RECENT CASES

J.D. Salinger was entitled to prevent publication of excerpts from his unpublished letters; Federal District Court's finding that biographer made fair use of letters is reversed

When J.D. Salinger sought a preliminary injunction to prevent Ian Hamilton and Random House, Inc. from distributing a biography of Salinger containing excerpts from the author's unpublished letters, Federal District Court Judge Pierre Leval found that Hamilton had made fair use of the material (ELR 8:7:12), and denied injunctive relief.

In reversing the District Court's decision, Federal Court of Appeals Judge Newman relied on Harper & Row, Publishers, Inc. v. Nation Enterprises 471 U.S. 5 39

(1985; ELR 7:2:8), a case in which the court emphasized the insulation of unpublished works from fair use "under ordinary circumstances" given an author's right to control the first publication of his/her work. Keeping the unpublished status of Salinger's letters in view, Judge Newman proceeded to consider the four statutory fair use factors, and agreed with Judge Leval that Hamilton's purpose in using the letters "to enrich his scholarly biography" weighed the first fair use factor in Hamilton's favor. But the purpose of the use did not entitle Hamilton to any special consideration because the author could have chosen to copy only the factual content of the letters, thereby avoiding the risk of an injunction. Judge Newman pointed out that a "biographer has no inherent right to copy the 'accuracy' or the 'vividness' of the letter writer's expression. Indeed, 'vividness of description' is precisely an attribute of the author's expression that he is entitled to protect."

The second statutory fair use factor, the nature of the copyrighted work, was a critical element for the court. Salinger's letters, although placed in university libraries, remained unpublished; access to the letters was subject to the protection of copyright law. Judge Newman read Harper & Row to mean that unpublished works normally enjoy complete protection against the copying of any protected expression, and that any narrower "scope" of protection for such works seemed to refer to "the diminished likelihood that copying will be fair use when the copyrighted material is unpublished.

The amount and substantiality of the portion used, Judge Newman asserted, in turning to the next statutory factor, referred to the copyrighted expression used, and such protected expression was used whether it was quoted verbatim or only paraphrased. Stating that he could not be certain that Judge Leval included close paraphrases of the letters in the determination of the quantity of copyrighted material used in the Hamilton biography, Judge Newman pointed out that the paraphrased material often exceeded a single sentence from a letter. And the court concluded that Judge Leval incorrectly denied protection to certain word combinations as so "ordinary" as not to qualify for copyright protection, for the "ordinary" phrase "may enjoy no protection as such, but its use in a sequence of expressive words does not cause the entire passage to lose protection ... a copier may not quote or paraphrase the sequence of creative expression that includes such a phrase." The passages containing the purported ordinary phrases displayed a sufficient degree of creativity "as to sequence of thoughts, choice of words, emphasis, and arrangement to satisfy the minimal threshold of required creativity." And Hamilton's paraphrasing of those passages tracked the original so closely as to constitute infringement, concluded the court.

The result of analyzing all fifty-nine of the passages from Hamilton's book cited by Salinger as infringements was a finding by the court that Hamilton copied protected sequences constituting at least one-third of seventeen letters and at least 10 percent of forty-two letters, and these sequences were protected although they included some reporting of facts and "an occasional use of a commonplace word or expression." The taking therefore was significant as to both quantity and quality, for the quoted and paraphrased material appeared on at least forty percent of the book's 192 pages and to a large extent, "make the book worth reading."

The effect-on-the-market fair use factor prompted the court to observe that Salinger was entitled to protect his opportunity to sell his letters (despite his disavowal to do so during his lifetime) and that the value of this opportunity was estimated at over $500,000. Judge Leval had concluded that only a few fragments of the letters were used and that the use had no effect on the marketability of the letters. But although Hamilton's book would not "displace" the market for the letters, some impairment of the market was likely, stated Judge Newman, since Hamilton copied almost all of the most interesting passages of the letters and since some readers might receive the impression that they were reading Salinger's words.

On balance, the claim of fair use was not available with respect to Hamilton's current version of the proposed biography. The court did not deny Hamilton the right to report factual material contained in the letters, but concluded that he could not claim fair use with respect to the protected expressive content of the unpublished writings. The matter therefore was reversed and remanded with directions to the District Court to issue a preliminary injunction barring the publication of the biography in its present form.

Salinger v. Random House, Inc., New York Law Journal, p.1, col.6 (2d Cir., Feb. 4, 1987) [ELR 8:9:3]

Police officer depicted in Joseph Wambaugh's book "Lines and Shadows" was entitled to review of whether personal depiction waiver precluded defamation and invasion of privacy claims

When Joseph Wambaugh wrote "Lines and Shadows" he obtained a personal depiction waiver from Kenneth Kelly, one of the San Diego police officers assigned to the Border Alien Robbery Force whose activities were recounted in Wambaugh's book. Kelly, who obtained $5,000, granted Wambaugh the right "to use, simulate and portray my likeness, activities, experiences and career and to use my name in and in connection with the production, exhibition, advertising and other exploitation of a motion picture, photoplay ... or other printed material ... [including] the right to depict and/or portray me and such other persons to such extent and in such manner, either factually or fictionally as you in your discretion and pursuant to a contract with me may determine and the right to distribute, exhibit or otherwise exploit any such photoplay by any method and in any manner. . ."

Following the publication of the book, Kelly sued Wambaugh and various publishers, including William Morrow & Co. and Bantam Books seeking damages for invasion of privacy, libel, slander, breach of contract, fraud, and negligent infliction of emotional distress. Kelly claimed that the book attributed false statements to him and inaccurately depicted him as "frivolous, flippant and irresponsible" toward his job as a police officer.

The trial court sustained without leave the amend demurrers filed by Wambaugh and the publishers on the ground that Kelly had consented to the publication of the book. A California appellate court has reversed and remanded the trial court's order of dismissal (except as to the breach of contract claim), finding that the court erred in concluding that the waiver, as a matter of law, constituted consent to the publication of allegedly defamatory matters and matters claimed to be an invasion of privacy.

Kelly had argued that the waiver required Wambaugh to elect a factual or fictional account of the activities of the BARF group and did not permit a commingled presentation. But Judge Butler noted that the entirely factual account about Kelly's experiences would not likely "find its way to the bestseller lists;" that Kelly was not paid $5,000 for the right to use his name; and that the police officer consented to the publication of a "mixed bag of fact and fiction The demurrer to the breach of contract cause of action therefore was properly sustained.

With respect to the defamation cause of action, Kelly argued that his consent to publication was given contingent upon the officer's prepublication review of Wambaugh's depiction of him. The court, while not agreeing with Kelly's interpretation of the waiver, declined to find that the rights granted to Wambaugh included, as a matter of law, a license to libel Kelly, (as alleged) or that Kelly was aware that he may have waived his right to privacy. The extent of the privileges conferred by the waiver, including any right to prepublication review, had to be determined by a trier of fact "in the light of the circumstances in which it was executed," stated Judge Butler.

Kelly v. William Morrow & Co., Case No. D003637 (Ca.Ct.App., Nov. 18, 1986) [ELR 8:9:4]

California Supreme Court rules that New York Times was not liable to author William Peter Blatty for omitting the novel "Legion" from the newspaper's best seller list

The California Supreme Court has ruled that author William Peter Blatty was not entitled to recover damages from the New York Times for the newspaper's failure to include, on its weekly list of best selling books, Blatty's novel "Legion," a sequel to "The Exorcist."

Blatty's claims, according to Justice Stanley Mosk (whose opinion was joined by Chief Justice Rose Bird and Justices Reynoso and Panelli) essentially stated that the Times falsely represented that its best seller list was an accurate compilation of actual book sales and that "Legion," by its omission from the list did not meet the newspaper's stated criteria for inclusion, resulting in an alleged decrease in the novel's economic value.

A Los Angeles trial court sustained the Times' demurrer to Blatty's complaint, ordered the action dismissed and awarded costs to the newspaper. An appellate court, however, held that the facts alleged by Blatty were legally sufficient to support the author's causes of action for intentional interference with prospective economic advantage and reversed the judgment of dismissal as to those claims (ELR 7:8:10).

Justice Mosk, in reversing the appellate court's ruling on the intentional interference claims and upholding the dismissal of Blatty's other causes of action, stated that the First Amendment's "zone of protection for the press;' although established in defamation actions, applied as well to other claims involving the alleged injurious falsehood of a statement, and that the protection would apply whether the statement related to an individual or to his/her property. In defamation actions, a party must show that the statement on which a claim is based specifically refers to or is "of and concerning" the parry in some way, stated Justice Mosk, citing Rosenblatt v. Baer, 383 U.S. 75 (1966). And, in Justice Mosk's view, in order to protect free speech and free press values, the "of and concerning" requirement also would apply to claims involving injurious falsehoods.

The injurious statement, i.e. the best seller list, was the gravamen of Blatty's intentional interference claims. But the claims did not allege that the best seller list was of and concerning, or specifically referred to, Blatty or his novel. Furthermore, the alleged false statement apparently concerned a group consisting of books currently in print and their authors-a group far too large to justify any reasonable implication of a reference to Blatty.

In a footnote, it was pointed out that Blatty also failed to effectively allege falsehood because the Times did not make the purportedly false representation that the best seller list was an accurate compilation of actual book sales. Rather, the newspaper set forth a legend stating that "The listings above are based on computer-processed sales figures from about 2,000 bookstores in every region of the United States" - a legend which was not meant to imply an "objective, unbiased and accurate compilation of actual sales" as argued by Blatty, but more of a general ranking of books based on sales figures from a sample of bookstores.

Also rejected in a footnote was Blatty's argument that the First Amendment did not apply to the intentional interference claims arising from the Times' marketing of the best seller list because in that context the list constituted commercial speech. Even when marketed, the list was not commercial speech, stated Justice Mosk, and, in any event, commercial speech is not excluded from First Amendment protection.

It should be pointed out that the court chose to rely primarily on article I, section 2 of the California Constitution in addition to the First Amendment to the United States Constitution.

In a separate opinion, Justice Grodin (joined by Justices Broussard and Lucas), concurred in the court's judgment, but did not join in the conclusion that the of and concerning requirement in defamation actions would be a constitutionally required element of a cause of action for intentional interference with prospective economic advantage whenever the alleged tort occurred in conjunction with a media party. In this case, however, Blatty's allegations, even after he was granted leave to amend, were not sufficient to support a claim that the Times knowingly published false information for the specific purpose of causing the author financial injury.

Blatty v. New York Times Company, Case Nos. B008737 and B010053 (Ca., Dec. 29, 1986) [ELR 8:9:4]

New York State Crime Victims Compensation Board is ordered to reopen account for additional funds earned by Warner Bros. film "Dog Day Afternoon" and to distribute the funds to the victims of the crime depicted in the film

The film "Dog Day Afternoon" depicted John S. Wojtowicz' attempt to rob a bank in Brooklyn on August 22, 1972. Wojtowicz was arrested, convicted and sentenced to twenty years in prison. Artists Entertainment Complex, in partnership with Warner Bros., Inc., produced the film; Artists Entertainment allegedly agreed to pay Wojtowicz one percent of the film's net profit.

Prior to the distribution of any profit, New York State enacted section 632-a of its Executive Law. Section 632-a requires that all proceeds due to a convicted person from the literary or artistic depictions of his or her crime are to be paid to the New York State Crime Victims Compensation Board for the benefit of the victims of the crime. In 1977, the Board took control of the funds due to Wojtowicz and in 1983, found that three victims of his crime were entitied to payments totalling about $35,000. The account was insufficient to satisfy the judgments held by the victims, and when the funds in the account were exhausted, the Board ordered the account closed.

Subsequently, Warner Bros. sought to turn over to the Board additional money derived from the film. In response to claims raised by the crime victims and other parties, the company filed a federal interpleader action. The court, however, determined that it did not have the authority under New York law to distribute the funds. A state interpleader action followed, in which Warner Bros. sought, in part, an order discharging it as a stakeholder and directing that all funds derived from "Dog Day Afternoon" should be deposited with the court.

Judge Elliott Wilk found that Warner Bros. correctly argued that under section 632-a, the company had no interest in the money it was holding and did not have the authority or obligation to decide which of the multiple claimants was entitled to the fund. And the court did not possess subject matter jurisdiction to determine the claims presented because the statute vested exclusive control over the crime victim fund and its distribution to the Board. But the statute did not support the Board's decision to refuse to administer the fund when valid judgments remained unsatisfied. According to Judge Wilk, it appeared that the twenty year statute of limitations generally applicable to the enforcement of money judgments would apply to the enforcement against the fund of judgment obtained under section 632-a.

Warner Bros. therefore was directed to pay to the Board the "Dog Day Afternoon" royalties held by the company and thereafter acquired on behalf of Wojtowicz. The Board was directed to accept payment of the funds and to distribute them in accordance with state law and with prior court decisions. Judge Wilk noted that the court's determination would not deprive any claimant of the right to judicial review of the propriety of the Board's disposition of the fund.

Warner Bros., Inc. v. Wojtowicz, New York Law Journal, p.5, col. 3 (N.Y.Cnty., Dec. 29, 1986) [ELR 8:9:5]

Home Box Office obtains injunction preventing promoter from holding Spinks-Cooney fight until terms of broadcast contract for series of heavyweight boxing matches are met

In March 1986, Don King Productions, Inc. and Butch Lewis Productions, Inc. entered into a joint venture agreement (known as Dynamic Duo, Inc.) to conduct a series of professional heavyweight boxing matches; the matches were intended to unify the World Boxing Association, the World Boxing Council and the International Boxing Federation heavyweight titles.

In an agreement dated as of January 1986, Dynamic Duo and Home Box Office entered into a broadcast contract for the unification series of fights; the contract included a provision in which Dynamic Duo stated that it would "ensure that [Gerry] Cooney will contractually commit if Cooney wins the Cooney Fight and is declared the IBF World Heavyweight Champion" to participate in the title series.

Michael Spinks, represented by Butch Lewis, agreed to fight Cooney in Madison Square Garden on March 9, 1987; Cooney, however, was not under contract to one of the three boxing leagues and did not agree to participate in the championship series.

HBO claimed that Lewis' failure to obtain a contractual commitment from Cooney violated the relevant provision of the Dynamic Duo-HBO contract and the company sought injunctive relief. Lewis argued that the provision was intended to become operative only if and when Cooney defeated Spinks and that the promoter's only obligation was to encourage Cooney to engage in "good faith" negotiations concerning his participation in the unification series of fights.

A New York trial court has denied Lewis' motion to dismiss HBO's complaint, stating that the provision at issue could not be read, on its face as requiring Lewis "only to use its best efforts to bring Cooney to the negotiating table should [he] defeat Spinks" According to Civil Court Judge Wilk (sitting by designation) the more rational interpretation was that Lewis was required to obtain Cooney's contractual commitment in advance of the Cooney-Spinks fight. HBO therefore was entitled to injunctive relief preventing Lewis from holding the fight between Spinks and Cooney unless Cooney agreed to participate in the remaining fights in the series in accordance with the HBO-Dynamic Duo contract.

Home Box Office, Inc. v. Butch Lewis Productions, Inc., New York Law Journal, page 5, col.2 (N.Y.Cnty., Dec.30, 1986) [ELR 8:9:5]

USA Network was entitled to broadcast 1986-1987 basketball games of the Southeastern Conference, rules New York trial court

Jefferson-Pilot Communications Corp. was entitled to accept a bid from USA Network for the exclusive right to broadcast the 1986-1997 basketball games of the colleges comprising the Southeastern Conference, a New York trial court judge has ruled, stopping a fast break effort by ESPN.

Play began in 1984 when the Conference entered an agreement giving Lorimar-Telepictures Corporation syndication rights for 1983-1984, 1984-1985 and 1985-1986 seasons. Lorimar then granted nonexclusive broadcasting rights to USA Network for the 1984-1985 and 1985-1986 seasons; USA Network also obtained a right of first negotiation and a right of first refusal with respect to broadcasting the Conference's games during the 1986-1987 season. However, Lorimar apparently did not permit USA Network to exercise these rights, but rather began negotiating with ESPN concerning broadcasting rights in the event that Lorimar's agreement with the Conference was extended.

When the Conference and Lorimar did not enter an extension agreement, the Conference granted syndication rights to Jefferson for the 1986-1987, 1987-1988, 1988-1989 and 1989-1990 seasons. The agreement provided that during each of the first three seasons, Jefferson would "cause eleven (11) regular season games to be telecast live by ESPN, Inc.. . ." About three months later, the parties deleted the references in the agreement to ESPN and substituted the words "national cable distributor."

ESPN claimed that the agreement between the Conference and Jefferson made ESPN a third party beneficiary entitled to exclusive broadcast rights to the Conference games.

After reviewing the claims of the parties, New York County Supreme Court Justice Stecher found that ESPN was an incidental beneficiary rather than an intended beneficiary of the ESPN-Jefferson agreement; the Conference's intent throughout its negotiations was that ESPN's rights, if any, were to be derived from a license from the syndicator, not from a direct contract between the Conference and ESPN. Furthermore, nothing in the Conference's agreement with Jefferson specifically prohibited the parties from modifying any rights purportedly acquired by ESPN. And ESPN had not alleged that it entered into any contract with advertisers for the 1986-1987 basketball season and did not specify that it had foregone opportunities to acquire broadcast rights to any other series of basketball games. If there were any acts of reliance by ESPN, such acts occurred before the formation of the agreement between the Conference and Jefferson. Jefferson therefore was free to sell the broadcast rights to the Conference games to the highest bidder; for the 1986-1987 season, that bidder was USA Network.

ESPN, Inc. v. Lorimar-Telepictures Corp., New York Law Journal, p. 12, col. 6 (N.Y.Cnty., Dec.18, 1986) [ELR 8:9:6]

Breach of implied contract claim against MCA TV and creators of music trivia television program is denied by California appellate court

The creators and syndicator of a television program entitled "Pop 'N Rocker, A Game in Concert," did not use any material from Robbie Davis' proposed program

"Rock Back," a California appellate court has found in denying Davis' claim for breach of an implied contract.

In mid-1982, producer Aaron Greenberg presented an idea for a music trivia television program to an affiliate of Alan Landsburg Productions - the program focused on contemporary music and musicians and included live appearances by the feature artists. In November 1982, Greenberg made a pilot presentation of Pop 'N Rocker to American Broadcasting Companies' owned and operated television stations and to the Westinghouse television group. Subsequently, MCA Television Enterprises agreed to syndicate the program and production soon began.

Davis alleged that the concept for Pop 'N Rocker was taken from his idea for a rock and roll "oldies" game show in which a celebrity panel answered music trivia questions. According to Davis, he had presented to Charles Gerber, a program development executive at

MCA, a project treatment for a pilot of the program in November 1981. Gerber and MCA did not agree to produce, finance or distribute Rock Back and Davis did not present his proposal to Greenberg or Alan Landsburg Productions.

A Los Angeles trial court granted summary judgment to the Pop 'N Rocker parties and the appellate court affirmed this decision. The court, in a decision marked "Not for Publication," noted that there was substantial evidence that Pop 'N Rocker was produced by Greenberg and Alan Landsburg Productions, not Gerber and/or MCA. Davis stated that the individual who was chosen as the announcer for Greenberg's production was the same individual who served as the announcer on an audiotape Davis submitted to Gerber in 1981, and that Davis had suggested as a host for Rock Back the same person who was selected to host Pop 'N Rocker. Such "mere coincidences" were not sufficient to create a triable issue of fact as to whether the Pop 'N Rocker parties actually used Davis' material in their production, declared the court, particularly since the creative elements of the programs appeared to be entirely different.

Davis' causes of action for breach of confidence, unjust enrichment and fraud depended on evidence establishing that the Pop 'N Rocker parties actually used his material; summary judgment therefore was properly granted by the trial court as to these counts as well, concluded Judge Beach.

Davis v. MCA TV Limited, Case No. B014943 (Ca.Ct.App., Nov. 13, 1986) [ELR 8:9:6]

Warner Books may continue to distribute author Don Pendleton's "psychic detective" series, rules Federal District Court in New York in dismissing breach of contract action brought by Harlequin Enterprises, the publisher of "action/adventure" books featuring Pendleton's character Mack Bolan

In 1986, Harlequin Enterprises began a courtroom action/adventure by charging author Don Pendleton and his literary agent Scott Meredith with breach of contract and claiming that Warner Books, Inc. and Meredith tortiously interfered with Pendleton's contract with Harlequin.

Pendleton created "The Executioner" series of books featuring Mack Bolan, an urban warrior character whose violent fictional encounters with criminals may have spawned motion pictures such as "Death Wish," "Dirty Harry," and "Rambo."

In 1980, Pendleton signed a contract whereby Harlequin acquired the right to use Mack Bolan and Pendleton's other characters in a continuation of the "Executioner" series, and the right to publish spinoff series. (A dispute between Harlequin and Pendleton's former publisher, Pinnacle Books, was reported at ELR 3:16:6.) Pendleton agreed to serve as a consulting editor in return for a royalty of two cents on each book sold, with a guaranteed minimum of $200,000 a year. The contract included a provision preventing Pendleton from competing "directly or indirectly" with the sale of the Executioner series. But Pendleton did reserve the right "to create and/or write works for others, other than works which would compete with the sale of the actionadventure series contemplated in this Agreement, which Pendleton may publish or cause to be published in any language throughout the world and all rights to which are solely the property of Pendleton."

During the next six years, Pendleton selected writers for the Mack Bolan books, reviewed manuscripts and wrote portions of some of the works; Harlequin sold 12 million books in the Mack Bolan series and in two spinoff series.

In 1985, Pendleton signed a contract with Warner Books to write six books about a detective with psychic powers. When the first Ashton Ford book was published, Warner's promotional material initially emphasized Pendleton's reputation as the creator of the Mack Bolan series - the promotional material and cover art were revised when Harlequin advised Warner that the Ashton Ford books might compete with the Mack Bolan series. Harlequin soon decided that such revisions were insufficient, and that the similarities between the series in content, style and marketing warranted a lawsuit.

Federal District Court Judge Goettel first attempted to determine whether the Ashton Ford series would compete with the sale of Harlequin's Mack Bolan books within the meaning of the Pendleton-Harlequin contract. Since Judge Goettel could not determine the actual market impact of the Warner works on the Mack Bolan series (primarily due to the delayed availability of sales figures) he considered Harlequin's contention that the books competed with each other in that they appealed "to similar readerships, as short, easy to read, men's adventure books with a dominant male hero who solves problems beyond the means of conventional law enforcement... [and] the male hero in both books has a strong moral code and special skills." But the expert testimony and a comparison of the works revealed to the court that the books would appeal to "distinctly dissimilar audiences," for the majority of Mack Bolan fans would not find Ashton Ford to be "their sort of hero."

It was noted that the two series might be competitive simply because they would be sold in close proximity by vendors who alphabetize all fiction by author. However, halting the sale of books by Warner on this basis would effectively prevent Pendleton from writing any new fiction, stated the court, a possibility that would "carry the restriction of the contract to excess" Both Ontario law (under which covenants in restraint of trade are prima facie void as contrary to public policy) and the public interest in benefiting from Pendleton's creations demanded a narrow construction of the term "compete" Judge Goettel declared that "Harlequin bought Pendleton's characters - it did not buy his writing ability," and concluded that because the subject matter of the two series was so different, the series did not compete.

Judge Goettel then held that the references to Pendleton on the cover of the Ashton Ford books as the creator of the Executioner series did not per se violate the HarlequinPendleton contract, and pointed out that if Harlequin had wished to prevent Pendleton's new books from referring to his earlier writings, the publisher should have incorporated that restriction in the contract.

Harlequin's claim against Warner Books for tortious interference with Harlequin's contract with Pendleton failed as a result of the court's finding that Pendleton did not breach the contract.

In a counterclaim, Pendleton asserted that the continued use of his name on the covers of the Harlequin series of books, combined with the absence of any author's name, misled readers who assumed that Pendleton continued to write the Mack Bolan books and therefore violated section 43(a) of the Lanham Act. In denying Pendleton's counterclaim, Judge Goettel cited Pendleton's previous acquiescence in Harlequin's use on its book covers of the phrase "Don Pendleton's Mack Bolan," and the author's financial return from the sales of the books. Pendleton was responsible for the repeated use of his name over the years, and thus did not have the clean hands required to seek an injunction restraining Harlequin from any further use of his name.

Harlequin Enterprises Limited v. Warner Books, Inc. 639 F.Supp. 1081 (S.D.N.Y. 1986) [ELR 8:9:7]

New York Surrogate's Court directs "literary property fiduciaries" designated in Lillian Hellman's will to control the literary work of the late playwright and of author Dashiell Hammett

Lillian Hellman may have been "a complex person who executed a complex will," but a New York Surrogate's Court has managed to determine that the author did not intend to have the legal title to her literary property fall into her residuary estate. By naming three literary property fiduciaries - writers Peter Feibleman, William

Abrahams and Richard Poirier - Hellman anticipated the "unified, expert and appropriate" handling of her literary work, stated Surrogate Marie M. Lambert, handling which went beyond the responsibilities of a traditional trustee.

In language befitting the matter before the court, Surrogate Lambert declared that "the management of literary property is more than the economic stewardship of a limited and wasting monopoly conferred upon an author under the copyright laws. How such literary property is exploited affects not only economic aspects of the author's works, but the esteem in which the author is held. As such, management of a literary work requires a delicate balance between economic enhancement and cultural nurture. Traditional trustees, emphasizing prosperity rather than posterity may be forced to concern themselves solely with keeping the books rather than keeping the flame."

Hellman chose different individuals to serve as trustees depending upon the purpose of each trust established in her will. But although the duties, compensation and powers of the literary property trustees were set forth, the will did not bequeath them a trust to administer. In order to effect Hellman's intent, Surrogate Lambert issued limited letters of administration authorizing the literary property fiduciaries to take right, title and interest to Hellman's literary property and to manage the intellectual property rights under the powers conferred by the will. The powers granted to the trustees included the power to contract for publication of previously published literary property, to contract for the sale, lease or other disposition of subsidiary rights (including film and television), to sue for copyright infringement and to renew or extend the copyright terms.

Surrogate Lambert further found that Hellman intended to grant to Feibleman the right to receive 50 percent of the gross royalties due upon or to become due from Hellman's literary work, less only any agent's commission. Any surplus royalties then would be payable to the trustees of the Lillian Hellman Fund, and the trustees of the Fund would have complete discretion regarding the distribution of the trust's income and principal.

Hellman also held interests in the intellectual property of the late author Dashiell Hammett; these interests were bequeathed to The Dashiell Hammett Fund (a trust comprised, in part, of Hellman's residuary estate). The Surrogate approved the literary property fiduciaries' offer to supervise the management of Hammett's literary property, and directed the trustees of the Fund to distribute all net receipts from such property to the income beneficiaries specified by Hellman.

It should be noted that Hellman bequeathed to the University of Texas all of the original writings and manuscripts she owned. According to news reports, the combined value of the Hellman and Hammett estates was about $3.5 million after taxes; the Hellman estate earns about $100,000 a year in royalties.

Estate of Lillian Hellman, New York Journal, p. 13, col. 5 (N.Y. Surrogate's Court, Jan. 7, 1987) [ELR 8:9:8]

Dismissal of independent television station's antitrust claim against San Francisco broadcasters and television program suppliers is upheld

When Ralph C. Wilson Industries, the licensee of television station KICU-TV, brought an antitrust action against several San Francisco network and independent television stations and against suppliers of non-network television programs, a Federal District Court in California granted summary judgment to the station and supplier parties (ELR 7:5:11); the judgment has been affirmed by a Federal Court of Appeals.

On appeal, Wilson argued that the stations' exclusive program licensing practices unreasonably restrained trade in that the licenses were overbroad geographically, unreasonably long in duration and incorporated unreasonable rights of first refusal. According to Wilson, separate local advertising and program acquisition markets served to distinguish a "South Bay market" or "San Jose market" apart from the San Francisco market. Consequently, Wilson argued, the television station and program supplier parties were not entitled to maintain exclusivity against KICU, a station whose effective signal coverage was limited to the South Bay area and was substantially smaller and different than that of the station parties.

Federal Court of Appeals Judge Brunetti pointed out that in order to recover treble damages under the

Clayton Act, Wilson had to show that it was injured in its business or property "by reason of anything forbidden in the antitrust laws." The exclusivity agreements, as vertical, non-price restraints, were subject to analysis under the rule of reason standard, a standard which focuses on the challenged restraint's impact on competitive conditions in the relevant market. In this case, the relevant product was quality television programming; the relevant geographic market had been set by the District Court as the San Francisco Bay area, including San Jose. The commercial realities of the industry conformed with this definition, stated Judge Brunetti. San Jose was properly included in the San Francisco market because the two national television rating services, Nielsen and Arbitron, considered San Jose and San Francisco to be in the same market. Furthermore, the Federal Communications Commission regulates San Jose and San Francisco as part of the same market-there was substantial overlap in the coverage of the signals of KICU and the station parties and a substantial overlap in viewers. Arbitron rating data showed that about 80 percent of KICU's audience was outside the San Jose market. In all, Wilson did not show any genuine issue of material fact with regard to actual injury to competition in the relevant market.

Wilson also argued that the stations violated section 3 of the Clayton Act by engaging in a conspiracy to deny Wilson access to quality television programming. But section 3 did not apply to the alleged injury, stated Judge Brunetti. A vertical agreement between an individual station and an individual program supplier does not, without more, mean that the supplier engaged in the type of exclusive dealing covered under section 3. Wilson was not willing to pay the San Francisco Bay area rate for television programming. The company did not show that it was unable to bid for or obtain quality programs; that prices for the programs were illegally "fixed;" that output was restricted or that its program offerings were detrimentally affected. Judge Brunetti again found that no genuine issue of material fact was raised by Wilson with respect to the alleged injury to competition.

Also rejected were Wilson's claims that the stations engaged in a conspiracy to deny and boycott programming to KICU in violation of section 1 of the Sherman Act, and that station KTVU and the Independent Television News Association conspired to deny KICU membership in the Association.

Ralph C. Wilson Industries, Inc. v. Chronicle Broadcasting Co., 794 F.2d 1359 (9th Cir. 1986) [ELR 8:9:8]

Tax Court ruling disallowing depreciation deductions in connection with investment in master recording of soundtrack album for the film "The Deep" is upheld

A Federal Court of Appeals has affirmed a Tax Court decision (ELR 7:4:5) holding that taxpayers Sydney S. Baron (now deceased) and his wife improperly claimed certain deductions in 1977 and 1978 in connection with their investment in the master recording of the soundtrack album for the film "The Deep."

The Barons purchased rights in the master recording in 1977 for $90,000 in cash and $560,000 in two nonrecourse notes (bearing face amounts of $460,000 and $100,000 respectively), payable solely out of the album sale proceeds. The Barons then claimed depreciation deductions based on the $90,000 cash payment and the

$460,000 note; the deductions were denied by the Tax Court.

Federal Court of Appeals Judge Pierce noted that there was conflicting evidence regarding the revenues that the master recording, "an inherently risky investment," could reasonably have been expected to generate. Casablanca Record and Filmworks, the company that released the album, was required to manufacture and distribute only 50,000 albums and 10,000 singles, although the company earlier had made a considerably higher estimate of record sales. The appraisal letters obtained by Baron during, rather than prior to, the negotiations involving the purchase of rights, were given little weight since the appraisals did not carefully analyze "relevant technical, industry and marketing data." And even if Casablanca's projected "potential" sales were reached, that number was still less than half the number of sales required to enable Baron to pay off the principal alone on the $460,000 note. Thus, whatever the fair market value of the rights at the time of purchase, Baron did not show that this value reasonably approximated or exceeded his claimed depreciation deductions.

In addition to upholding the Tax Court's conclusions that the nonrecourse debt was "too contingent" an obligation to be depreciable, and that the master recording "was not susceptible of valuation." Judge Pierce upheld the determination that the purchase of rights was an activity "not engaged in for profit." Therefore, a depreciation deduction was correctly disallowed not only on the nonrecourse note, but also as to the $90,000 cash payment. The court emphasized that apart from the failure to demonstrate the profit potential of the investment, Baron's substantial income during the tax years in question and the likelihood of substantial tax benefits from the investment, independently supported the Tax Courts' conclusion that the investment was not for profit, and that payments of $230,031 and $82,525 were due for the tax years 1977 and 1978.

Estate of Baron v. Commissioner of Internal Revenue, 798 F.2d 65 (2d Cir. 1986) [ELR 8:9:9]

Limited partner was entitled to tax benefits in connection with the movie "Overboard" because partnership acquired requisite ownership interest as joint venturer with movie's producer

The disallowance by the Internal Revenue Service of a taxpayer's depreciation and investment tax credit in connection with the movie "Overboard" has been reversed by the Tax Court.

"Overboard" was licensed by its producer, Factor Newland Production Corporation, to NBC and Time-

Life Films in exchange for periodic payments totalling almost $1.5 million plus additional royalties or license fees. In May 1978, Lorelei Productions Ltd. acquired Overboard from Factor. The parties agreed that Factor would register the copyright in the photoplay, but that Lorelei could request an assignment of the copyright after the domestic broadcast of the movie. And Lorelei obtained the right to the benefits of Factor's agreements with NBC and Time-Life.

The IRS questioned whether Lorelei indeed acquired an ownership interest in the movie so that James B. Leahy, a limited partner in Lorelei, was entitled to claim tax benefits.

According to Tax Court Judge Gerber, Lorelei and its partners became a joint venturer with a 25% interest in Overboard. Lorelei obtained Factor's retained right to use the photoplay for theatrical purposes as well as the right to receive a payment of about $1.2 million due from NBC, a $300,000 advance from Time-Life, and certain net profit payments. The net profits under the Time-Life license agreement were allocated on a 75%-25% basis to Factor and Lorelei. Thus, stated the court, to the extent that the movie was successful beyond the amount received from NBC and Time-Life, Lorelei and Factor jointly ventured to share the profits from the exploitation of the work; the companies anticipated sharing any losses in a similar ratio.

Furthermore, even if Lorelei requested assignment of the copyright held "in trust" by Factor, the consent or participation of both Lorelei and Factor were necessary in order to exploit and profit from the movie under the licenses. The movie was a viable property and Lorelei acquired an ownership interest in the asset such that its limited partners were entitled to claim 25% of the depreciation and investment tax credit allowance, concluded the court. However, the basis of the property for purposes of depreciation was limited to the movie's production cost of about $1.5 million rather than the $2.4 million stated sales price. The parties therefore were required to recompute depreciation and thus increase the amount of net income realized from the license revenues. Leahy then could deduct depreciation and an investment tax credit in accordance with his percentage interest in Lorelei.

Leahy v. Commissioner of Internal Revenue, T.C. Memo 1987-4 (U.S.Tax Ct. 1986) [ELR 8:9:9]

Copyright Royalty Tribunal's 1983 cable television royalty fee distribution is upheld

The Entertainment Law Reporter is looking forward to collecting royalties for its reports concerning the various challenges to the distribution of cable television royalty fees by the Copyright Royalty Tribunal. Dissatisfied cable royalty claimants appealed the Tribunal's determinations for the calendar years 1978, 1979, 1980 and 1982 (see ELR 8:6:14, 5:8:14; 3:24:1); each determination was affirmed, in large part, by the Federal Court of Appeals in Washington, D.C. The most recent petitions for review, brought by claimants to the 1983 cable royalty fund, were heard by a Federal Court of Appeals in New York. The court, noting that the petitions raised the "usual array of noisily contested minutiae concerning the precise allocations of cable royalty fees," has affirmed the Tribunal's cable royalty distribution.

Judge Winter briefly reviewed the Copyright Act's compulsory licensing scheme under which a cable system is protected from copyright liability when it carries only those signals and programs designated under the rules of the Federal Communications Commission, and deposits semiannual royalty payments into a central fund. The fund then is distributed annually by the Tribunal to the copyright owners whose works have been retransmitted via distant signals.

Judge Winter noted that in response to the elimination of the FCC's distant signal and syndicated exclusivity rules, the Tribunal added two new royalty fees to be paid by cable systems - one fee requires cable systems to pay 3.75% of their gross receipts from basic services for each distant signal equivalent they add as a result of the repeal of the distant signal rules. The second fee - a syndicated exclusivity (syndex) surcharge - is paid by cable systems retransmitting signals formerly subject to the FCC's blackout provisions. In 1983, the Tribunal, for the first time, divided cable royalties into three separate funds - the basic fund, the 3.75% fund, and the syndex fund.

After 53 days of evidentiary hearings, the Tribunal allocated the three funds among the following parties: program suppliers, joint sports claimants, public broadcasting service, commercial television broadcasters, music claimants, devotional claimants, the Canadian claimants (there was no distribution to the commercial radio parties).

In challenging the Tribunal's decision, the National Association of Broadcasters argued that television stations, not program suppliers (i.e., producers and syndicators) owned the relevant copyright interests represented by the syndex fund and that the stations should have received the 95.5% syndex royalty allocation which went to the program suppliers.

The Canadian claimants, representing Canadian television broadcasters and producers, argued that the Tribunal's allocation of the basic and 3.75% funds was arbitrary and capricious. To the contrary, the Motion

Picture Association of America, representing 83 producers and/or syndicators in the program supplier category, claimed that the Tribunal's awards to the Canadian claimants and to the devotional claimants (the owners of syndicated programming with religious themes) were too high.

Judge Winter first found that the Tribunal did not err in dividing the royalties into three separate funds, or in maintaining a single-fund approach in the second phase of its royalty distribution. The court then rejected the National Association of Broadcaster's claim to the syndex funds. In the view of several parties to the proceeding, the fund was created because of the increased number of performances of copyrighted programs due to the elimination of the syndicated exclusivity rules, thereby justifying increased royalty payments by cable operators. However, it was noted that according to the Federal Court of Appeals for the District of Columbia, local broadcasters possibly would suffer advertising losses from the duplication in programming resulting from distant signals transmitted to their local areas by cable. The broadcasters then might reduce their bidding for syndicated programming and, in turn, reduce the revenues received by the syndicators. The syndex fund "was thus intended to compensate for the losses caused by the elimination of exclusivity protection, not for the increased exploitation of copyrighted works by cable operators."

Notwithstanding the above, the Tribunal correctly denied the Association's claim, stated Judge Winter, because the broadcasters had entered into their contracts with the copyright owners knowing that the exclusivity rules might be eliminated before the contracts expired and also knew that the syndicators were claiming almost all of the syndex royalties. The Tribunal therefore was entitled to assume that the broadcasters were aware that an "uncompensated loss of exclusivity rights was likely to occur before the contracts expired."

The remaining fact - based challenges to the particular royalty percentages set by the Tribunal were not discussed in detail by the court. The Canadian claimants' argument that the Tribunal should have recognized the marketplace value of French language programming was denied - no evidence was presented which was sufficient as a matter of law to require a change in the Tribunal's 1980 conclusion that French language programming had no significant value to American cable systems.

In all, the 1983 cable royalty allocations were well within the "zone of reasonableness," concluded the court and were upheld accordingly.

The National Association of Broadcasters v. Copyright Royalty Tribunal, Case Nos. 1491, 1492, 1493 (2d Cir., Dec. 22, 1986) [ELR 8:9:10]

Briefly Noted:

Cable Television.

Tandy Corporation, through its Radio Shack Division, manufactured and distributed a cable television converter known as the "Archer Converter" Shenango Cable TV claimed that Tandy marketed the converter for the specific purpose of intercepting, without authorization, Shenango's mid- and super-band signals, thereby violating section 705 of the Communications Act of 1934 and section 633 of the Cable Communications Policy Act of 1984. But a Federal District Court in

Pennsylvania noted that the converter was designed to permit cable television viewers to utilize remote channel control, a function that may be lost when cable is installed on standard television sets, and to permit users of cable television to view one cable channel while using VCR equipment to record another channel. The converter did not permit the user to receive any cable channels unless the user had acquired and paid for basic cable service; to unscramble premium cable programming such as HBO, Showtime and The Movie Channel; or to unscramble or decode protective or security devices employed by cable companies to protect their signals. Since Shenango failed to present evidence that Tandy intended that the Archer converter was to be used for the interception or pirating of the cable company's signals, or that the converter was designed solely and separately for that purpose, the court granted Tandy's motion for summary judgment.

Shenango Cable TV Inc. v. Tandy Corporation, 631 F.Supp. 835 (W.D.Pa. 1986) [ELR 8:9:11]

Release Agreement.

When entertainer Kenny Rogers sued R. Joseph Mulhern in a Florida state court for alleged fraudulent conduct in connection with Rogers' purchase of a boat owned by Mulhern, the matter was settled; Rogers eventually obtained a court order requiring the parties to execute all releases necessary to effectuate the terms of the settlement agreement. Mulhern, arguing that the release applied only to the claims raised in the state court action, proceeded to sue Rogers in a Federal District Court in Florida, seeking in excess of $23 million in damages for alleged slanderous remarks made by Rogers during the course of the boat negotiations. Federal District Court Judge Scott disagreed and held that the relevant language demonstrated that the parties intended the release to encompass all claims which had matured at the time the settlement was reached, including Mulhern's claim for slander. In granting summary judgment on behalf of Rogers, Judge Scott stated that no other conclusion by the court would be "according to Hoyle" (or in accordance with applicable law).

Mulhern v. Rogers, 636 F.Supp. 323 (S.D.Fla. 1986) [ELR 8:9:11]

Previously Reported:

The following cases, which were reported in previous issues of the Entertainment Law Reporter, have been published: Harvey Cartoons v. Columbia Pictures Industries, Inc. 645 F.Supp. 1564 (8:7:10); Engel v. Wild Oats, Inc., 644 F.Supp. 1089 (8:8:9); Frank v. National Broadcasting Co., Inc., 506 N.Y.S.2d 869 (8:8:8); Jones v. Virgin Records, Ltd., 643 F.Supp. 1153 (8:1:12).

The Court of Appeals of New York has upheld an appellate court's ruling (ELR 8:5:13) that Manny Sokolofsky (also known as Manny Sokol) did not establish prima facie that he was physically fit to fully perform as a professional basketball referee and that the National Basketball Association thus did not discriminate against Sokol on the basis of disability by refusing to rehire him. National Basketball Association v. New York State Division of Human Rights, 505 N.Y.S.2d 63 (N.Y. 1986)

All requests for attorneys fees have been denied by Federal District Court Judge William C. Conner in an interpleader action (ELR 8:5:13) brought by the National Basketball Association when a dispute arose among various basketball referee groups as to the disposition of dues paid by union members. National Basketball Association v. National Association of Basketball Referees, 644 F. Supp. 342 (S.D.N.Y. 1986)

The United States Supreme Court has declined to review the California Supreme Court's decision that a former Los Angeles Herald Examiner television critic's comments about a documentary program did not libel the producer of the program Baker v. Los Angeles Herald Examiner (ELR 8:8:16). The Supreme Court also has refused to consider the decision in Hubbard Broadcasting, Inc. v. Southern Satellite Systems, Inc. (ELR 8:8:11) involving a copyright infringement claim in connection with a cable television operator's retransmission of programming.

The 9th Circuit Court of Appeals has denied the National Football League's request that it review a three-judge panel decision upholding a $14.6 million damage

award to the Los Angeles Memorial Coliseum Commission (ELR 8:6:13).
[ELR 8:9:11]

IN THE NEWS

Recording Industry Association of America reports record number of counterfeit cassette seizures in 1986

The Recording Industry Association of America, Inc. (RIAA), has announced its year-end anti-piracy statistics for 1986, and they show that a record number of counterfeit cassettes were seized last year.

In 1986, more than 465,000 pirate and counterfeit cassettes were seized by law enforcement agencies with assistance from RIAA personnel throughout the country.

This was the second straight year that there has been a dramatic increase in the total number of illegal cassettes seized. The near half-million seized cassettes represent an 823% increase in confiscated cassette tapes over 1984 and a 21% increase over last year. In addition, year-end figures indicate approximately 5.3 million counterfeit labels were confiscated representing a 37% increase over the previous year. During 1986, there was a three-fold increase in the number of audio master tapes taken during the execution of 94 audio piracy-related search warrants and seizures.

"During 1986, law enforcement agencies throughout the United States, with assistance from RIAA's Anti-Piracy Unit (APU), targeted and raided major manufacturers of illicit sound recording product," said Joel Schoenfeld, Director, Anti-Piracy. "The comprehensive anti-piracy effort of 1985 at the retail level provided invaluable information which led to the elimination of major manufacturers of piratical product-the number one priority of the Anti-Piracy Unit." The objective of targeting and raiding major manufacturers of counterfeit cassette product was highlighted in October of 1986 when Special Agents of the FBI from two offices coordinated the execution of 11 federal search warrants, involving four alleged major counterfeit cassette manufacturers. During these raids alone, hundreds of thousands of alleged counterfeit cassettes and millions of labels were seized by federal agents in addition to machinery allegedly used to manufacture the illicit product. In 1986, 32 law enforcement agencies, working in conjunction with prosecutors' offices at federal, state and local level, contributed to the 69 arrests, 38 convictions, and 94 piracy related seizures throughout the country - 12 involved illegal manufacturing operations.

The 682 piracy referrals received by RIAA in 1986 gave rise to investigations in 43 states, the District of

Columbia, and Puerto Rico. As was the case in 1985, the West and Southeast regions of the United States continued to lead the country in sound recording piracy in all forms. "While there was a decreased number of arrests and seizures involving sound recording piracy at the retail and flea market level in 1986," said Ken Giel, Deputy Director, Anti-Piracy Investigative Operations, "the total number of law enforcement actions involving manufacturers of illicit sound recordings doubled this year thereby stemming the tide of these goods into the legitimate retail market."

Seizures on the retail level were highlighted by a March "ex-parte" seizure conducted by Deputy U.S. Marshals assisted by RIAA APU personnel at the San Jose Flea Market, San Jose, California resulting in the confiscation of approximately 27,700 alleged pirate and counterfeit cassette tapes. This civil action ultimately resulted in the issuance of 37 preliminary injunctions.

Year-end statistics illustrate that domestic markets are increasingly being threatened by illegal sound recordings manufactured abroad and exported to the U.S. Approximately 20% of those counterfeit cassettes seized by law enforcement in the U.S. during 1986 were manufactured in foreign countries including Taiwan, Indonesia, Singapore, Mexico and countries throughout Western Europe. in addition, there were 165 parallel importation investigations conducted by RIAA in 1986, which represent a 36 % increase over last year and the third straight year in which parallel import matters have increased. "The year-end antipiracy report reflects a new concern for the U.S. recording industry," stated Steven D'Onofrio, Deputy Director, Anti-Piracy Legal Operations. "The significant number of parallel imports and foreign manufactured counterfeit product flowing into the U.S. market is an unfortunate development in RIAA efforts to protect its member companies' sound recording rights.

This development places a still further strain on the entire legitimate domestic market and on RIAA's efforts to protect the rights of its members."

In 1986 alone, civil suits were filed against 5 separate businesses by RIAA on behalf of member companies in parallel import matters. In addition, Anthony Dharmawan Setiano, of Djakarta, Indonesia was found guilty in May 1986, of six felony counts of criminal copyright infringement and violations of U.S. Customs Laws in Federal Court in the Eastern District of New York. He was subsequently sentenced in July to a two-year suspended sentence and received a fine of $100,000. Dharmawan was arrested by U.S. Custom Agents in December 1985 after offering 360,000 counterfeit cassettes for sale and shipping 5,000 counterfeit cassettes to a dummy import/export corporation in New York. The New York company was run by RIAA undercover operatives posing as businessmen.

The manufacture and sale of bootleg sound recordings appears to be on an overall decline. Approximately 3,600 bootleg LPs, cassettes and music videocassettes were seized in 1986, this number represents the lowest amount of bootleg recordings confiscated in the last 3 year period.

In addition to parallel import cases, another major facet of the RIAA's civil copyright infringement program on behalf of its member companies has been in the area of unauthorized record rentals. During 1986, the RIAA saw a reduced number of record rental complaints. This reduction may be a result of RIAA's filing of two separate civil copyright infringement actions against unauthorized record rental establishments on behalf of individual member companies asserting their rights under the Record Rental Amendment of 1984.

[Feb. 1987] [ELR 8:9:12]

Federal Communications Commission proposes revision of media ownership regulations

The Federal Communications Commission has voted to seek public comment on a proposal to revise its rules prohibiting a single entity from owning radio stations and television stations in the same city. In its statement, the Commission referred to the diversity of viewpoints provided by increasing numbers of local broadcasters and cable television systems. The proposal does not extend to the restriction against cross-ownership of newspapers and radio or television stations.

If the rule changes are completed promptly, ABC/Capital Cities might not find it necessary to comply with its scheduled July divestiture of radio stations in New York, Chicago, Los Angeles, and San Francisco and NBC similarly would avoid a December deadline for the divestiture of radio stations in New York, Chicago and Washington, D.C. [Feb. 1987] [ELR 8:9:14]

Coleco Industries agrees to end lawsuit against Univesal City Studios

Coleco Industries will not proceed to trial in its $14.7 million lawsuit against Universal City Studios because MCA, the parent company of Universal, has agreed to invest $20 million in Coleco. At issue in the lawsuit was Coleco's payment of about $4.7 million in royalty fees to Universal in response to the studio's claim that the home video game "Donkey Kong" infringed certain rights Universal had obtained in the character "King Kong" Coleco had obtained a license to manufacture the Donkey Kong game from Nintendo Co., Ltd.; Nintendo's rights in its Donkey Kong arcade game were upheld by a

Federal Court of Appeals (ELR 8:8:7). In addition to the royalty fees, Coleco had sought $10 million in punitive damages, interest and legal fees. MCA stated that its investment in Coleco was for "reasons beyond the lawsuit." [Feb. 1987] [ELR 8:9:14]

Walt Disney Productions settles lawsuit against Filmation Associates in connection with "The New Adventure of Pinocchio"

Walt Disney Productions and Filmation Associates have settled a lawsuit in which Disney claimed that Filmation's proposed series of animated films, including "The New Adventures of Pinocchio," and "Alice Returns to Wonderland," would constitute copyright infringement, unfair competition and misappropriation of Disney property rights (see ELR 8:7:10). The terms of the settlement were not announced. [Feb. 1987] [ELR 8:9:14]

Boston psychiatrist settles $6 million libel action involving film based on Sylvia Plath's novel "The Bell Jar"

Boston psychiatrist Dr. Jane V. Anderson has settled her lawsuit against CBS Inc., Home Box Office, poet Ted Hughes and other companies and individuals involved with the 1979 film "The Bell Jar" which was based on a novel written by Hughes' late wife Sylvia Plath. Anderson contended that she was the basis for a character in the novel, but that the movie improperly changed the character by portraying purported lesbian scenes.

Anderson will receive $150,000 and copies of the film will carry a disclaimer stating that the characters and events depicted in the film are fictitious and that any similarity to real-life characters is coincidental. [Feb. 1987] [ELR 8:9:14]

San Diego jury awards former San Diego Chargers owner Gene Klein an additional $5 million in damages in action against Los Angeles Raiders official Al Davis

A San Diego Superior Court jury has awarded Eugene Klein, the former owner of the San Diego Chargers, punitive damages of $5 million in his malicious prosecution action against Los Angeles Raiders managing general partner Al Davis (Davis was held liable for $1.4 million; the Raiders were found liable for $3.6 million).

The jury previously awarded Klein $5 million in compensatory damages (ELR 8:8:20) in connection with his claim that Davis maliciously named Klein as an individual defendant in an antitrust action against the National Football League. Klein suffered a heart attack in 1982 while testifying in the trial of the case. [Feb. 1987] [ELR 8:9:14]

Creator of "Cabbage Patch Kids" settles action against distributor of "Garbage Pail Kids" bubble gum cards

Original Appalachian Artworks, the manufacturer of Cabbage Patch Kids dolls, has agreed to accept a cash payment of an undisclosed amount to settle its $30 million copyright and trademark infringement action (see ELR 8:5:9) against Topps Chewing Gum, Inc., the distributor of Garbage Pail Kids bubble gum cards. Topps also agreed to give "facelifts" to Dead Fred, Acne Amy and other members of the Garbage Pail brigade to avoid any resemblance to the Cabbage Patch Kids. The settlement was reached soon after a trial of the matter began in a Federal District Court in Atlanta. [Feb. 1987] [ELR 8:9:14]

DEPARTMENTS

Book Review/Article:

"Musicians and the Law in Canada"
Book by Paul Sanderson
Review/Article by Joseph Taubman

The content of Canadian music law has been shaped by Canadian, English and American law. English influence is strong because Canada is a member of the British Commonwealth. American legal influence is due, in large measure, to the closeness of the United States as well as the existence of some common organizations such as the American Federation of Musicians of the United States and Canada ("AFM"). n1

The decisive influence necessarily is Canadian jurisprudence consisting of Canadian federal and provincial statutes and cases. While similar in many ways to American music law, Canadian law differs from American law in two important respects. First, in Canada, provincial law is of greater importance to the music business there than U.S. state and local law are to the music business here. Second, the updating of Canada's Copyright Law has yet to take place, n2 while copyright revision in the U.S. has been accomplished. n3 For an understanding of Canadian music law, we are indebted to Paul Sanderson's short, compact opus, Musicians and the Law in Canada. The book consists of a total of 191 pages of text, plus five appendices of forms and check-lists, and a short subject index. The author's Table of Contents is detailed, and he advises the reader than the Index complements the Table of Contents and both should be utilized as cross references. A table of cases is included following the Table of Contents.

The book, like Julius Caesar's Gaul, is divided into three parts. Part I covers Composers, Copyright and Music Publishing and consists of four chapters on Copyright, Assigning and Licensing Musical Copyright, Music Publishing, and Copyright Infringement.

Canadian Copyright

To understand the nature of Canadian copyright, which is described in Chapter 1, it should be noted that for a long time, British copyright provisions extended to Canada under the British Copyright Act of 1842. n4 It was not until 1886 that Canada adopted its own Copyright Act. n5 This was superseded by the Act of 1921 n6 which (as amended) is still in effect.

Efforts are being made to adopt a new copyright law for Canada. In a sense, then, there is a rough historical parallel with U.S. copyright revision. The U.S. operated under the 1909 Copyright Act, n7 as amended, n8 until 1978, the effective date of the Copyright Act of 1976. n9

But unlike the U.S. which is not as of this date a party to the Berne Convention, Canada became a party to the Rome revision of the Berne convention in 1928. n10 Thus international copyright protection for Canadians differs from that available to Americans. In order to obtain protection under Berne, U.S. authors must pursue the route of simultaneous publication n11 subject to the hazards of failure to satisfy the technical requirements of simultaneous publication. Canadian authors, by contrast, can invoke Berne protection simply by reason of Canada's adherence to Berne.

There are also fundamental domestic differences between the more than six-decade old Canadian Copyright Act and our 1976 revision. In Canada, for example, the rate for music under the compulsory license is still two cents per playing surface (side) which probably hearkens back to U.S. practice under the 1909 Act. n12 But Canadian copyright norms are not a mere reflection of U.S. norms, old or new. Quite the contrary. Take for example the case of rate setting by the performing rights societies. In the U.S. this is administered judicially by the U.S. District Court for the for the Southern District of New York. n13 In Canada,rate setting is administrated by the Copyright Appeal Board. n14

Consequently, one can appreciate pointed references to different rules and procedures in the U.S. that punctuate the book throughout. n15

Another area of significant difference relates to terms of art utilized in Canadian copyright law but not in U.S. copyright law. Thus, the term "contrivance" is used in Canadian copyright, as in "mechanical contrivances" and "other contrivances." n16 Another concept in Canadian law is "fair dealing" as an exception to copyright infringement. Fair dealing is not defined in Canadian copyright and should not necessarily be taken as synonymous with the U.S. concept of "fair use." n17

Copyright infringement is covered in chapter 4. There are two main types of infringement in Canadian law: direct and indirect. n18 The former is sometimes called "primary infringement" n19 and can occur by reproduction or public performance. n2O The latter can come about by sale, destruction, public exhibition and importation knowing them to be infringement. n21

One cannot overemphasize distinctions between Canadian and U.S. norms. Thus, in Canada, "one can sue in either the federal court or a provincial court." n22 By contrast, in the U.S., preemption compels plaintiffs to seek relief exclusively in the federal courts. n23

Music Publishing

Music publishing is a copyright industry pure and simple.

At the outset of Chapter 2, the author states: "The way musical copyright is assigned and licensed is fundamental to an understanding of how the law affects musicians, especially composers. Licensing copyrights is the main activity. It is also the main intersection between copyright law and the music publishing business, and the main source of a composer's income .... The system consists of music publishers, and organizations which affect copyright licensing as discussed below." n24

The chapter then summarizes the principal agencies involved - both the reproduction rights agencies and the performing rights agencies.

The principal agency for reproduction rights is the Canadian Musical Reproduction Rights Agency (CMRRA). The French Canadian analogue is La Societe des Droits de Reproduction Mechanique Canada Ltee (SDRM), based in Montreal. "Its mandate is to administer French music catalogues. It is a subsidiary of SDRM in France." n25

This fact serves to underscore the impact of a Canadian duality which does not have a counterpart in the U.S., i.e., English cultural influences in Englishspeaking Canada, and French and European influences in Quebec and Frenchspeaking Canada.

The performing rights societies, CAPAC (Composers, Authors and Publishers Organization of Canada) and the Performing Rights Organization of Canada (PRO Canada or PROCAN) have strong ties to their American counterparts, ASCAP and BMI. The organizational interface reflects English and French influences and American propinquity, but the gestalt thereof emerges as distinctly Canadian.

In Chapter 3, entitled "Music Publishing," the author states in the opening paragraph, "What are referred to as 'publishing rights' in the music business are copyrights." n26 There follows a good discussion of the functions and types of music publishers. n27 This is useful because the historical nature of music publishing has been transformed over the decades, n28 and this chapter helps put music publishing in perspective.

The balance of the chapter is devoted to detailing the various rights under copyright of importance in music publishing: performing rights, mechanical rights, synchronization rights, print rights and subsidiary rights. n29

Publisher/composer contracts are then analyzed and discussed in the remainder of the chapter. Appendix 1 covers CMRRA Mechanical and Synchronization Licenses, a sample single-song publishing contract, and a sample sub-publishing agreement checklist. n30 The forms, like the discussion covering contractual provisions such as composer's obligations, publisher's obligations, and general provisions, n31 are intended for reference and are useful in context. Nevertheless, Americans contemplating music publishing contracts in Canada would be well advised to retain the services of Canadian counsel. One is concerned there not only with interpretation of Canadian statutes, but also Canadian case law, and at times, Canadian reliance upon UK and American case law, where there is no Canadian case law in point.

The Musician in Canada

Part II of the book directly involves the musician qua musician in Canada in terms of his regimen as a performer. It covers Performers, Live Performances and Related Activities and consists of five chapters on Labour, Agents and Managers, Live Performance, Recording, and Merchandising.

The foremost concern of the Labour chapter is the "AFM" (American Federation of Musicians of the United States and Canada) to which the author devotes virtually the entire chapter. n32 His justification for doing so is explained in the opening sentence of the chapter: "Most musicians in the music business, particularly those who perform live, are members of the AFM." n33

What is of significance here to the U.S. reader is that the AFM is the oldest performers' union in the U.S. and is an international union having jurisdiction in the U.S. and Canada. Consequently the Labour chapter will have a not unfamiliar ring to those involved in the U.S. with the AFM. But there are distinctions. For example, there is no exact counterpart agreements in the U.S. to AFM negotiated with the CBC (Canadian Broadcasting Corporation), the government owned broadcasting network, n34 which is more analogous to the BBC (British Broadcasting Corporation), than to our commercial networks - ABC, CBS and NBC - or even to our PBS network.

The AFT also has a separate agreement with the National Film Board of Canada (NFB), the government created and supported film production agency. NFB has no counterpart in the U.S. (The Swedish Film Institute, which has considerable stature in Sweden while coexisting with private, for-profit film production and distribution, might be analogous to the NFB.)

The rest of the Labour chapter covers two other unions, ACTRA (Alliance of Canadian Cinema, Television and Radio Artists) and Canadian Actors Equity Association (Actors Equity).

ACTRA's counterpart in the U.S. is AFTRA (American Federation of Television and Radio Artists). The actors' U.S. counterpart is Actors Equity Association (Equity).

One would hope that future editions of the book expand its coverage of ACTRA. ACTRA is a major union in the sound recording industry in the U.S. for recording artists. ACTRA is also significant in Canada and merits fuller discussion than the single paragraph accorded it.

On the other hand, the legitimate theater scene is much less significant in Canada than in the U.S. Equity in the U.S. covers live theater in a great many population centers and also in regional theater. Canada's smaller population does not provide the touring opportunities that exist in the U.S., n35 and thus Actors Equity in Canada does not have the sweep of comparable live theater that in the U.S. gives Equity its importance here.

Chapter 6 is entitled "Agents and Managers" The chapter is devoted to the role of booking agents, personal managers, lawyers, accountants and publicists. The regulation of booking agents by the AFM is covered in this chapter. n36 There is also an AFM Personal Management Agreement. n37 The text seems to suggest that this is used by booking agents who are not prevented from acting as personal managers.

There follows a protracted discussion of the Personal Management Agreement which covers the remainder of the chapter. n38 The author has reproduced a sample personal management agreement in Appendix 2. n39 This would tend to suggest that personal managers not also functioning as booking agents would prefer the larger personal manage ment agreement.

The author suggests the possibility of a manager and an artist working together for a period of time, three to six months, on a trial basis, and recommends a written agreement therefore as opposed to a handshake or oral agreement. n40 This is an interesting suggestion because personal manager/artist agreements generally are deficient in dealing with terminations which, if the parties are inflexible, can become traumatic experiences. Moreover, trial basis relationships are the exception in the U.S.

Chapter 7 on Live Performance is extensive. n41 There is a good analysis and breakdown of various facets of live performance including an explanation of the roles of the AFM, booking agents, personal managers, promoters, engagers, and sponsors. n42 The term "engagers" is not commonly used in the U.S. and denotes those who employ performers, such as bar owners, or parents of bride or groom for a wedding.

Again, AFM provisions are covered. n43 In addition, there may be riders to either the AFM or non-AMF agreement covering specifics of an engagement not otherwise covered, such as billings and rates in excess of union scale. n44

The author also includes a discussion of a Promoter's Rider which covers restrictive covenants not to perform within a restricted area for a period of time before and after the engagement, and control of the production. n45

Other points of interest in the chapter include a discussion of the lack of copyright in a live performance, n46 as in the U.S. n47 and how to overcome this lack by protection of personal rights and by contract. n48

The chapter concludes with a review of traveling musicians leaving-and-returning to Canada including notes on U.S. customs and immigration. n49 This has bread-and-butter importance for those dealing with the business of music.

Records

The author succinctly sums up the importance of this major chapter n50 by his opening sentence: "Record companies dominate the music business." n51 The chapter consists of analysis of the recording artist's agreement and the role of the label.

The author puts his finger on an important fact by stating, "There are two types of record companies: the major record company and the independent record company. In Canada, the majors are mainly subsidiaries of U.S. record companies and the U.S. majors are often owned by multinational corporations." n52

One wishes the author had developed this theme further since the record industry also constitutes a major source of income for the music publishing industry, in the form of mechanical reproduction royalties.

Suffice it to say, in the recording industry, contractual terms, developments and results rarely materialize in a vacuum. Negotiations reflect the relative strength of the parties, the importance of the recording artist, the strength of a label, and the willingness of the parties to reach a meeting of the minds. Recording superstars may command terms for advances, royalties and so forth that the very same label would resent even discussing with non-superstar though established artists. At the other end of the spectrum is the neophyte recording artist, glad to be recorded. The negotiator for the neophyte must bite the bullet of the submitted label agreement and request certain clauses that are more equitable than the label negotiator is prepared to give.

The chapter on recording is a useful primer on the record business, and it details contractual considerations in negotiating long term exclusive recording contracts. n53 A useful "Sample Long-term Exclusive Recording Agreement Checklist" is annexed in the appendix, n54 as is a "Sample Exclusive Long-Term Agreement." n55 The author is aware of the changes caused by technology. He states, "The ultimate object of the company is to sell 'recorded product' Product includes records, tapes, cassettes, videos and compact discs, for example. The word recordings is used here to mean 'recorded products'." n56 One hopes that later editions will cover the role of music videos and also the role that the emerging use of compact discs plays in the recording artist's agreement.

The remaining chapter of Part II covers merchandising. n57 The author defines the term as "the marketing to the public of manufactured products related to the musician's 'personality' and business." n58 Traditionally, labels were concerned about obtaining the right to use the name, likeness and bio of the recording artist for advertising, publicity and promotion of the records or label without violation of rights of privacy under local law. Endorsements were often omitted. If included, they would he deleted by the label upon request.

A recent trend has been to seek merchandising rights. These are commercial rights to exploit the name and likeness by licensing the manufacture and sale of a variety of diverse items such as posters, toys, games, balloons, T-shirts, bearing images and/or the name of the person or group involved.

Merchandising has been a rather remote offshoot of the record industry since only the top name performers or groups could attract that kind of interest. The devotion of an entire chapter to merchandising by the author attests to his belief that the subject has attained general importance in the music business, particularly the record industry.

The author covers under the umbrella of this chapter certain aspects of personality, such as appropriation of personality and passing off as well as the selection and ownership of names. He discusses trademarks and trade names and registration thereof as well as use of unregistered names. In a sense, the chapter therefore discusses the intellectual property phase of the music industry. n59

Business Affairs

Part III of the book covers the Structuring Business Affairs and consists of three chapters: Personal Service Contracts, Business Entities, and Income Tax.

Chapter 10 is short. n60 The bulk of the chapter relates to personal service contracts. The remainder consists of coverage of minors and a note on conflict of laws.

Basically personal service contract law consists of the application of general principles of contract law to music. In Canada, as in the U.S., courts will not compel a performer to perform by granting specific performance. n61 Consequently, the principal weapon of relief is the injunction. Where an injunction is violated, the court is able to assess penalties for contempt of court. Hence the boilerplate in personal service contracts that the performer's services are "special and unique" Injunctive relief thereby becomes the desired remedy on the grounds that there is no adequate remedy at law.

The author also discusses equitable notions of inequality of bargaining power allowing a court to refuse to honor an unconscionable agreement as well as restraints of trade and restrictive covenants. n62 Again, general notions of contract law and equity apply.

So, too, the discussion of remedies by the author seems to be based on general rules of contract and case law. n63

One should bear in mind that in jurisdictions in the U.S. where the entertainment industries are important, such as New York and California, procedures exist for judicial approval of infants' contracts, thereby sanctioning the personal service contracts of minors so approved. This takes the matter out of common law principles concerning void and voidable contracts. n64

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principles concerning void and voidable contracts. n65 Although the author does not cite any comparable provincial law, it might be useful in a given situation to consult Canadian counsel on whether a comparable petition for judicial approval would be entertained by provincial courts in Canada absent statutes comparable to those of New York and California.

The author concludes the chapter by posing problems of conflict of laws as to personal service contracts which are inter-provincial and those involving non-Canadian jurisdictions. Basically these relate to clauses which specify the laws of which state or province are to govern (or the absence of such a clause).

Chapter 11 is entitled "Business Entities" covers the choice of business organization. Of particular interest is the impact of special Canadian legislation such as The Business Corporation Act of Ontario and the Foreign Investment Review Act. n65 These are intended to assert controls over non-Canadians doing business in Canada or investing in Canadian businesses. As a sovereign nation, Canada seeks to regulate foreign participation and investment. Conse- quently, U.S. would-be participants and investors are well advised to retain Canadian counsel. The book in this regard represents a caveat to non-Canadian readers.

The author details various provisions of a group partnership agreement. These are useful as a checklist of various points to be considered.

The final chapter on "Income Tax" is brief. n66 It wisely follows the chapter on Business Entities. The author notes that taxes are not the only consideration in determining the choice of a business entity, but they are a very important one. n67 The norms of taxation in Canada and their application to musicians should have a familiar ring to American taxpayers in music. n68

The section on Specific Types of Income - Canada Council Grants, Copyrights, Record masters and Videotapes, Trade Marks and Trade Names - are useful subdivisions relating to specific categories and sets forth the tax treatment of each. The concluding subdivision relates to U.S.-Canadian withholding which is of general interest to Americans.

The final section of the book covers Tax planning. The section includes a discussion of forward averaging, a kind of Canadian version of income averaging.

Conclusion

In the U.S., a book such as this would be considered principally a reference book for lawyers, since footnotes, including case citations, are set forth on the same page as the text to which the item is footnoted. However, the work also has a broader application and is intended for all those concerned with musicians and the law, i.e., music publishers, record producers, managers and agents, and, of course, musicians. This book belongs in U.S. libraries and on the shelves of U.S. lawyers who deal with the Canadian law of music, as well as on the shelves of musicians and other Americans who deal with Canadian music, music publishers, record labels, and producers.

The author, Paul Sanderson, is himself a musician as well as a Barrister & Solicitor in the firm of Clark Miller with offices in Toronto, Canada.

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NOTES

1. See assorted AFM contracts in Appendices 2 and 3 at pp. 203-211.

2. Canadian Copyright Act of 1921. See Henderson, Gordon F. Canadian Copyright Law in the Context of American Canadian Relations, Jean Geiringer lecture delivered February 23, 1977 in New York City, reprinted in Bulletin of the Copyright Society of the USA, Vol. 24, p. 369.

3. Copyright Revision Act, Public Law 94-553, Act 19, 1976, 90 Stat. 2541, effective in the main, as of January 1, 1978.

4. 5 & 6 Victoria (1842).

5. Canadian Copyright Act of 1886, which became part of the Revised Statutes of Canada of 1906, as amended

by the laws of 1908. See Canadian Copyright Act in Appendix of the Law of Motion Pictures, by Louis D. Frohlich and Charles Schwartz (1918) at p. 812.

6. The Canadian Copyright Act of 1921 which became effective January 1, 1924. For recent efforts to revise Canadian Copyright, see Report of the Sub-Committee on the Revision of Copyright, Canada House of Commons, October 1985 entitled "A Charter of Rights for Creators" and A.A. Keyes and C. Brunet, Copyright in Canada-Proposals for revision of the Law (1977).

7. Act of March 4, 1909, 60th Cong., 2d Sess.

8. See Copyright Enactments, Laws Passed in the United States Since 1783 Relating to Copyright, Copyright Office Bulletin 3 (Revised) (1963) and Title 17 U.S.C. approved July 30, 1947 therein at p. 102 and

amendments to Title 17 prior to passage of Copyright Revision Act of 1976, effective January 1, 1978.

9. Copyright Revision Act, Pub. L. 94-553 approved October 19, 1976, effective in the main as of January 1, 1978.

10. See 4 Nimmer on Copyright (1985). Appendix 22. Berne Convention-List of Publications

11. 3 Nimmer on Copyright, Sec. 17.04D(2). Simultaneous Publication as the Basis of Berne Protection For Nationals of Non-Berne Countries. 12. This discrepancy is exacerbated when comparison is made in terms of the exchange value of the Canadian dollar vis-a vis the U.S. dollar. Within the past decade the value of the Canadian dollar has declined from par or premium vis-a-vis

the U.S. dollar to a discount of more than 25% in exchange rate.

13. See Taubman, Joseph, Copyright and Antitrust (1960) at pp. 3-4 and footnotes 6 and 10 thereto.

14. This writer testified several years ago as an expert witness before the 3-man Copyright Appeal Board in Toronto, Ontario in connection with its rate making proceedings. See text at pp. 28-29.

15. See, for example, the author's reference on p. 7 under (C) Registration, (ii) Note on U.S. Law.

16. See pp. 15 - 20 of text of book.

17. See pp. 62-63 of text of book.

18. P. 49.

19. P. 49, footnote 1.

20. P. 49.

21. Pp. 49 - 50 of text of book.

22. p. 58 of text of book.

23. 17 U.S.C. Sec. 301.
24. P. 21.

25. P. 24.

26. P. 31.

27. Pp. 32-34.

28. See Taubman, Joseph, "In Tune with the Music Business," (1980) at p. 28.

29. Pp. 34-35.

30. Appendix 1, at pp. 195-202.

31. Pp. 38-48.

32. Pp. 67-80 out of a chapter covering pages 67-81, inclusive.

33. P. 67.

34. Pp. 73-74.

35. The writer of this review has worked with Canadian Theater producers and drafted licensing agreements for production in Canada. Canadian producers find it difficult to tour a production, other than to Toronto and Vancouver and perhaps Montreal. Canadian theater logistics therefore differ materially from the U.S.

36. Pp. 86-89. See also Appendix 2, AFM Exclusive Agent Musician Agreement p. 203.

37. P. 89. See also Appendix 2, AFM Personal Management Agreement, p. 207.

38. Idem. Pp. 89-98.

39. Pp. 208-217.

40. P. 90.

41. Pp. 99-116.

42. Pp. 100-101.

43. Pp. 101-102. See also Appendix 3. Live Performances, AFM Casual Engagement (Contract for Canada) at pp. 218-219 and AFM Steady Engagement Contract, at pp. 220-221.

44. See pp. 104-108 Musician Riders Provisions and Appendix 3, Sample Musician's Live Performance Contract Rider Checklist at pp. 222-223.

45. Pp. 108-109.

46. Pp. 110-111.

47. A copyright in performance was deleted from the Copyright Revision Act of 1976. Efforts continue with bills in Congress for same, so far without success.

48. P. 111.

49. Pp. 114-116.

50. P. 117-136.

51. R 117.

52. P. 119. The author does not elaborate but no doubt he had in mind CBS Records, RCA Records, Warner Records, MCA, Capitol and Polygram, the latter two being foreign, not U.S., owned.

53. Pp. 121-136.

54. Appendix 4. Recording at pp. 224-228.

55. Appendix 4. Recording at pp. 229-250.

56. P. 117.

57. Chapter 9, Merchandising, at pp. 137-150.

58. P. 57.
59. The final form in the book is Appendix 5 Merchandising License Checklist at pp. 251-252.

60. Pages 153-164.

61. The author cites the landmark British case of Lumley v. Wagner, 42 E.R. 687 (1852), where an opera singer who breached her contract of exclusivity was not

compelled to perform but was enjoined from singing elsewhere.

62. Pp. 154-157.

63. Pp. 161-163.

64. Pp. 162-163.

65. Pp. 168-169.

66. Pp. 179-191.

67. P. 171.

68. Pp. 179-186.

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