM radio stations in comparative evaluation proceedings. In

1981, James U. Steele and Dale Bell each applied for construction permits for new FM broadcast facilities at St. Simon's Island, Georgia. An Administrative Law Judge found that the merits of each party were close, but granted Bell's application in large part because of her status as a female with past local residence.

The court noted that while the Commission has a comprehensive policy on granting preferences to minority applicants, with the reasonable expectation that increased minority ownership may promote programming diversity, women apparently are accorded preferential treatment only in comparative hearings for FM licenses. But, stated Judge Tamm, "it simply is not reasonable to expect that granting preferences to women will increase programming diversity." Calling the Commission's presumption "so questionable as a matter of fact and so offensive as a matter of principle," the court declared the female preference policy invalid, reversed the

Commission's decision and remanded the matter for further proceedings.

In a lengthy dissent, Judge Wald stated that the Commission's decision to grant "enhancement merit" to women was within its public interest mandate, particularly since the court consistently has supported the Commission's policy of awarding preferences for minority ownership. In Judge Wald's view, the Commission's policy served to recognize the significant underrepresentation of women in the broadcast industry and to encourage increased ownership and participation of women in the media in the interest of promoting diverse viewpoints.

Steele v. Federal Communications Commission, 770 F.2d 1192 (D.C.Cir. 1985) [ELR 8:7:18]

Summary judgment is denied publisher of sewing manual in copyright infringement action

In 1976, the Sew/Fit Company, Inc. published a book by Doris Ekern entitled "Slacks Cut to Fit Your Figure" The book was very successful, but in December 1980, Sew/Fit terminated Ekern's employment with the company. Soon after, the company discontinued publication of Ekern's book. In the spring of 1981 Sew/Fit published a book entitled "Slacks for a Perfect Fit" by Ruth Oblander, the company's president and sole shareholder. Oblander's book was substituted for Ekern's book on the April 1981 Sew/Fit publications list.

When Ekern sued the Sew/Fit parties on a variety of claims Federal District Court Judge Norgle first found that Ekern possessed a protectable copyright interest in her book. The court distinguished Landsberg v. Scrabble Crossword Game Players Inc., 736 2F2d 485 (ELR

6:8:7) a case which discussed the principle that the copyrightability of fact-based works is fundamentally different from that of fictional works. Judge Norgle stated that "fact-based works are limited to a rather narrow range of expression ... More likely than not a subsequent expression of a fact-based idea will appear to be a substantially similar paraphrase of the original work" If a fact-based work is found to be copyrightable, this may serve to grant its author a copyright on ideas, in that a later author could not restate the ideas contained in the original work without being found to infringe on the original work-a result contrary to the Copyright Act's policy of encouraging the free exchange of ideas.

Ekern's book, however, did not consist only of short, technical textual passages describing sewing techniques. The author's combination of textual explanation and art work constituted original expression which was entitled to copyright protection.

In turning to the question of substantial similarity, Judge Norgle observed that since at least five of the thirty alleged appropriations appeared to be direct copies of Ekern's work, triable issues of fact were present, precluding summary judgment on behalf of Sew/Fit.

Ekern also had brought a cause of action for breach of contract based on Sew/Fit's purported promise to use its best efforts to sell, promote and distribute her work. But the initial royalty agreement between the parties granted Sew/Fit the discretion to discontinue the publication or distribution of the book, noted the court in dismissing this claim.

A cause of action for breach of an implied covenant of good faith was not dismissed since, if Ekern demonstrated that copyright infringement occurred, the author then might be able to establish that Sew/Fit published Oblander's book for the purpose of diverting royalties from Ekern. But Sew/Fit was granted summary judgment on Ekern's claim of breach of fiduciary duty-the relationship between a publisher and an author is not generally regarded as one between fiduciaries, and Ekern did not make a clear and convincing showing that a fiduciary relationship existed in this case.

Ekern v. Sew/Fit Company, Inc., 622 F.Supp. 367 (N.D.Ill. 1985) [ELR 8:7:18]

Briefly Noted:

Publishing Contract.

The authors of a book entitled "The 100 Best Corporations to Work for in America" entered a contract with Addison-Wesley Publishing Company whereby Addison-Wesley agreed to pay specified royalties for each copy of the book sold by the company. In an action alleging breach of contract and various other causes of action against the publisher, the authors claimed that Addison-Wesley sold a large number of copies of the book at a rate of less than one-half of the normal retail price, and paid royalties at a lower rate on these sales.

A Federal District Court in California has ruled that the authors stated causes of action for breach of contract and for breach of the implied covenant of good faith and fair dealing; the court rejected Addison-Wesley's assertion that the implied covenant of good faith was contradicted by a provision giving the publisher unfettered discretion to establish the sales price of the books. The author's cause of action for fraud also was not dismissed, giving them the opportunity to show that the publisher's use of a lower royalty provision in the contract contravened the parties' express intentions and industry custom, and that the publisher misled the authors into believing that the challenged royalty provision would apply only to special sales. And the authors were allowed to proceed with their claim that they were fraudulently induced to enter a second contract with Addison-Wesley when the publisher promised to pay them royalties at the higher rate set forth in the first contract, but that the publisher breached the second contract as well.

However, punitive damages were not available to the authors unless the complaint was amended to allege the existence of a special, confidential or fiduciary relationship. And claims alleging conversion of royalties, breach of fiduciary duty and promissory estoppel were dismissed by the court.

Levering v. Addison-Wesley, 12 Med.L.Rptr.1807 (N.D.Ca. 1986) [ELR 8:7:19]

Publishing Contract.

In June 1984, Random House deposited $300,000 with Lecht Sciences for the right to evaluate certain master disks and print material. When the publisher found the material commercially unsuitable and requested the refund of the deposit, Lecht refused to comply. The trial court granted Random House's motion for summary judgment, finding that the publisher's decision concerning the material was reached in good faith. But an appellate court has determined that factual issues were present in the case, such as the duration of the publisher's exclusive "option" to evaluate the developmental materials, that precluded the granting of summary judgment to either party.

Random House v. Lecht Sciences, Inc., 498 N.Y.S.2d 842 (N.Y.App. 1986) [ELR 8:7:19]

Libel.

A second Federal District Court (see ELR 7:10:11) has considered Victor Lasky's libel action against American Broadcasting Companies and has concluded that ABC's documentary program "The American Inquisition" was, on its face, reasonably susceptible of a defamatory meaning. In refusing to dismiss Lasky's complaint, Judge Walker, after describing the content of the program and discussing the contentions of the parties, discerned at least two interpretations of the material at issue that were not defamatory as to Lasky. But the court declined to find that Lasky's defamatory interpretation of the broadcast, i.e. that Lasky caused the downfall of educator Luella Mundel by calling her a Communist, was not reasonable.

ABC's claim that it was protected by the privilege of neutral reportage was rejected as inapplicable since the case did not involve the "accurate and disinterested reporting of serious charges leveled by a responsible organization against a public figure under circumstances where a raging and newsworthy controversy existed" The defamatory statement alleged by Lasky was not neutrally reported by ABC; rather, ABC was its purported author, the summary judgment was denied the broadcaster.

Lasky v. American Broadcasting Companies, Inc., 631 F.Supp. 962 (S.D.N.Y. 1986) [ELR 8:7:19]

Invasion of Privacy.

A Federal District Court in Mississippi has denied Hustler Magazine, Inc.'s motion for summary judgment in an invasion of privacy action brought by Thomas Blackwell. Hustler contended that a state statute, which establishes a one year limitation on actions for assault, false imprisonment, libel or slander, was applicable to invasion of privacy claims and thus barred Blackwell's suit. The court disagreed, and determined that invasions of privacy suits were not listed specifically in the statute and could not "be defined to fall squarely within" any category mentioned in the statute. Therefore. Blackwell Is suit was not precluded by the Mississippi statute of limitations.

Blackwell v. Hustler Magazine, Inc., 633 F.Supp. 870 (S.D.Miss. 1986) [ELR 8:7:19]

Criminal Law.

A Federal District Court in Hawaii, citing the United States Supreme Court's decision in Dowling v. United States (ELR 7:5:9) has set aside Alvin G. Nunes' plea of guilty to charges that he violated 18 U.S.C. section 2314 for the interstate transportation of copyrighted motion pictures. The court found that the reasoning of Dowling applied equally to bootleg or, as in the instant case, pirated copyrighted material, and agreed with Nunes that the conduct for which he was indicted and which he admitted by his plea of guilty did not constitute a violation of section 2314. The ten year sentence imposed on Nunes therefore was vacated and the charges against him under section 2314 were dismissed.

Nunes v. United States, 630 F.Supp. 1048 (D.Hawaii 1986) [ELR 8:7:19]

Bandmaster Compensation.

In July of 1983, the City of Sioux Falls, South Dakota, increased the salary of the city bandmaster from $16,000 a year to $23,000 a year. Several months later, when the City Commission discovered that an accounting firm's salary recommendation was based on the erroneous assumption that the bandmaster position was a full-time job, it voted to decrease the salary to three percent over its original figure and recoup its overpayment in the form of salary deductions. The city bandmaster, Dr. Leland Lillehaug, filed a section 1983 suit challenging the city's action. Lillehaug contended that he possessed a property interest in the increased salary, that the city's unilateral reduction of his salary constituted a taking without due process, and that the deduction of earlier salary overpayment constituted garnishment without due process. A Federal Court of Appeals has affirmed a District Court's ruling dismissing Lillehaug's constitutional claim. The court found that city ordinances made it clear that the job of bandmaster was appointed and that the City Commission could discharge Lillehaug from the position without cause by a majority vote. Thus, the court held that Lillehaug had no property interest in his continued employment, nor in any particular salary level. Furthermore, because the City of Sioux Falls was Lillehaug's employer and no third party was involved, the City Commission's decision to deduct prior overpayments from Lillehaug's salary did not constitute garnishment. Lillehaug was entitled to challenge the recoupment under state contract law.

Lillehaug v. City of Sioux Falls, 788 F.2d 1349 (8th Cir. 1986) [ELR 8:7:20]

Cable Television.

Storer Communications has obtained preliminary injunctive relief barring several individuals from engaging in the unauthorized sale and installation of equipment intended for the interception of Storer's transmission of programming and the decoding of the transmissions for reception on standard television receivers. A Federal District Court in Florida noted that the manufacture and distribution of equipment intended for the unauthorized reception of communications services offered over a cable system violated section 553 of the federal Cable Communications Policy Act of 1984, and that Storer's services were the type the statute sought to protect. Furthermore, when the allegedly unlawful equipment was sold, it was with the knowledge or intent that customers most likely would not contact Storer to arrange to pay for the company's programs. The court also found that the installation of the equipment violated several state statutes. Injunctive relief was warranted because Storer was likely to succeed on the merits, and the company met its burden of proving that it was irreparably injured because of the impairment of its ability to retain existing subscribers, to enlist new subscribers, to acquire suitable programming and to remain in the cable television business.

Storer Communications, Inc. v. Mogel, 625 F.Supp.1194 (S.D.Fla. 1985) [ELR 8:7:20]

Ballpark Injury.

A Federal Court of Appeals in Chicago has reversed a District Court's judgment in favor of the White Sox Baseball Club. While visiting Chicago in July of 1980, Norman Higgins attended a White Sox game at Comiskey Park. As he walked by a concession stand on the way to his seat, Higgins was struck in the head by a door that had broken free from its hook above the stand. He filed suit against the concession service, Illinois Sports Service, the White Sox and Arnell Company, owner of the stadium, under the theories of negligence and res ipsa loquitur. At trial, the jury returned a verdict in favor of the concession service and ballpark. Higgins appealed and challenged the District Court's instructions to the jury. The Court of Appeals held that the lower court had committed prejudicial error by instructing the jury that Higgins was required to prove that the concession stand or ballpark owners had actual or constructive knowledge of the condition of the concession stand

door. The court also found that this was an appropriate case for application of the res ipsa loquitur presumption and remanded the issue back to the trial court.
Higgins v. White Sox Baseball Club, Inc., 787 F.2d 1125 (7th Cir. 1986) [ELR 8:7:20]

Radio Station Promotion.

Steve Jennings, a prisoner in the Texas Department of Corrections, sued the radio station KSCS for breach of an oral contract. Jennings claimed that the station promised over the air that it would play at least three songs in a row or it would "pay you $25,000" He further alleged that he often listened to KSCS and each time the station played "five-in-a-row," it actually played three songs, followed by a brief commercial, and then two songs. However, when Jennings contacted the station on the occasions when it failed to play three consecutive songs, the station refused to pay him the $25,000. A trial court held that there was no enforceable contract because there was no consideration flowing to the station. But a Texas appellate court reversed this decision on the ground that consideration for a contract may consist of either a benefit to the promisor or a detriment to the promisee. The court reasoned that Jennings could have listened to any station but he chose KSCS because it promised to pay him $25,000 if he could catch it playing less than three songs in a row. He thus relied on the promise to his detriment because he was denied the prize. Further, KSCS benefitted from its promise because it gained new listeners, like Jennings, who listened in the hope of winning the money. The court concluded that Jennings' petition sufficiently stated a cause of action for breach of contract to necessitate a trial on the merits.

Jennings v. Radio Station KSCS, 708 S.W.2d 60 (Tex.App. 1986) [ELR 8:7:20]

Jurisdiction.

A Federal Court of Appeals in California has affirmed a trial court's dismissal, for lack of personal jurisdiction, of a lawsuit against musician Don Breeland and other members of The Oak Ridge Boys. Marilyn Scott, a PSA flight attendant, claimed that Breeland assaulted her after he boarded a plane in Reno, Nevada. Breeland was removed from the plane before it took off for its scheduled flight to California, but the other members of the group remained aboard. The court held that neither Breeland, a Tennessee citizen, nor The Oak Ridge Boys, a Tennessee corporation, had sufficient substantial, continuous or systematic contacts with California to justify the court's exercise of general jurisdiction. Scott's claim against Breeland for assault and her claim against The Oak Ridge Boys for negligence in employing Breeland did not arise out of, or result from, the fact that some of the members of the group changed planes in California, from the group's sales of records or tapes in California, or from their occasional musical performances in the state. The court concluded that these activities did not justify the exercise of jurisdiction over Breeland or the group, and upheld the trial court's dismissal of the complaint.

Scott v. Breeland, 792 F.2d 925 (9th Cir. 1986) [ELR 8:7:21]

Previously Reported:

The following cases, which were reported in previous issues of the Entertainment Law Reporter, have been published: Barris/Fraser Enterprises v. Goodson-Todman Enterprises, Ltd., 638 F.Supp. 292 (8:5:9); Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc., 642 F.Supp. 1031 (8:5:9); Columbia Pictures Industries, Inc. v. Aveco, Inc., 800 F.2d 59 (8:5:10). [ELR 8:7:21]

IN THE NEWS

American Multi-Cinema pleads guilty to criminal antitrust product-splitting charges

American Multi-Cinema has agreed with the Justice Department to plead guilty to two criminal antitrust productsplitting charges in connection with the company's activities in Deptford, New Jersey and in Dallas, Texas, and has agreed to pay fines totalling more than $1 million. Under the agreement, which is subject to judicial approval, AMC will cooperate in continuing government investigations, but the Justice Department will not prosecute AMC for alleged splits in any market prior to May 2, 1985. [Dec. 1986] [ELR 8:7:21]

Walt Disney Productions and Wherehouse Records agree to pay $9000 to children because rented videotape of a Disney cartoon contained added explicit sex scenes

A Los Angeles Superior Court judge has approved a settlement whereby Walt Disney Productions and Wherehouse Records agreed to pay $9000 to two children who watched explicit sex scenes which were added to a rented videotape of a Disney cartoon. Although no lawsuit was filed by, or on behalf of, the children, the settlement was brought before the court because minors were involved; no determination was made as to the responsibility of any party for the addition of the sex scenes to the end the cartoon. [Dec. 1986] [ELR 8:7:21]

In the Law Reviews:

Comm/Ent, Hastings Journal of Communications and Entertainment Law, Volume 8, Number 1, has been published and contains the following articles:

Protecting the Press by Protecting the Journalist: A Wrongful Discharge Action for Editorial Employees at Newspapers by Randy Baker, 8 Comm/Ent 1 (1985)

Will the Real Cable Television Industry Please Stand Up: The Divergent Regulatory Treatment of the Cable Television Industry Prior to the Cable Communications Policy Act of 1984 by Michael A. McGregor, 8 Comm/Ent 33 (1985)

Requiem for a Parody by Randall B. Hicks, 8 Comm/Ent 55 (1985)

Cable's "Non-Cable Communications Services": Cable Television as a Common Carrier by David Kupetz, 8 Comm/Ent 75 (1985)

Journal of Law & the Arts, Volume 10, Number 4, has been published by Columbia University School of Law and Volunteer Lawyers for the Arts and contains the following:

Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, 10 Journal of Law & the Arts 1 (1986)

Implementing Legislation to Permit U.S. Adherence to the Berne Convention: A Draft Discussion Bill and Commentary by the Staff of the U.S. Copyright Office, 10 Journal of Law & the Arts 109 (1986)

Comments Submitted to Mr. Harvey Winter, Department of State, Regarding the Preliminary Report of the Ad Hoc Working Group of US. Adherence to the Berne Convention, 10 Journal of Law & the Arts 127 (1986)

The Evolving Legal Status of Home Satellite Earth Stations by Harold M. White, Jr. and Rita Lauria, 8 Communications and the Law 57 (1986) (published by Meckler Publishing Corporation, 11 Ferry Lane West, Westport, CT 06880)

Judicial Behavior and the First Amendment by Thomas A. Schwartz, 8 Communications and the Law (1986) (for address, see above)

The Legality of Sports Leagues' Restrictive Admissions Practices, 60 New York University Law Review 925 (1985)

Omission of Copyright Notice Under Section 405(a): What Kind of Oxymoron Makes a Deliberate Error?, 60 New York University Law Review 956 (1985)

Defamation-in-Fiction: The Limited Viability of Alternative Causes of Action by R. Bruce Rich and Livia D. Brilliant, 52 Brooklyn Law Review 1 (1986)

Celebrities and the First Amendment: Broader Protection Against the Unauthorized Publication of Photographs, 61 Indiana Law Review 697 (1985-6)

Video and Satellite Transmission Piracy in Latin America: A Survey of Problems, Legal Strategies and Remedies by Richard V. Campagna, 20 The International Lawyer 961 (1986) (published by the American Bar Association, 750 N. Lake Shore Drive, Chicago, IL 60611)

The Heavenly Realm of Regulation: What Is the Outlook for DBS Now? by Kimette Glenn, 52 The Journal of Air Law and Commerce 221 (1986) (published by

Southern Methodist University School of Law, Dallas, TX 75275)

Kentucky Law Journal, a publication of the University of Kentucky College of Law, Lexington, KY 40506, has published an Equine Law Symposium in its Volume 74 with the following articles:

Introduction by Gov. Martha Layne Collins, 74 Kentucky Law Journal 689 (1985-6)

Racing Syndicates as Securities by Rutheford B. Campbell, Jr., 74 Kentucky Law Journal 691 (1985-6)

The Prevention and Treatment of Breeding Contract Controversies by John J. Kropp, J. Jeffrey Landen and Monica A. Donath, 74 Kentucky Law Journal 715 (1985-6)

Exclusion of Patrons and Horsemen from Racetracks: A Legal, Practical and Constitutional Dilemma by John J. Kropp, J. Jeffrey Landen and Monica A. Donath, 74 Kentucky Law Journal 739 (1985-6)

America Singing: The Role of Custom and Usage in the Thoroughbred Horse Business by Robert S. Miller, 74 Kentucky Law Journal 781 (1985-6)

Implied and Conditional Consent in the Sale of Horse Shares or Seasons by Sara Grinnell Smith, 74 Kentucky Law Journal 839 (1985-6)

Horse Syndicates as Securities Under Blue Sky Laws by John Coleman Ayers, 74 Kentucky Law Journal 863 (1985-6)

Chernick v. Fasig-Tipton: A Caveat to the Horse Trader by Paul L. Reynolds, 74 Kentucky Law Journal 889 (1985-6)

Libel and Letters to the Editor: Toward An Open Forum by Marc A. Franklin, 57 University of Colorado Law Review 651 (1986)

The Evolution of a Public Issue: New York Times Through Greenmoss, 57 University of Colorado Law Review 773 (1986)

Labor and Antitrust: Striking a Balance Without Balancing by Randall Marks, 35 The American University Law Review 699 (1986)

The Seven Billion Dollar Gray Market: Trademark Infringement or Honest Competition? by Scott R. Baugh, 18 Pacific Law Journal 261 (1986)

Ownership of Employment Creations by Lesley E. Harris, 23 Osgoode Hall Law Journal 275 (1985) (York University, Osgoode Hall, 4700 Keele Street, Downsview M3J 2R5 Ontario, Canada)

The Scope of Freedom of Expression by Richard Moon, 23 Osgoode Hall Law Journal 331 (1985) (for address, see above)

Telephones, Sex, and the First Amendment by Elizabeth J. Mann, 33 UCLA Law Review 1221 (1986)

Copyright Liability for Performance of Music Works: Use of Background Music in the Aftermath of Twentieth

Century Music Corp. v. Aiken, 43 Washington and Lee Law Review 245 (1986)
[ELR 8:7:23]