BUSINESS AFFAIRS

Syndicated Television Music: The Source Licensing Debate Rages On (Part 1)

by Kyle-Beth Basson

Every day, the American public listens to music. People turn on their radios in their cars and homes. They watch television and hear the themes of well-known shows like Moonlighting, Miami Vice, and Cheers or enjoy music on a late movie, perhaps "As Time Goes By" from Casablanca. Because people hear music so often in their daily lives, because they can turn on the radio or television and hear music without paying, they assume the music is free. The fact, though, is that music is a commodity which is priced competitively and then bought and sold in the free market. The public does not understand that a host of financial transactions occurs before the music hits the airwaves and that the same music which entertains them free of charge provides someone with a source of income.

This article will examine music in syndicated television: how it is made, marketed and licensed. After explaining the history and practicalities of the current system of blanket licensing, it will discuss a radical legislative proposal which by mandating source licensing could alter the very foundations of the music industry.

American Copyright Law

The starting point is American copyright law. Unlike European nations, the United States refuses to recognize ownership of intellectual property as a natural right. The

Constitution authorizes Congress to grant authors a monopoly over their writings for a limited time. After this limited time period ends, the writing enters the public domain for anyone to use as he wishes. During the protected period, however, the owner has exclusive rights to control the use of his work. These rights are enumerated in section 106 of the Copyright Act and include the exclusive rights to reproduce, distribute and display the works. Section 106(4) also grants the owner the exclusive right to perform the work publicly, specifically attributing this right to composers of musical works. Although listed fourth among the exclusive rights, the exclusive right to public performance has become the most important to composers. Through public performance royalties, composers earn money on which to live, and so they perfect their craft in the hope that their music will receive repeated performances. The performance royalty right thus furthers the Founding Fathers' goal of providing an incentive to create. It is the basis for the existing system of licensing, and it has become the focus of the current controversy.

Composers' Work Conditions

Before exploring the licensing systems, we must understand the highly pressured context within which composers, specifically television composers, work. Gerald Fried, the composer of scores from Star Trek and Dynasty, says, "Beethoven wouldn't have lasted a month in television, but Mozart would have been a natural because he was a 'first idea man.'" Bruce Broughton who composed the music for Dallas and Hart to Hart comments, "the sheer bulk of music you have to write, particularly if you're doing an entire series by yourself, which may require twenty to twenty-four weeks, can be overwhelming. I can't think of anything that demanding."

n1 Indeed, considering that the typical composer can comfortably write two minutes of music a day, n2 the television composer is under extreme pressure since he may have to compose twelve days' worth of music in about four days. n3 David Raksin, composer and ex-President of the Composers and Lyricists Guild of America (CLGA) observed that composers "are constantly subjected to deadlines imposed with little or no understanding of what is required in the way of time and effort to complete our part of the overall project. The composer, being last in the so-called creative processes involved, is the one most often cheated out of the time necessary to the job, and it is not at all unusual for a film or television composer to work 140 hours a week sometimes several such in a row." n4

In addition to facing extraordinary time demands, composers labor with virtually no up-front compensation. For a typical one hour television episode in which the composer writes, orchestrates, conducts and records for anywhere from two to four weeks, the composer receives about $3,000. The director, on the other hand, receives $25,000 to $30,000 for the same one hour episode. The disparity becomes even more gaping after the composer pays all his bills from supplies, instrument rentals, taping sessions, musicians, and recording studio rental. Jim DiPasquale, composer of music for Hawaii 5-0, Lou Grant and McLane's Law, noted that his net profit from nine days of work for the theme to Hawaii 5-0 was $152. n5 It is obvious, then, that the composer is the low man on the totem pole. Producers ask him to work quickly and cheaply, and he agrees because he wants the work and does not have the leverage to improve his working conditions.

Performance Royalties

How, though, does the average composer survive with such meager compensation? He lives on his performance royalties. He hopes that the show will be picked up by a network and enter syndication, because he receives continuous payments only if his work receives continuous use. The composer can, though, do no more than hope. For instance, Jerrold Immel (Dallas, Knot's Landing), one of television's more successful composers, has only received royalties from eleven or twelve pilots out of the thirty on which he has worked. n6 Consequently, composing for television is a high risk business. Performance royalties are the only lifeblood which composers possess to date, and they cannot even count on those royalties to materialize.

Composers' Efforts to Organize

The most reasonable question which now comes to mind is why composers work under these conditions. The answer is simple; they have no bargaining power. Composers are not in a position to effect meaningful changes in their form of employment. The NLRB has repeatedly ruled that composers are independent contractors and not employees, and therefore they cannot unionize. In the most recent decision, Aaron Spelling Productions, Inc. v. Society of Composers and Lyricists, 31-RC-5755 NLRB (ELR 6:10:7), the Board applied the "right of control test":

"There is no question that the Studios exercise control over the musical compositions and lyrics that they contract with composers and lyricists, respectively, to produce. Ultimately, however, what they control is not the manner and means by which the music is produced. Rather, they control the way the music sounds, and thus, the way it complements the production for which it is written.... [T]he record is replete with evidence regarding the independent environment in which composers and lyricists ply their trades .... The composer or lyricist is always free to accept from another studio [another] project .... They generally work at home, use their own pianos, video cassette recorders, and other available equipment, choose their own hours and, basically do whatever they want to do, so long as they complete their work on time. They may, at times, also work concurrently on projects for other studios .... That a studio may require a composer to attend a theme, spotting, and recording session on its own premises ... or even that a studio retain the plenary right to control the final shape of the musical product, does not detract from the fundamental fact that, with respect to the manner and means by which composers go about their daily work, the Studios do not, as a practical matter, retain any significant right of control."

The composers avidly disagree with the Board's refusal to let them unionize, pointing out that customary contractual language gives the Studios the right to control regardless of whether they actually do so. n7 Yet, composers request in the past to be classified as independent contractors, somewhat vitiate their arguments. In the antitrust suit Bernstein v. Universal Pictures Inc., 72 Civ. 542-CLB (April 10, 1979), the composers successfully claimed that they were independent contractors and that they should not be bound by an agreement between the producers and the then active CLGA requiring the composer to sign away all title, publication and exploitation rights to the producer. In a settlement, the composers received a limited right to attempt public exploitation of their works.

Yet, as Franklin J. Havlicek and J. Clark Kelso point out, "the settlement has had surprisingly little effect on contracting practices in the industry." n8 Havlicek and

Kelso attribute the lack of change primarily to the "composers' historic weakness in bargaining power with aristocratic patrons and executive producers alike." n9 This lack of strength, in the long run, is more important than whether the NLRB labels composers independent contractors or employees. Without bargaining power, the composers are unable to effectuate changes with or without a union. Composers are not businessmen. They lack the requisite skills in negotiating and contract interpretation to be effective bargainers.

Composers and Lyricists Guild

The short history of the CLGA evidences this weakness. Organized in 1954, the CLGA represented a feeble attempt to bargain collectively. The organizing statement explained the need for the Guild:

"The rapid expansion of television, with the employer taking as a precedent for prices and conditions a much curtailed radio standard, together with the current unprecedented decline in the production of theatrical motion pictures, is resulting in an all-round increase of abuse to the composers. A further concern is the imminent possibility that the Hollywood studios, while continuing a limited production schedule of theatrical motion pictures, will devote the remainder of their facilities to the production of films for television with an increased prospect of re-use of music in studio music libraries without compensation to the composer. Also the networks and a considerable number of independent producers and packagers have tremendous libraries from which they could score countless programs in both radio and television.... [T]he problem cannot be settled without concerted action-and that means a guild organization." n10

Despite this pressing need, the CLGA experienced difficulty in organizing its members and in gaining recognition by the studios. At first, the studios adamantly refused to deal, and the CLGA members refused to boycott. Although the CLGA signed two agreements with the studios, one in 1960 and one in 1967, which guaranteed composers royalties, little if no progress occurred in the area of hours and deadlines. The biggest problem was that the studios were not exploiting the members' writings, thus depriving them of valuable royalty income. After negotiations broke down in 1971, the CLGA went on strike. The strike was ineffectual because the general membership did not support it and the CLGA lacked funds to make an effective stand. Finally, members of the CLGA launched the Bernstein antitrust action to acquire copyright control of their music. The suit received funding from the personal bank accounts of CLGA members like Elmer Bernstein and Henry

Mancini but eventually these men could not sustain the financial burden. The result was the ineffectual 1979 settlement described above and the financial ruin of the CLGA.

The lesson from this short attempt at collective bargaining is that composers and lyricists lack the political clout to effect serious changes, but more importantly, that they have difficulties organizing themselves. Mike Gorfaine, a well-known agent, comments that the union attempt left a "bad taste in the composers' mouths. It was a time consuming experience which failed." Gorfaine adds that the composer's lifestyle does not lend itself to the comraderie necessary for a successful union. "Composers are loners. They sit alone in a room for hours and work. It's a very solitary existence." n11

The most important factor, though, militating against the success of a composers' union is the universal observation that the film and television industries undervalue the work of the composers. Producers add music to a film as a final step, at a point where they may have already gone overbudget, and they put their primary emphasis on the words and action within the film. Producers treat music as a subsidiary interest, although often music can create a mood far more effectively than can words. The only safeguard which composers have, the only way composers can be sure they will earn a living is through their performance royalties. A composer accepts small upfront fees because he knows that if his piece is a hit and receives continuous use, he will be compensated more adequately by continuous performance payments.

Performance Rights Societies

Aaron Copland explained the origins of performance payments when he said, "Once upon a time, there existed a curious system whereby composers would write, have their music performed, but would receive little or no money for these performances. Had this predicament continued, my colleagues and I would never have had the opportunity to devote our lives to composition. But along came the notion of the performing rights society. And music creators have benefitted ever since." n12 Copland was referring of course to ASCAP, founded in 1914, BMI in 1939, and SESAC in 1930. n13 These organizations were founded to enforce the musical performance right for which the copyright statute provided. The organizations serve as clearinghouses for composers and users. The composer joins one of the organizations and grants it the nonexclusive right to license his works' performing rights. The organizations monitor and track performances of works in their catalog, collect fees from the users, and after deducting administrative expenses, pay their member composers performance royalties determined on scales particular to each organization. These societies spare composers the arduous task of policing performances of their compositions and protect their copyrights by prosecuting infringement suits.

ASCAP and BMI only license non-dramatic performance rights. They do not collect either mechanical fees for the right to make and sell recordings or synchronization fees for the right to synchronize music to a film's action. SESAC does acquire some limited rights in these areas, but because it is such a small organization, it is not considered a trendsetter. ASCAP and BMI are the major players. Unlike SESAC, their activities are bound by judicial consent decrees and their licensing rates and fees are subject to judicial review. According to the consent decrees, ASCAP and BMI can only obtain the non-exclusive right to license performance rights. In addition, they must offer users several types of licensing alternatives. The availability of such alternatives has been a hotly litigated issue. In BMI v. CBS, 441 U.S. 1 (1979), and Buffalo Broadcasting v. ASCAP, 546 F.Supp. 274 (SDNY, 1986), rev'd 744 F.2d 917 (1984), cert. den. 105 S.Ct. 1181 (1985), networks and then local stations charged the societies with antitrust violations. The courts, however, upheld the validity of the performing rights societics' licenses and ruled that four types of licenses are available to broadcasters: the blanket license, per program license, direct license and source license.

Blanket and Per Program Licenses

The blanket license is the most commonly used license both in the United States and abroad. ASCAP and BMI allow the user access to their catalogs for the period of the contract for a fee determined by the characteristics of the user. Network broadcasters, for instance, pay a set fee which increases each year over the term of the contract. Local television stations (defined as "any commercial television station licensed by the FCC to broadcast a television signal, excluding the fifteen television stations owned and operated by one of the three television networks" n14) pay about 1% of their annual revenue. The licenses provide certain deductions for local stations whose shows consist of talk or news programs which use very little music. The advantages of the blanket license include "transaction cost savings, monitoring costs savings, unrestrained output, flexibility in the choice of musical material, and indemnification for users from liability for copyright infringement." n15

The per program license is a close relative of the blanket license. It allows complete access to the societies, repertoires for a certain program in exchange for a share of the station's revenues from that program. The per program license is more expensive than the blanket license, the rates approaching 9% rather than 1% of revenue, but in Buffalo Broadcasting, the Court of Appeals pointed out that this discrepancy stems from different bases for the percentages.

Since the base for the blanket license fee includes revenue from network programs, for which the networks have already acquired performing rights by virtue of their blanket licenses, as well as some local programs that use no music, it is inevitable that the rate for a local station's blanket license will be less than the rate for a program license taken solely to permit use of music on a particular program. n16

The Buffalo Broadcasting court also did not find the additional recordkeeping required by the per program license to be overly burdensome, and therefore, deemed it a realistic alternative to the blanket license.

Direct and Source Licenses

The direct license is another option which differs from the blanket and per program license in that it enables the user to bypass ASCAP and BMI altogether. Under a direct licensing scheme, television stations "directly contact each composer or agent or publisher that owns the television performing rights to the music contained in the program in order to obtain the music rights without the need of a blanket license from ASCAP or BMI." n17 The Buffalo Broadcasting court held that if local television stations would forego the blanket license so they do not have to make double payments, they would be able to pursue direct licensing. The court pointed out that to avoid the difficulties of tracking down each composer, an independent clearinghouse would probably evolve in order to broker performing rights licenses much as The Harry Fox Agency now negotiates licenses for synchronization rights. The court finally pointed out that even if certain composers were so difficult to locate that direct licenses for certain programs were impossible, stations could purchase per program licenses for such programs. Consequently, direct licensing is a realistically available alternative to blanket licensing, especially given the availability of per program licensing. n18

The final licensing option considered by the Buffalo Broadcasting court is source licensing. A source license is a type of direct license in that it bypasses ASCAP and BMI. The difference is that instead of the broadcaster negotiating and purchasing the license, the program producer secures from the composer/publisher owner performing rights simultaneously with the synchronization rights. When the broadcaster then purchases the programming, it receives all the rights intact and does not first have to buy the music rights. The television stations in Buffalo Broadcasting failed to establish that source licensing was not an available alternative, because they did not begin negotiating with the publishers and composers until the inception of the suit. Therefore, there was no clear indication that ASCAP and BMI, representing their composer and publisher members, would not be receptive. The court did not doubt that should local broadcasters decide that source licensing really was their objective, they would be able to effect a change from the current system of blanket licensing. n19

Syndicated Television

The Buffalo Broadcasting case, like the CBS case before it, ruled that broadcasters have at least the four alternative licensing schemes available to them and upheld usage of the blanket license in local television. Local television stations are unhappy with the decision and still want a change, specifically with regard to syndicated television. There are approximately 750 local television stations in the United States, about 150 of which are independent and 600 of which are affiliated with the major networks, CBS, NBC, and ABC. These stations use network programming, syndicated programming and locally produced programming. The Buffalo Broadcasting District Court decision defined syndicated programming as: "theatrical motion pictures, prerecorded television programs and live television programs offered by producers and distributors for sale or license to a television station to be broadcast as a nonnetwork program. Syndicated programs include made-for-television movies, series, cartoons, documentaries, news, sports, and religious programs... [S]yndicated programming typically comprises approximately 65-75% of the total non-network programming of local television stations. The bulk of syndicated programming is comprised of off-network programming, that is pre-recorded programs previously broadcast on network television, and of motion pictures originally distributed theatrically. The remainder ... is produced originally for syndication, and is known as first-run syndicated programming ... Most local television stations own inventories of syndicated programs for which they own the broadcast rights. n20

The court also noted that "locally-produced programming on the average occupies two to three hours of the local station broadcast day and typically consists of news shows, sports coverage and talk shows." n21 Unlike syndicated programming, local stations can control what music accompanies locally-produced programming. In syndication, the producer, not the station, chooses between "inside" composer-for-hire music (where the producer hires a composer to create new music for a specific need) and "outside" preexisting music (which the producer incorporates into a show after purchasing its rights).

Television music generally serves three purposes: theme, background, and feature. Theme music introduces and closes a show. Background music sets the mood in a scene by punctuating and accompanying the action and the script. Finally, feature music is the highlight of a scene, the exclusive focus of the audience's attention. Almost all local stations' programs contain theme or background music, most of which falls within the ASCAP or BMI repertoire. Feature music is present in a smaller but increasingly notable percentage of syndicated programming. Ron Anton of BMI notes that with the "lengthening honeymoon between pop music and film, shows are using more and more feature music. Fame, for instance consists of mostly feature music." n22 The evidence in the Buffalo Broadcasting case "established that music is decidedly less important to the overall entertainment value of most locally-produced programs than it is to the success of most syndicated programming. Nevertheless, local stations freely select music from the ASCAP and BMI repertoires for their locally-produced programs because their blanket licenses permit them to do so without additional costs. n23

Regardless of the purpose of the music, local stations and networks must purchase the performance right. Television producers only buy "synch" rights because their production of the show does not constitute a performance. In both CBS and Buffalo Broadcasting, the courts upheld the use of the blanket license to sell performance rights and recognized the validity of splitting performances and synchronization rights. The courts pointed out that the split was not an artificial one since the copyright law affords composers a right to separate income from performances. The courts therefore concluded that the blanket license was not a per se violation of the antitrust laws and upheld its use under a rule of reason analysis.

Broadcasters remain dissatisfied with the outcomes in CBS and Buffalo Broadcasting, and they have turned to Congress in another attempt to eliminate blanket licensing. That proposed legislation will be the subject of Part 2 of this article, to be published next month.

NOTES

1. Carol Starr Schneider. "Scoring the TV Series;' ASCAP in Action, Fall, 1985, p. 33.

2. Interview with Robert Light, January 12, 1987.

3. Schneider, Ibid.

4. Letter by David Raksin for CLGA to Professor Irving Falk, August 15, 1968.

5. Interview with James DiPasquale, January 21, 1987.

6. Schneider, Ibid., p. 34.

7. See generally, Richard Rasmussen, "Labor Law: Are Creative Artists Independent Contractors or Employees," Loyola Entertainment Law Journal, 1986, pp. 199-205.

8. J. Havlicek and J. Clark Kelso, "The Rights of Composers and Lyricists Before and After Bernstein," Columbia Journal of Art and Law, 1984, p. 453.

9. Ibid., p. 454.

10. "The Need for a Composers' Guild," CLGA, December, 1953.

11. Interview with Mike Gorfaine, January 22, 1987.

12. ASCAP, "Let the Music Play," Billboard Advertising Supplement, January 23, 1982.

13. See generally, Kernochan, John M., "Music Performing Rights Organizations in the United States of America: Special Characteristics; Restraints; and Public Attitude," Copyright, November 1985.

14. 546 F.Supp. at 276.

15. 546 F.Supp. at 286.

16. 744 F.2d at 926.

17. 546 F.Supp. at 289.

18. 744 F.2d at 928-929.

19. 744 F.2d at 929-932.

20. 546 F.Supp. at 279.

21. Ibid.

22. Interview with Ron Anton, January 20, 1987.

23. 546 F.Supp. at 281.

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City in September 1987. She conducted the research for this article in January 1987 while serving as an extern for Warner Bros. Music in Los Angeles. The author thanks Professor David Wilkins of Harvard Law School and Don Biederman, Esq., of Warner Bros. Music for their advice in connection with her work on this article. [ELR 9:2:3]

RECENT CASES

Owner of copyright in "Ol' Man River" obtains summary judgment in action against importer of album containing Frank Sinatra's rendition of the work

"Ol' Man River" may not keep rollin' into the United States via Jem Records' imported copies of the album

"His Greatest Hits Frank Sinatra - New York, New York," a Federal District Court in New Jersey has ruled.

Jem imported copies of the Sinatra album from New Zealand, and distributed the albums in the United States with the consent of WEA Records. However, T.B. Harms Company, the owner of the copyright in the musical composition "Ol' Man River," which was written by Jerome Kern and Oscar Hammerstein II, did not authorize Jem's importing and distribution activities, nor did the other owners of copyrights in the musical compositions contained in the Sinatra album.

In granting Harms' motion for partial summary judgment with respect to the issue of liability for violating section 602 of the Copyright Act of 1976, Federal District Court Judge John W. Bissell rejected Jem's argument that the company did not violate Harms' exclusive distribution rights because once a musical composition such as Ol' Man River becomes available for compulsory licensing, the copyright owner's exclusive rights to distribution are lost. The language used in section 106-118 of the Act did not imply that "a copyright holder's exclusive rights are extinguished once the compulsory licensing or other provisions addressing limitation on these exclusive rights are invoked." A compulsory license under section 115 of the Copyright Act confers a distribution right but only as to the phonorecords made pursuant thereto, stated Judge Bissell, citing Nimmer on Copyright. Thus, the compulsory licensing provision was not applicable to Jem, a middleman distributor of the Sinatra phonorecords.

Even if a distributor, as opposed to a manufacturer/distributor, was eligible to invoke the compulsory license provision, Jem failed to comply with the requirements of section 115.

Judge Bissell noted that the instant case was analogous to Columbia Broadcasting System, Inc. v. Scorpio

Music Distributors, Inc., 569 F.Supp.47 (ELR 5:11:7), in which the court rejected a claim that section 602 did not apply to an importer's conduct because the first sale doctrine limited the copyright owner's exclusive distribution rights in the sound recordings at issue. The fact that the copyrighted work in Scorpio was a sound recording did not alter "the legitimacy and applicability" of the reasoning utilized by the court in that case. For to allow Jem "to rely on a limitation of the owner's exclusive rights to circumvent the prohibition on importation would tie the hands of the copyright holder who seeks to exercise his rights to control copies of the work which enter the American market," emphasized the court in holding that the exclusive rights of a copyright owner to enforce section 602 are not limited by the compulsory licensing provision of the Copyright Act, and that as a matter of law, Jem infringed Harms' copyright.

T.B. Harms Company v. Jem Records, Inc., Case No. 85-2677 (D.N.J., March 26, 1987) [ELR 9:2:8]

Distributor of albums featuring late musician Jimi Hendrix was entitled to establish damages in Lanham Act claim against competitor, rules Federal Court of Appeals

A dispute concerning the distribution of record albums which purported to feature performances by the late musician Jimi Hendrix, but which either did not contain such performances or contained performances by Hendrix as a background artist or session player, has reappeared on the litigation charts (see ELR 7:4:5).

PPX Enterprises, the holder of financial interests in the sale of records containing Hendrix performances sued Audiofidelity Enterprises, claiming damages under the

Lanham Act and tortious interference with prospective economic advantage. A Federal District Court in New York granted injunctive relief to PPX on the Lanham Act claim, but denied damages on the ground that PPX did not present evidence of actual consumer confusion. The court also granted judgment notwithstanding a jury verdict to Audiofidelity on the tortious interference claim.

A Federal Court of Appeals has affirmed the District Court's decision with respect to the tortious interference claim, finding that PPX did not prove (or even allege) an essential element-that Audiofidelity interfered in any way with the underlying business relationship existing between PPX and Hendrix.

However, the court has reversed the judgment as to PPX's damages claim and remanded the matter for further proceedings. Judge Roger J. Miner noted that parties seeking damages for the violation of section 43(a) of the Lanham Act (as opposed to injunctive relief) must establish actual consumer confusion or deception. In the instant case, the jury found that "Audiofidelity's recordings, through their design, labelling and album cover, purported to contain feature performances of Jimi Hendrix, when in fact they did not." It appeared to Judge Miner, on the basis of the jury finding, that PPX;s claim was for false advertising under the Lanham Act, rather than misrepresentation as to source. And it was found that the "only possible conclusion to be derived from Audiofidelity's conduct was that consumers actually were deceived by the misrepresentations." PPX should not have been required to provide evidence of actual consumer confusion in order to establish that it was entitled to damages, stated the court, in remanding the matter for the calculation of such damages.

PPX Enterprises, Inc. v. Audiofidelity Enterprises, Inc., Docket Nos. 86-7704, 86-7900 (2d Cir., May 5, 1987) [ELR 9:2:8]

Eden Music was not entitled to summary judgment in action involving ownership of copyright renewal interest in songs, rules New York appellate court

A dispute concerning the ownership of the copyright renewal interests in over 300 songs was not amenable to summary judgment or injunctive relief, a New York appellate court has ruled, in reversing trial court decisions on behalf of Eden Music in its action against Times Square Music Publications Company.

Clyde Otis' publishing companies, Eden Music and Prentice Music, controlled over 1,000 copyrighted songs, including many composed by Otis. In 1973, Eden and Prentice sold a one-half interest in certain songs to New York Times Music Corporation and Music of the Times Publishing Corporation (the interests subsequently were conveyed to Times Square and Herald Square Music Company) in return for $125,000 and 50 percent of the buyers' net receipts.

Both Eden and the Times Square parties claimed the renewal rights to about 300 of the 1,000 songs. The trial court initially determined that the contracts gave Times Square the right to participate in securing renewals of the copyrights, but did not give the company an interest in rights Eden had subsequently acquired; in a second order, the court found that Eden had the exclusive rights to the copyrights in the disputed compositions.

In disagreeing with the trial court orders, Judge Asch noted that the 1973 contract contained conflicting terms with respect to renewal rights, that there was no provision expressly excluding the renewal term in the disputed songs, and that parol evidence introduced by Eden did not resolve the factual issues raised.

Eden Music Corporation v. Times Square Music Publication Company, New York Law Journal, p. 1, col.6 (N.Y. App., April 9, 1987) [ELR 9:2:9]

United States Supreme Court affirms ruling that Utah's Cable Television Programming Decency Act is unconstitutional

The United States Supreme Court has affirmed a Federal Court of Appeals decision which held that Utah's Cable Television Programming Decency Act was unconstitutional.

The Supreme Court did so in a one-sentence order without hearing oral argument or issuing an opinion of its own. The Court of Appeals, in a per curiam opinion, upheld a Federal District Court's findings (ELR 7:12:16) that federal law preempted state regulation of the content of cable television programming, and that while cable operators still may be held liable by a state for violating "obscenity ... or other similar laws," the Utah statute exceeded this limited power. Utah's statute banned, as a public nuisance, the exhibition by cable systems of "indecent material" The Court of Appeals also agreed with the District Court's holding, in its "comprehensive" opinion, that the Utah statute was unconstitutionally overbroad and vague, and "void on its face," and affirmed the court's award of attorney's fees.

In a lengthy concurring opinion, Judge Baldock, although "compelled by precedent" to agree with the findings that the Utah statute was vague and overbroad, did not join in the court's apparent conclusions that federal law, in this case the Cable Communications Policy Act of 1984, preempts state regulation of sexually oriented program content which is not obscene and that the First Amendment precludes the regulation of indecency on cable television. In Judge Baldock's view, indecency may be regulated via a narrowly drawn time, place and manner regulation. However, the Utah statute, although identifying a substantial governmental interest in the protection of minors, completely prohibited indecency, rather than providing for reasonable alternative times for the dissemination of indecent material. And the statute's vague definition of indecency did not provide fair notice of the proscribed conduct, thereby possibly deterring protected expression, concluded Judge Baldock.

Jones v. Wilkinson, 800 F.2d 989 (10th Cir.1986), aff'd without opinion, 107 S.Ct. 1559 (1987) [ELR 9:2:9]

New Jersey's "Son of Sam" law did not extend to profits earned by author and publisher of a biography of a murderer

The ELR recently obtained a copy of a May 1986 New Jersey appellate court opinion involving a claim for damages brought by the parents and sister of Maria Fasching against her murderer, Joseph Kallinger, and against Flora Schreiber and Simon and Schuster, the author and publisher of "The Shoemaker: Anatomy of a Psychotic" The Shoemaker, a 423-page "psycho-biography" of Kallinger, contained a 13-page account of the murder of Maria Fasching.

Schreiber had obtained the rights to Kallinger's story in an agreement with Kallinger and his wife. The agreement provided that the Kallingers would receive 12 1/2 percent of any money received by Schreiber from the publication of the biography. Schreiber received advances of $475,000 and royalties of about $75,000; in August 1976, the author forwarded about $14,000 to Kallinger's attorney (Kallinger had assigned to his attorney all rights in the contract with Schreiber to be credited toward his legal expenses). Subsequently, the attorney received an additional payment of between $12,000-$14,000; Kallinger received nothing from the book's proceeds.

Maria Fasching's next-of-kin sued The Shoemaker parties, in part, under New Jersey's Criminal Injuries Compensation Act of 1971. A 1983 amendment to the statute, entitled "An Act Concerning Certain Moneys Received by Persons Accused of Crime," (the so-called "Son of Sam" law) concerned contracts entered into with persons "convicted or accused of a crime in this State or an agent, assignee, beneficiary ... of a person convicted or accused of a crime in this State." As described by the court, if such a contract involves media reenactment of a criminal act, or "expressions" of a criminal's "thoughts, feelings, opinions or emotions," regarding a crime, the contract is void unless it contains a provision for payment to the Violent Crimes Compensation Board of money that would otherwise be owed to the convicted/accused person or his/her agent or assignee. An accused can gain access to these funds only through a court order after a showing that the money will be used for his/her defense.

In 1985, a New Jersey trial court dismissed the Fasching kin's defamation claim, holding that no cause of action existed for the defamation of a dead person, causes of action for false light invasion of privacy and for unjust enrichment also were dismissed. The court then granted summary judgment to the Fasching parties on their claim under the Compensation Act.

The appellate court agreed with the trial court's rulings with respect to the common law causes of action.

However, Judge King declined to find that the Shoemaker parties were agents or representatives of Kallinger within the meaning of the statute. The language of the 1983 amendment, as well as its structure and function, its title and legislative history indicated that it was intended to reach the profits owed to an offender, not the money earned by authors and publishers from the recounting of a crime.

Fasching v. Kallinger, 211 N.J.Super. 26 (N.J.App. 1986) [ELR 9:2:9]

Two limited partnerships did not obtain sole ownership interest required to justify depreciation deductions for six films, rules United States Tax Court; limited depreciation allowance was available in connection with income participation interests

In the late 1970s, two partnerships, known as Balmoral and Shelburne, invested in the films "First Love," "The One and Only," "Heaven Can Wait," "Foul Play," "Grease," and "Bad News Bears 3." The investments raised several issues which have been considered by the Tax Court in a "test case" that is likely to affect the outcome of petitions filed by about 500 other taxpayers.

Judge Simpson posed the first issue for decision as whether Balmoral and Shelburne became the owners of their respective motion pictures for purposes of computing allowable depreciation. The Commissioner argued that Paramount Pictures acquired, under its distribution agreements, the irrevocable right to exploit the films, leaving the partnerships with no interest upon which to base a depreciation deduction.

After pointing out that for tax purposes, a sale of a film occurs when there is a transfer of all substantial rights of value in the film's copyright, the court determined that Balmoral and Shelburne did not acquire and retain substantial ownership rights in the films. Paramount had the right to make copies of the films, to distribute and exhibit copies of the films to the public, and to otherwise exploit any dramatic material contained in the films, i.e., the "entire bundle of rights that is a copyright."

Furthermore, Paramount retained other rights and liabilities associated with ownership, including the right to select the laboratory which would make copies of the films; to determine the title of each film and the opening advertising and initial theatrical release of the films in the United States and Canada; and to license the soundtrack of the films. In addition to its "tremendous" control over the exploitation of the films, Paramount retained a significant financial interest in the films and control of their proceeds.

Balmoral and Shelburne, as a result of a series of transactions, obtained a gross receipts participation and a net profits interest in the proceeds of Paramount's distribution efforts; such interests, as in the proceedings involving taxpayers Law and Tolwinsky (ELR 9:2:11) would exhaust over time, stated Judge Simpson, and the partnerships therefore were entitled to a depreciation allowance. However, Balmoral, in using the income forecast method of depreciation, was required to use its own net income, rather than Paramount's gross receipts in its computations.

Judge Simpson also agreed with the Commissioner that in this case, an estimate of income from network television broadcasts of the films should have been included in Balmoral's income estimate for 1977 and thereafter.

It then was noted that Shelburne could not use the double declining balance method of depreciation for 1978 because the contract rights it owned in the films were intangible. Because the partnership chose an unacceptable method of depreciation, the straight line method was applied to compute depreciation expenses for 1978, and six years was determined to be a reasonable useful life for Shelburne's contract rights.

The next question before the court concerned the basis of depreciation of Balmoral's and Shelburne's contract rights. The Commissioner argued that long-term notes from the partnerships were not includable in Balmoral's and Shelburne's bases because the notes were contingent, illusory liabilities and because the purchase price of each film unreasonably exceeded its fair market value. The partnerships claimed that the notes represented genuine indebtedness, that the purchase price of each film was not substantially in excess of its fair market value, and they were at risk for the entire amount set forth in the purchase agreement. Judge Simpson determined that the partnerships' long-term notes and the guarantees of the limited partners were without business purpose and executed solely to gain tax benefits. However, certain short-term notes were found to be bona fide debt, as were the promissory notes of the limited partners to the partnerships, and the amounts of these notes essentially constituted the "true" cost of the films.

With respect to the investment tax credit issue, the court found that the partnerships' interest included the value of the cash and bona fide recourse notes from an intermediate financing party to Paramount, less the amount of foreign costs incurred to produce the Bad News Bears film. An additional credit for subsequently incurred print costs and union and guild costs was not allowed because the evidence did not establish that the costs were paid or incurred by the partnerships or someone under their control. Judge Simpson stated that "Given that the partnerships did not own the motion pictures, did not distribute such motion pictures, did not determine any of the costs, and ... only received payments which were net of costs, we conclude that these costs were too remote from the partnerships to be considered paid or incurred by them." The partnerships therefore were entitled to investment credits only as to the amounts conceded by the Commissioner.

The court went on to reject the partnerships' claims for deductions for guaranteed payments to partners, and for advertising payments to Paramount. Deductions were allowed, however, for expenses attendant to film screening activities, and certain legal fees.

Durkin v. Commissioner of Internal Revenue, 87 T.C. No. 79 (1986) [ELR 9:2:10]

Depreciation deductions and investment tax credits available to limited partners in "The Deer Hunter" and "Force 10 From Navarone" are reviewed by United States Tax Court

The two cases previously decided by Judge Simpson and cited in his opinion in Durkin (ELR 9:2:10) upheld rulings by the Internal Revenue Service disallowing certain depreciation deductions and investment tax credits claimed by taxpayers William J. Law and Nathan Tolwinsky in connection with their participation in motion picture "negative pickup" limited partnerships promoted by TBC Films, an Illinois general partnership.

William J. Law was a limited partner in an entity involved with the 1978 film "Force 10 From Navarone." The producer of the film sold all rights (except the right to three network broadcasts) in the United States and Canada to American International Pictures, Inc. After a series of transactions, a limited partnership known as Deka (whose general partner was TBC Films) acquired rights in "Force 10 From Navarone."

Judge Simpson first found that two of the companies in the investment transaction were "strawman" entities inserted in the chain of title between AIP and Deka for tax planning purposes, i.e., to allow the investors to be "at risk" for tax purposes without being at any genuine risk of loss. Thus the agreements under which Deka's limited partners assumed personal liability for a portion of Deka's debt did not represent bona fide obligations and the agreements were to be disregarded, stated the court, for purposes of determining the true nature of the interest acquired by Deka and the tax liabilities of its partners.

The court next cited the "controlling principle" of Tolwinsky (see below) in which it was decided that "where the transferor of title to a motion picture negative and the copyright therein retained all substantial rights in the motion picture copyright, the transferee acquired no depreciable interest in the motion picture." The agreements and circumstances in the instant case revealed that Deka acquired no substantial rights in Force 10 From Navarone, but only a participation in AIP's interest in the gross receipts generated by the film-AIP retained complete and exclusive control over the film while purporting to convey ownership of the film and its copyright to Deka. Deka's payment to AIP of $560,000 (along with a $5.04 million nonrecourse note) did not of itself give the partnership a depreciable interest in the film.

It was further pointed out that AIP accounted for the transaction with Deka as a participation, rather than as a sale of the film - the company reduced its depreciable basis only by the amount of cash paid by Deka. And the payment arrangements of the parties indicated that the nonrecourse note given to AIP did not represent a genuine debt or investment in the film. The court therefore found that Deka was entitled to depreciate only its contractual right to participate in AIP's gross receipts. The basis for depreciation was limited to the $560,000 cash paid to AIP, plus an $84,000 acquisition fee; depreciation for 1978 was to be computed under the straight line method.

Judge Simpson then found that the Commissioner did not meet the burden of proving that Deka's investment in the film was not engaged in for profit. With respect to the investment tax credit issue, the court concluded that any ownership interest acquired in the film by Deka was acquired before the film was placed in service and thus was "new section 38 property" And, as distinguished from Tolwinsky, Deka, which purchased a gross receipts participation in Force 10 From Navarone, was a "lender" under the applicable regulation, and thereby obtained an "equity-like" interest in the film for purposes of the investment credit, even if the interest did not amount to ownership or a depreciable interest. Law's share of Deka's qualified investment was the amount for which he was at risk in 1978, i.e., the full amount of his required capital contribution of $11,500, rather than the amount of cash (about $5,100) actually contributed by Law in 1978.

In Tolwinsky v. Commissioner, the companion case considered by Judge Simpson, EMI Limited obtained an option to acquire the motion picture rights to an original screenplay which, as rewritten and renamed, evolved into the film "The Deer Hunter." In 1977, EMI entered into an agreement with Universal Pictures for the production, financing and distribution of the film. After a series of transactions (described in detail by Judge Simpson) an Illinois limited partnership known as Hart Associates (whose general partner was TBC Films) obtained certain rights in The Deer Hunter. In August

1978, Dr. Nathan Tolwinsky acquired 46 limited partnership interests in Hart.

Judge Simpson, after describing the roles of various parties engaged in the transactions at issue, discussed the question of whether Hart became the owner of the film for tax purposes and concluded that Hart did not acquire a depreciable interest in the film but purchased, in substance, a contractual right to payments contingent upon the success of the film. Although Hart acquired legal title to the film's copyright, the entity acquired no substantial rights in the film. Universal had been granted the exclusive and perpetual right to distribute The Deer Hunter in all media throughout the United States and Canada; EMI obtained a net profits interest in the proceeds of Universal's distribution efforts. Any rights that EMI may have conveyed to Hart, noted the court, either were simultaneously granted back to EMI or were of no apparent commercial value. Hart did not control the film's exploitation or use and did not assume EMI's financial position with respect to the film. Rather, Hart purchased a right to receive certain payments, the amounts of which were measured by the accountable gross resulting from the distribution of The Deer Hunter. But the amounts of the payments did not depend on the income received by EMI or Universal from such distribution.

Judge Simpson found additional support for the conclusion that Hart acquired, for tax purposes, a right to contingent payments rather than ownership of the film, in the fact that Hart's actual investment was far less than the alleged fair market value of EMI's interest in the film.

However, as in Law, the court determined that Hart purchased an income interest dependent on the success of a film; the income interest was subject to exhaustion over time and Hart was entitled to an allowance for depreciation under the straight line method in 1978 and 1979. The basis for depreciation was limited to the $1,225,000 cash paid to EMI plus a $235,000 acquisition fee paid to TBC Films.

Hart's film-related investment was engaged in for a profit (a "very close case"), stated the court and Tolwinsky's share of Hart's expenses therefore was not limited to the amount allowed under section 183 of the Internal Revenue Service regulations. However, Tolwinsky was not entitled to an investment tax credit with respect to The Deer Hunter since Hart did not possess the requisite ownership interest in the film by virtue of being a lender or guarantor.

Law v. Commissioner, 86 T.C. No. 63; Tolwinsky v. Commissioner, 86 T.C. No. 62 (1986) [ELR 9:2:11]

National Football League disability payments to former player Randy Beisler were not tax-exempt

Randall Beisler played professional football from 1966 through 1975. In 1975, he injured his neck in a National Football League game while playing for the Kansas City Chiefs; the injury caused him to lose 60 to 79 percent of the use of his neck. Beisler was advised by his doctors to stop playing professional football and to avoid professions requiring strenuous labor.

Beisler subsequently applied for line-of-duty disability benefits under the League's Player Retirement Plan. In 1979, he received a total of $47,475 in payments from the plan, and reported $10,552 of this amount as income in that year.

The Commissioner of Internal Revenue determined a deficiency in the Beislers' income taxes for 1979. According to the Commissioner, the payment to Beisler was received through an accident or health insurance plan and should have been included in Beisler's gross income. In order to exclude benefits from income, the taxpayer must prove that the amount received was paid through an accident or health insurance plan; that the amount constituted payment for the permanent loss, or loss of use, of a member or function of the body, or permanent disfigurement, of the taxpayer; and must demonstrate that the amount was computed with reference to the nature of the injury without regard to the period the employee was absent from work.

The Tax Court ruled on behalf of the government on the basis of the latter requirement. A three-judge Federal Court of Appeals panel upheld the Tax Court decision and, after a rehearing en banc, the Court of Appeals, on a 7-4 vote, has affirmed the panel's ruling.

Federal Court of Appeals Judge Charles E. Wiggins found that the National Football League's retirement plan did not compute benefit amounts with reference to the type and severity of the injury incurred by an employee and thus did not meet the statutory requirement which would enable a taxpayer to exclude benefit payments from gross income. Judge Wiggins determined that Congress intended to exclude from income only those payments that would compensate an individual for permanent losses of bodily function; a requirement that a plan's benefits vary according to the type and severity of a person's injury thus would insure that the payments and the injury were sufficiently related to the compensatory purpose of the statute.

Under the National Football League plan, when a player shows substantial disablement, benefit amounts then are computed solely on the basis of the number of seasons played without reference to the nature of the injury. The Beislers argued that the plan did take into consideration the nature of the injury by reducing certain benefits for injuries compensable by workers' compensation - workers' compensation statutes vary benefits based on the degree of permanent loss of bodily function. However, Judge Wiggins observed that any variance in payment would be in inverse proportion to the severity of the injury, and Congress did not intend that lesser injuries be given greater compensation.

Judge John T. Noonan, in dissent, declared that the court's opinion would be correct if the applicable statute read, as it does not, that payments to an employee are excludable from gross income "if computed only in proportion to the severity of the injury and without regard to the number of years of service." Congress presumably intended that the payments being received should not be anything like ordinary income - the excluded income was compensation for the permanent loss of part of a person's body, not substitute wages. Judge Noonan concluded by observing "Does money paid a football player because he has lost an eye, suffered a loss of hearing, or broken his neck resemble 'compensation for services'? A great national sport has not reached the point where the NFL's efforts to offer some redress for permanent loss of parts of a person's body should be characterized, even by implication, as 'compensation for services.'"

Beisler v. Commissioner of Internal Revenue, Case No.85-7222 (9th Cir., April 9, 1987) [ELR 9:2:12]

National Football League is ordered to promptly conclude arbitration of disability benefits application filed in 1981 by former player Otis Armstrong

A lawsuit involving the National Football League's Player Retirement Plan was brought by Otis Armstrong, a former running back for the Denver Broncos.

Armstrong's football career ended on November 2, 1980 when his neck was injured during a game with the Houston Oilers. Armstrong applied to the League for line-of-duty disability benefits, but in May 1982, the retirement plan's administrative board denied the benefits application on the basis of a doctor's finding that the disability was congenitally based; two other doctors both attributed Armstrong's disability to his football activities.

In mid-March 1983, the board decided to reconsider Armstrong's application and referred him to a neurologist; the neurologist reported that Armstrong was 80% disabled in the neck or back and that the disability was due to a football injury. However, the management members of the board discounted the report and voted to oppose an award of benefits.

It was not until January 1986 that a Medical Advisory Board doctor reported that while Armstrong was not entitled to line of duty benefits, the player should receive benefits for total and permanent disability.

Armstrong then sued the retirement plan, members of the retirement plan board and members of the medical advisory board to recover either line of duty or total and permanent disability benefits. Subsequently, the board removed the matter from the medical advisory board and placed it in arbitration.

After reviewing the "sordid" chronology of Armstrong's experience, "replete with delays, confusion, stalemates, and inconstancy on the part of the board and the persons under its control," Federal District Court Judge Kane stated that he had considered appointing a board receiver. However, the court has denied Armstrong's motion to remove all plan board members and to appoint a receiver upon determining that such an appointment most likely would be used as a reason for even more delay and would not allay the court's concern over "the blatant, inequitable treatment" to Armstrong. Rather, Judge Kane ordered the continuation of the arbitration process, but stated that the case would be withdrawn from arbitration on January 3, 1987 unless a decision was reached prior to that date. In the absence of a decision, trial would begin on January 12th.

Armstrong v. Bert Bell NFL Player Retirement Plan and Trust Agreement, 646 F.Supp. 1094 (D.Colo. 1986) [ELR 9:2:13]

Professional sports team, rather than player's personal services corporation, was employer of player for federal employment tax purposes, rules Internal Revenue Service

In a technical advice memorandum issued in February 1986, but not immediately published, the Internal Revenue Service has determined that a professional sports team was the employer of its players for federal employment tax purposes when the team secured the services of its players through personal service corporations established by the players. The team therefore was obligated to withhold federal income taxes with respect to compensation paid the players and was liable for statutory tax and withholding responsibilities.

The unidentified team did not consider those players who contracted with the team through personal service corporations to be "employees" of the team, and therefore did not pay and withhold the amounts due under the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, and income taxes, as it would have done had the players not formed wholly-owned or player-controlled personal service corporations.

The following factors were considered by the Internal Revenue Service: the team controlled when and where the players practiced and played, and controlled player behavior with fines and suspensions; player training was conducted by the team, rather than by the personal services corporations; the player services were integrated into the business operation of the team, including the team's use of the player's name and likeness for advertising and promotions relating to the team; player services were rendered personally; the team paid all player travel expenses and medical expenses for injuries incurred while playing; uniforms and equipment were provided by the team, as were locker rooms and other facilities. It was further found that the fact that the team paid the player's annual salary to the personal services corporation rather than to the player did not negate the existence of an employer-employee relationship, nor did certain restrictions in the contracts between the personal services corporations and the team concerning the team's right to terminate the contract.

In all, despite the interposition of a personal services corporation, the team had the right to exercise sufficient control over the players to be their common law employer, and was liable for employment taxes and subject to withholding on all sums paid to players through the corporations.

Under the Internal Revenue Code, the memorandum may not be used or cited as precedent.

IRS Letter Ruling Reports (CCH) No. 8625003 (1986) [ELR 9:2:13]

Distributor of "Care Bears" stuffed toy bear was not entitled to contempt citation arising from competitor's marketing of teddy bears, rules Federal Court of Appeals, in remanding case for further findings on "tummy graphics" issue

The "Care Bears" have emerged from a brief litigation hibernation into a thicket of rulings issued in connection with an action brought by American Greetings Corp. against Dan-Dee Imports, the distributor of various stuffed toy animals, alleging copyright infringement, false designation of origin under section 43(a) of the Lanham Act and unfair competition.

Federal Court of Appeals Judge Stapleton first agreed with a Federal District Court's determination that the "tummy graphics" borne by the bears were functional in that the graphics contributed "to the effectiveness and performance of Care Bears as plush toy teddy bears."

The District Court also was correct in finding that a party may have a protectible interest in a combination of features or elements that includes one or more functional features. American Greetings therefore could have a protectible interest in the Care Bears' "overall appearance" even though the graphics were an essential feature thereof. Furthermore, American Greetings established a secondary meaning in the combination of features distinguishing its Care Bears, and the company was not required to show that the secondary meaning derived solely from non-functional features, stated the court.

However, Dan-Dee correctly argued that the District Court could not enjoin the company from using the functional features encompassed in the Care Bears "combination." After noting the lack of clarity in a preliminary injunction issued by the District Court and the court's "self-confessed inability to specify how Dan-Dee might sufficiently differentiate its products." Judge Stapleton stated that Dan-Dee appeared to be entitled to market teddy bears and to utilize tummy graphics on plush toys. The company thus could not be enjoined from distributing a bear with graphics unless it were found that it was feasible, by altering other features of a teddy bear, to avoid a likelihood of confusion with the Care Bears. In the absence of such a finding, the only interim or permanent relief available to American Greetings would be a requirement that Dan-Dee utilize a clear source-identifying label or distinguishing packaging.

The preliminary injunction at issue, concluded Judge Stapleton, was a directive that Dan-Dee was to engage in no act "likely to cause confusion" with any of 33 specified products. The injunction improperly required the company to guess at what kinds of conduct might constitute infringement-privileged imitation as well as impermissible copying might fall within the scope of the order, particularly since an inclusive list of elements constituting the protected combination was not provided.

The court let stand a contempt finding against Dan-Dee in connection with the continued marketing of a stuffed toy dog in violation of a consent order agreed to by the company. But a second contempt citation, arising from the marketing of a stuffed toy bear allegedly in violation of a preliminary injunction, was vacated because the requisite findings for the entry of the injunction were not made, stated the court.

American Greetings Corporation v. Dan-Dee Imports, Inc., 807 F.2d 1136 (3d Cir.1986) [ELR 9:2:13]

Original Appalachian Artworks obtains injunction in New York barring importation of foreign licensee's "Cabbage Patch Kids" dolls, but does not succeed in copyright infringement action in Georgia against manufacturer of pattern for soft-sculpture dolls, or in obtaining disqualification of attorneys in Illinois proceeding involving "Furskins" stuffed toy bears

The Cabbage Patch litigators are the newest courtroom sensation. The settlement of a sticky $30 million copyright and trademark infringement action against Topps Chewing Gum (ELR 8:9:14; 8:5:9) concluded one of several lawsuits brought by Original Appalachian Artworks against alleged infringers of the company's rights in the popular Cabbage Patch Kids dolls.

In a trademark infringement action against Granada Electronics, Original Appalachian challenged Granada's sale, in the United States, of Cabbage Patch Kids dolls made in Spain by a company named Jesmar under a license from Original Appalachian. Jesmar was authorized to manufacture and distribute a vinyl-headed, smaller version of the original soft sculpture doll in Spain, the Canary Islands, Andorra and Ceuta Melilla; the company agreed that it would distribute licensed products only with an express agreement that the purchaser would not use or resell the licensed products outside the licensed territory.

A Federal District Court in New York, in granting Original Appalachian's request for a permanent injunction barring Granada's importation of the Jesmar dolls and other Cabbage Patch Kids dolls made abroad under territorially restricted licenses, noted that Jesmar's dolls arrived with birth certificates and adoption papers in Spanish. The purchasing public in the United States therefore was likely to be confused and deceived because such dolls were not the product the purchasers expected to receive, particularly since the packages containing the Jesmar dolls displayed the Cabbage Patch Kids trademark in English.

Judge William C. Conner also found that the sale of the "nonconforming" foreign dolls in the United States damaged and threatened to continue to damage the reputation of Original Appalachian and its primary licensee, Coleco Industries, as sources of high quality Cabbage Patch Kids products.

In a separate proceeding in a Federal District Court in Georgia, Original Appalachian failed to obtain injunctive relief and damages in a copyright infringement and unfair competition action against McCall Pattern Company.

In 1982, McCall had entered into an agreement with Fay Wine, a doll collector and designer whereby the company obtained the right to manufacture and sell patterns of soft sculpture dolls designed by Wine. Wine began making her "Little People" dolls in 1976. Originally Wine sold the dolls, along with adoption papers and birth certificates, in "The Hen's Nest Orphanage" doll shop, located in her home. As of 1981, the dolls' names were changed to "Blossom Babies" and the doll shop was known as the Garden Center. The anatomical features of the dolls included a round, over-sized head, large and widely spaced eyes, a small, pug nose placed high on the doll's face, between the eyes, and either a straight single-stitched mouth or a semi-circular embroidered mouth.

In mid-1983, McCall included in its catalog a Faye Wine pattern for a 23-inch soft-sculpture Blossom Babies doll; subsequently, the company issued a pattern for an 18-inch doll.

Judge G. Ernest Tidwell noted that in 1977, Wine had purchased one of Xavier Roberts' "precopyrighted developmental" dolls at a gift shop in North Georgia

(Roberts soon after began producing the Cabbage Patch Kids). But Original Appalachian did not show that Wine had access to the copyrighted Cabbage Patch Kids dolls. The extensive public distribution of the dolls was not sufficient to establish access, stated the court, since Wine's first doll pattern was developed by 1980, well before the year 1983, when Coleco Industries sold over 2.8 million Cabbage Patch Dolls.

Judge Tidwell then found that the pattern for the 18-inch doll was not substantially similar to Original Appalachian's dolls, except that both were needle-sculpture dolls, made of similar material, which depicted children. The overall impression and the individual features of the dolls differed significantly - there were differences in the size of the head, face, eyes, nose, torso and the areas of needle sculpting. In all, the McCall doll pattern was independently created by Faye Wine, stated the court, and was not copied from Original Appalachian's copyrighted dolls.

The depictions of the Wine dolls on McCall's pattern package covers and in the company's catalogs also were not substantially similar to the Cabbage Patch Kids dolls. And although McCall's referred to the Cabbage Patch dolls on catalog pages offering patterns for clothes for soft sculpture creations, the pages included a disclaimer stating "these soft sculptured doll wardrobe patterns are not sponsored by Original Appalachian Artworks, Inc."

Furthermore, Original Appalachian did not show that any consumers were likely to be confused as to the source or affiliation of the products displayed in the McCall's catalog. The court concluded by granting McCall's motion for attorneys fees in an amount to be determined.

A third proceeding, in a Federal District Court in Illinois, involved Original Appalachian's "Furskins" - a family of stuffed toy bears. The company claimed that May Department Stores and Venture Stores marked a line of stuffed toy bears, called "Trapper,' which were similar to the Furskins in appearance and marketing strategy. The issue before the court was Original Appalachian's motion to disqualify May's counsel on the grounds that the law firm formerly acted as Original Appalachian's attorney, and that the law firm was representing clients with interests adverse to May's.

In denying Original Appalachian's motion, Judge Shadur questioned whether the company actually was a client of the law firm. Even assuming an attorney-client relationship, such a relationship was "extraordinarily narrow" the law firm apparently registered copyrights on four Cabbage Patch Kids stickers, a matter not substantially related to the Furskins dispute. It also was noted that Original Appalachian did not identify an actual use of confidential information, and that the clients whose interests purportedly were in conflict had not expressed concern about the law firm's presence in the case.

May moved for sanctions, claiming that Original Appalachian filed its motion without reasonable inquiry into its factual basis, and Judge Shadur responded by requiring Original Appalachian to bear May's attorneys fees.

Original Appalachian Artworks, Inc. v. Granada Electronics, Inc., 640 F.Supp. 928 (S.D.N.Y. 1986); Original Appalachian Artworks, Inc. v. McCall Pattern Company, 649 F.Supp. 832 (N.D.Ga. 1986); Original Appalachian Artworks, Inc. v. May Department Stores Company, 640 F.Supp. 751 (N.D.Ill. 1986) [ELR 9:2:14]

Los Angeles radio station KIIS-FM obtains summary judgment in action by former disc jockey alleging discrimination in connection with the termination of his employment

A Federal District Court decision (ELR 8:8:18) granting summary judgment to Los Angeles radio station KIIS-FM in an action filed by disc jockey Valentine Jurado has been affirmed by a Federal Court of Appeals.

Jurado had claimed that KIIS fired him in August 1981 for his refusal to comply with the station's request that he stop using the Spanish language during his broadcasts; an amended complaint alleged that Jurado was not given an opportunity to comply with the English-only format. The District Court, in rejecting Jurado's discrimination claims under 42 U.S.C. section 1981 and under Title VII of the Civil Rights Act of 1964, and for breach of a collective bargaining agreement under the

Labor Management Relations Act, found that Jurado did not show retaliation, disparate treatment, or disparate impact in his employment and that KIIS' actions were protected under the First Amendment.

Federal Court of Appeals Judge Wiggins agreed with the District Court that there was insufficient evidence that KIIS discharged Jurado for discriminatory motives, or that the English-only order was racially motivated. KIIS' order was limited to Jurado's on-air time and was reasonably related to the station's exercise of discretion over its broadcast programming, stated the court.

Jurado also did not establish that he engaged in any activity protected by Title VII - he did not oppose the format change as discriminatory before he was fired, but rather, sought to preserve the value of his bilingual radio personality. And the alleged breach of the collective bargaining agreement in effect between AFTRA and

KIIS was within the jurisdiction of the National Labor Relations Board.

Judge Wiggins stated that because summary judgment was available to KIIS on the Title VII and section 1981 claims, the court did not find it necessary to address the station's argument that its actions were protected under the First Amendment and the Communications Act of 1934.

Jurado v. Eleven-Fifty Corporation, Case No.86-5606 (9th Cir., April 2, 1987) [ELR 9:2:15]

United States Supreme Court upholds decision exempting teletext transmissions from fairness doctrine and reasonable candidate access requirements; Federal Communications Commission's decision to eliminate six broadcast regulatory policies is upheld by Federal Court of Appeals

In September 1986, a Federal Court of Appeals in Washington, D.C. upheld the Federal Communications Commission's decision to exempt teletext transmissions from certain regulations applicable to broadcast licensees. The United States Supreme Court has declined to hear an appeal of the Court of Appeals decision.

Teletext provides a means of transmitting textual and graphic material to the television screens of home viewers; in the instant case, teletext referred solely to over-the-air transmissions. The transmissions, containing primarily general interest material such as news, sports and weather, may be received only by viewers with teletext decoder devices.

In 1983, the Federal Communications Commission concluded that political broadcast regulations, i.e., requiring licensees to provide "reasonable access" to federal candidates, and to comply with equal opportunity and fairness doctrine requirements, did not apply to teletext, an "ancillary" and technologically developing medium. The Commission subsequently rejected a petition for reconsideration.

In considering a petition for review filed by the Media Access Project and the Telecommunications Research and Action Center, Federal Court of Appeals Judge Bork noted that the Commission viewed the regulation of teletext, a "unique blend of the print medium with radio technology," as presenting First Amendment considerations not associated with the regulation of traditional broadcasting. However, after reviewing the relevant case law which has resulted in a Supreme Court-drawn First Amendment distinction between broadcast and print media on the premise of the physical scarcity of broadcast frequencies, Judge Bork observed that teletext, "whatever its similarities to print media," uses broadcast frequencies; the Commission therefore could not refuse to apply, on First Amendment grounds, any regulations which were constitutionally permissible where applied to other broadcast media.

The first regulation at issue, section 312(a)(7) of the Communications Act states that the Commission may revoke any station licensed for willful or repeated failure to allow reasonable access or to permit the purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for federal elective office on behalf of his/her candidacy. The Commission decided that the statutory requirement of affording reasonable access was adequately satisfied by permitting federal candidates access to a licensee's regular broadcast operations. Judge Bork agreed that the general approach taken by the Commission with respect to candidate access to teletext was consistent with Commission precedent.

Section 315 of the Communications Act requires a licensee to provide equal opportunities to competing candidates and imposes a "lowest unit rate" obligation upon licensees. Judge Bork declared that the Commission erred in concluding that teletext does not constitute a "traditional broadcast service" subject to the obligations of section 315. Teletext and main channel broadcasting "are merely different time intervals within the broadcast spectrum," stated the court, in remanding, for further proceedings, the Commission's decision with respect to section 315.

Judge Bork then upheld the Commission's decision to exempt teletext from the requirements of the fairness doctrine, finding that the Commission acted rationally in concluding that the burdens of applying the doctrine might impede the development of a new technology which was likely to serve the public interest.

In a separate decision, the Court of Appeals also upheld the Commission's elimination, as no longer warranted or necessary, of six broadcast regulatory policies, such as those concerning licensee distortion of audience ratings, conflicts of interest and sports announcer selections, promotions of nonbroadcast business of a station, concert promotion announcements, nonperformance of sales contracts, and false, misleading and deceptive commercials. Chief Judge Re rejected the Telecommunications Research and Action Center's petition for review of the Commission's action, finding that detailed reasons were set forth for the deletion or elimination of each of the policies.

Telecommunications Research and Action Center v. Federal Communications Commission, 801 F.2d 501; 800 F.2d 1181 (D.C.Cir.1986) [ELR 9:2:16]

California Supreme Court upholds revocation of theater owner's permit to exhibit adult films

Seung Chun Lim, the owner of the Valley Adult Theater in North Hollywood, has unsuccessfully challenged the revocation by the Board of Police Commissioners of the City of Los Angeles of his theater permit. The films shown at the theater depicted explicit heterosexual sex acts. Between April 1984 and August 1985, Los Angeles Police Department officers observed over twenty separate incidents of illegal sexual conduct at the theater; Lim was notified that continued arrests at the theater could lead to administrative proceedings.

In April 1986, the Board held a hearing and voted to revoke Lim's permit. Subsequently, a trial court denied Lim's petition seeking to set aside the Board's decision.

Lim claimed that the revocation of his permit violated his state and federal free speech guarantees. But a panel of the state Court of Appeals citing, inter alia, Arcara v. Cloud Books, Inc. (ELR 9:2:17), affirmed the trial court's decision on the ground that the revocation ordinance was not directed at any First Amendment activity, but at unlawful public sexual conduct. Justice Arleigh Woods stated that since under Arcara, laws proscribing unlawful sexual conduct in public places do not involve First Amendment rights, neither do the penalties for violations of such laws.

Also rejected was Lim's argument that California's free speech guarantee provided him additional protection against the revocation ordinance. The state courts have long recognized that the prevention of unlawful sexual conduct is a permissible public purpose for regulating theaters, according to Justice Woods. Lim failed to remedy, by adequate supervision of the premises, a situation of which he was "well-aware," concluded the court, and was not entitled to claim that because he may not have had knowledge of each specific incident, he had no knowledge at all of illegal conduct for the purposes of the ordinance.

The California Supreme Court has let stand the revocation of Lim's permit; in its order, according to news reports, the court stated that the appellate court decision could not be cited as legal precedent in other cases. Justice Stanley Mosk voted to grant review of the case.

Seung Chun Lim v. Board of Police Commissioners of the City of Los Angeles, Case No. B021779 (Ca.Ct. App., April 3, 1987) [ELR 9:2:16]

United States Supreme Court rules that order requiring one year closure of New York adult bookstore as a public nuisance did not violate bookstore owners' rights; on remand, New York Court of Appeals finds that order closing bookstore violated state's constitutional guarantee of freedom of expression

In Arcara, the United States Supreme Court held that the First Amendment did not bar the enforcement of a statute authorizing the closure of a premises where illegal sexual conduct occurred, even though the premises also housed an adult bookstore.

The adult bookstore in question, Village News and Book Store, was operated by Cloud Books in Kenmore, New York. After an investigation, a civil complaint was filed against Cloud Books by Eric County District Attorney Richard Arcara, seeking the closure of the premises, for a mandatory one year period, as a public health nuisance. A New York trial court held that the statute was applicable to the premises in which the bookstore was operated, and did not violate Cloud Books' First Amendment rights; the trial court's ruling was affirmed on appeal.

The New York Court of Appeals, however, reversed on First Amendment grounds, adverting to the impact of the closure order on Cloud Books' protected bookselling activities. The court determined that the closure order was much broader than necessary to restrict illicit commercial sexual activities, and that an injunction against conducting such activities on the premises could achieve the same effect without restricting bookselling as well.

In reversing the Court of Appeals decision, then Chief Justice Burger stated that "the sexual activity carried on in this case manifest[ed] absolutely no element of protected expression." A "least restrictive means" scrutiny was not warranted simply because the closure might have some effect on the First Amendment activities of a party subject to sanction - such an analysis is undertaken when conduct with a significant expressive element "drew the legal remedy in the first place ... or where a statute based on nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity..." This case involved neither situation, and the First Amendment was not implicated by the enforcement of a public health regulation. The court concluded by declaring that "Bookselling in an establishment used for prostitution does not confer First Amendment coverage to defeat a valid statute aimed at penalizing and terminating illegal uses of premises."

Justice O'Connor, with whom Justice Stevens joined in concurring, cautioned that if a city were to use a nuisance statute as a pretext for closing down a bookstore because it sold indecent books or because of the "perceived" secondary effects of having a purveyor of such books in the neighborhood, the case then would implicate First Amendment concerns and would require analysis under the appropriate First Amendment standard of review. There was no suggestion in the record or in the opinions below of such "pretextual" use of the public nuisance statute.

Justice Blackmun, joined by Justice Brennan and Marshall in dissent, characterized the bookstore closure as a direct and substantial impairment of a First Amendment right which would require the state to show, at a minimum, that it had chosen the least restrictive means of obtaining its objective. State officials did not demonstrate that a remedy less restrictive than a one year closure would be inadequate to abate the alleged nuisance, and because the statute was not narrowly tailored to further the asserted governmental interest, the statute was unconstitutional in Justice Blackmun's view, as applied to Cloud Books.

On remand from the Supreme Court, the New York Court of Appeals, while noting that it was bound by Supreme Court decisions defining and limiting Federal constitutional rights, declared that "the minimal national standard established by the Supreme Court for First Amendment rights can not be considered dispositive in determining the scope of [New York's] constitutional guarantees of freedom of expression." Chief Justice Sol Wachtler, citing New York's "long history and tradition of fostering freedom of expression, often tolerating and supporting works which in other states would be found offensive to the community," and the fact that bookselling is a constitutionally protected activity, stated that closure of the bookstore required a showing that no other narrower sanction would accomplish the state's purpose of preventing a public nuisance. If sanctions such as arresting the offenders or injunctive relief did not serve to accomplish the state's objective, closure might then be considered.

Justice Wachtler modified the order of the appellate court to grant Cloud Books partial summary judgment dismissing the portions of the state's causes of action seeking an order directing the closing of the bookstore premises.

Arcara v. Cloud Books, Inc., Case No. 85-437 (U.S.Sup. Ct., July 7, 1986); People ex rel. Arcara v. Cloud Books Inc., New York Law Journal, p. 1, col. 6 (N.Y., Dec. 18, 1986) [ELR 9:2:17]

Wine magazine may proceed with claim alleging that headlines accompanying article published by competing magazine were defamatory

The April 1985 issue of the twice-monthly publication "Wine Spectator" contained an article concerning the editorial and advertisement policy of "Vintage Magazine." The Spectator article reported that Vintage was providing editorial coverage to those wineries willing to subsidize the writing and printing of the magazine, and that companies failing to advertise in Vintage would not have their products reviewed. In its table of contents, the Spectator identified the article as follows: "Vintage Magazine Editorial Space for Sale." The headline for the article read "Editorial Space for Sale in Vintage."

In 1984, Vintage had notified members of the wine trade that it planned a paid-for "advertorial" wine column which would be published in The New York Times and The Los Angeles Times. The magazine also announced that companies advertising in Vintage's competitors, without advertising in Vintage, would not have their wines reviewed by Vintage. In a third communication, Vintage stated that it would publish full-length articles on wineries willing to share writing and printing expenses.

Vintage claimed that the headlines and the article, construed together, conveyed the false message that the magazine offered to publish favorably slanted and biased wine reviews and articles for a fee.

New York State Supreme Court Justice Burton S. Sherman has found that the complained-of headlines could be reasonably construed to impute a lack of integrity to Vintage. Although it appeared that the article was a truthful report of Vintage's letters, "the fact that the article may have dispelled the meaning of the headline is of no importance as defamatory headlines are actionable though the matter following is not." Furthermore, the headlines were not expressed as (constitutionally protected) opinions, but as statements of fact.

Justice Sherman found that Vintage and Philip Seldon, its founder, editor and publisher, were limited issue public figures, but rejected the Spectator's argument that Vintage and Seldon would be unable to prove that the headlines were false and were published with actual malice. According to the court, the headlines did not fairly describe a fundamentally accurate article; thus, an inference might be drawn that the headlines were published with knowledge of their falsity. A jury question therefore was presented as to the sense in which the headlines were likely to be understood by the ordinary and average reader of the Spectator, and whether the headlines fairly indicated the substance of the matter to which they referred, the Spectator's motion for summary judgment was denied accordingly.

Seldon v. Shanken, New York Law Journal, p.6, col.5 (N.Y.Cnty., June 2, 1987) [ELR 9:2:18]

Recalculation of damages is ordered in copyright infringement action brought by publisher of black history works

A recalculation of damages has been ordered in an action brought by Fitzgerald Publishing Co., the publisher and copyright holder of the Golden Legacy Illustrated Magazine, a multi-volume publication recounting the history of prominent black people in comic book format, against Bill Baylor and World Color Press.

World Color Press printed Golden Legacy for Fitzgerald from 1974 until 1980. In 1983, Fitzgerald entered an agreement with Bill Baylor whereby, in return for receiving 100,000 sets of the publication, Baylor agreed to finance the reprinting of 142,857 sets of Golden Legacy. Baylor also agreed to pay Fitzgerald's outstanding debt of about $8,000 to World Color.

When Baylor failed to pay the installments due on a promissory note and to provide the financing for the reprinting, Fitzgerald terminated the publication agreement. Nevertheless, Baylor directed World Color to reprint the Golden Legacy series and to change the copyright notices on the series' plates to a copyright notice provided by Baylor. In January 1984, Fitzgerald learned of the republication, immediately notified World Color that the change in the copyright notice was unauthorized, and sued World Color and Baylor for copyright infringement and unfair competition.

A Federal District Court magistrate found that Baylor willfully infringed Fitzgerald's copyrights for the first eleven volumes of Golden Legacy and was liable for the maximum amount of statutory damages - $550,000. Chief Judge Weinstein then determined, after a trial on Fitzgerald's claim against World Color, that the printer was liable for $22,000 in statutory damages, actual damages of about $28,000 for the infringement of volumes 12 through 16 of Golden Legacy (the value of the total number of volumes that Fitzgerald was to receive from the reprint of the work) and attorneys fees of $12,500. The District Court refused to hold World Color jointly and severally liable for the payment of the statutory damages awarded Fitzgerald for Baylor's acts of copyright infringement.

On appeal, World Color argued that it was not liable for copyright infringement because it relied on the BaylorFitzgerald contract. However, even an innocent infringer may be liable for infringement, noted Federal Court of Appeals Judge Cardamone. And in the case, the District Court correctly found that World Color

Press acted willfully in infringing Fitzgerald's copyright, given that the printer had received a copy of the Baylor-Fitzgerald contract and must have realized that the contract did not authorize any changes in the copyright notice on the works.

Judge Cardamone next found that the District Court erred in not holding World Color jointly and severally liable with Baylor for the award of statutory damages; the infringement "flowed from" Baylor's and World Color's joint action in reprinting the first eleven volumes of Golden Legacy. But the damage award was remanded for reconsideration. The court reviewed the factors relevant to setting statutory damage awards and suggested that on remand the District Court consider a damage award higher than the figure originally assessed against World Color alone.

The award of actual damages against World Color also was remanded for reconsideration because the District

Court did not determine the extent to which the market value of the copyrighted work at the time of the infringement was injured or destroyed by the infringement. Judge Cardamone noted that World Color's allegation that it made no profit from reprinting Golden Legacy did not bar Fitzgerald from recovering actual damages for copyright infringement. However, Fitzgerald was not necessarily entitled, as the company claimed, to damages based on the gross revenues from the sales of the Golden Legacy sets that Baylor may have made after receiving the copies from World Color. On remand, Fitzgerald will be allowed to present any relevant evidence on the question of how much the value of the copyrights for volume 12 through 16 of its work was injured in order to prove its damages.

The court concluded by vacating the award of attorneys fees, stating that an appropriate award must await the reconsideration of the damages issues.

Fitzgerald Publishing Co., Inc. v. Baylor Publishing Co. Inc., 807 F.2d 1110 (2d Cir.1986) [ELR 9:2:18]

Briefly Noted:

Copyright/Jurisdiction.

Effects Associates, the creator of original special effects filmstrips, sued Larry Cohen and New World Pictures for copyright infringement, alleging that Cohen used Effects' material in a film entitled "The Stuff." A Federal District Court dismissed the action on the ground that Effects' claims did not "arise under" federal law because the principal issue involved was a question of state contract law. A Federal Court of Appeals has reversed the District Court's order, finding that a reference in the complaint to an oral agreement concerning the use of Effect's works did not transform the company's infringement claim into a claim for breach of contract. Effects did not assert that it had transferred any copyright or entered into a license agreement. Rather, stated Judge Kozinski, it was alleged that Cohen's purported oral agreement to pay for the use of Effects' material amounted to fraud. If the oral agreement effected a valid transfer of Effects' interest in the works, the copyright claim would fail. But Judge Kozinski stated that the presence of a potentially meritorious defense did not change the nature of Effects' claim.

Effects Associates, Inc. v. Cohen, Case No.86-5997 (9th Cir., May 8, 1987) [ELR 9:2:19]

Promotional Agreement.

When Duracell, Inc. purchased certain assets of Dynacharge Incorporated, Duracell did not assume an obligation to pay Philip Esposito under his 1983 sales promotion agreement with Dynacharge, a New York trial court has ruled. Esposito had been hired to make television and radio commercials and personal appearances to promote Dynacharge's batteries. The agreement was to extend for ten years and Esposito was to receive the greater of $50,000 or a stipulated percentage of Dynacharge's net sales. Although the court granted summary judgment to Duracell, it was found that a question of fact remained as to whether Esposito had released Dynacharge from its obligation under the sales promotion agreement.

Esposito v. Dynacharge, Inc., New York Law Journal, p.15, col.4 (N.Y.Cnty., April 13, 1987) [ELR 9:2:19]

Teddy Ruxpin.

Worlds of Wonder, the company that manufactures, markets and distributes Teddy Ruxpin, an animated toy bear, under an exclusive licensing agreement with the creator of the bear, has obtained a preliminary injunction barring Vector Intercontinental from distributing unauthorized cassette tapes for use in animating the toy bear.

A Federal District Court in Ohio found that there was a substantial likelihood that Worlds of Wonder would establish substantial similarity in its copyright infringement claim against Vector-the voice of the narrator on the Vector tape was almost identical to the Teddy Ruxpin voice; the method for signaling the end of a page was similar; and when a Vector tape was played in Teddy Ruxpin, the visual impression of the bear's eyes, nose and mouth movement was virtually identical to the impression produced when a Worlds of Wonder tape was used. In all, the general feel and concept of Teddy Ruxpin when telling a fairy tale was the same regardless of whether a Worlds of Wonder or Vector tape was used; the work created by the Vector tapes was "at least ... a derivative work, if not an exact copy."

In addition to the presumption of irreparable injury attendant to a showing of a substantial likelihood of success on the merits in a copyright infringement case, Worlds of Wonder established that the conduct of the Vector parties would incalculably impair the distinctiveness of the Teddy Ruxpin character and its commercial value in the merchandising market.

Worlds of Wonder, Inc. v. Vector Intercontinental, Inc., 653 F.Supp. 135 (N.D.Ohio 1986) [ELR 9:2:19]

Lillian Hellman Estate.

A New York County Surrogate has declared that the literary property fiduciaries named as the trustees for Lillian Hellman and Dashiell Hammett's intellectual property (see ELR 8:9:8) were responsible, along with the executors of Hellman's will, for paying for the legal services rendered in obtaining a determination of the meaning of the provisions of the will. About $43,000 was awarded to the attorneys for the literary property fiduciaries-the residuary estate was held responsible for $25,000; the three fiduciaries were held responsible for the balance.

Estate of Lillian Hellman New York Law Journal, p.14, col.3 (N.Y.Surr.Ct., June 10, 1987) [ELR 9:2:19]

IN THE NEWS

Wrongful death actions arising from "Twilight Zone" helicopter crash incident are settled

The wrongful death actions filed by the parents of the two children killed during the filming of "Twilight Zone" have been settled. The terms of the settlements, which were reached before a jury acquitted the film's director John Landis and four associates of involuntary manslaughter charges in connection with the incident, have not been revealed. However, the trial court judge disclosed that the settlements did not involve an admission of liability or wrongdoing by any of the filmmaking parties, including several parties who were not charged in the criminal case such as Warner Bros., the Burbank Studios, Bell Helicopters and producer Steven Spielberg. [July 1987] [ELR 9:2:20]

Former Nevada Senator Paul Laxalt announces settlement of $250 million libel action against McClatchy Newspapers

Former Nevada Senator Paul Laxalt has announced the settlement of his $250 million libel action against McClatchy Newspapers. Laxalt had claimed McClatchy's Bee newspapers in Sacramento, Fresno and Modesto alleged that federal tax agents had found evidence of illegal skimming of profits at a Nevada casino in the early 197Os when the casino was owned by Laxalt's family. In his lawsuit, Laxalt denied that any skimming had taken place, and also denied any implication that he sought to prevent an investigation into skimming, and any implication that organized crime figures were involved in financing or operating the casino. McClatchy claimed that the newspapers never actually alleged that skimming had occurred. A panel of retired judges will determine whether McClatchy will be required to pay any of Laxalt's legal expenses. [July 1987] [ELR 9:2:20]

Jefferson Airplane obtains dismissal of lawsuit by former manager

San Francisco Superior Court Judge Marie-Victoire has dismissed a twenty year old lawsuit against the Jefferson Airplane (now known as Jefferson Starship). The musical group's former manager, Matthew Katz, had claimed that he was entitled to royalties from the group's first two albums; during the lawsuit, the members of the groups were prevented from receiving $2 million in royalties from RCA Records. The court stated that Katz failed to cooperate in settlement negotiations, but the ELR is not aware of any written opinion in the matter. [July 1987] [ELR 9:2:20]

KABC-TV fails to obtain temporary restraining order to prevent A.C. Nielsen from releasing ratings book with disputed "delisting" of certain newscast ratings

KABC-TV was not entitled to a temporary restraining order to prevent A.C. Nielsen Co. from releasing its May ratings book, a Los Angeles trial court judge has ruled. The station alleged that Nielsen's deletion of the

11-11:30 p.m. ratings for all Los Angeles stations for the period from May 18-25 rendered the ratings book inaccurate and would irreparably damage the station's reputation and potential advertising revenue.

During the viewing period at issue, KABC's 11 p.m. newscasts presented a series of reports concerning the Nielsen ratings system. KNBC and KCBS complained that the Nielsen "families" whose viewing habits were being measured were likely to watch a series about themselves, thereby skewing the ratings; preliminary results released by Nielsen indicated that KABC's 11 p.m. ratings had nearly doubled during the series.

Nielsen stated that it decided not to publish the ratings because KABC violated the company's guidelines by airing the series during a "sweeps" month. KABC responded that Nielsen cooperated in preparing the reports, and was aware that the broadcasts would be presented during the sweeps period. But Judge Jerry K.

Fields ruled that Nielsen could proceed to mail out the ratings book on June 18th; a hearing on a preliminary injunction was set for June 30th. [July 1987] [ELR 9:2:20]

Actress Lynn Redgrave is denied new trial in action against MCA Inc. and Universal Television

In a $10.5 million lawsuit against MCA Inc. and Universal Television, Lynn Redgrave alleged that Universal fired her in July 1981 from the television series "House Calls" because she planned to breast-feed her then-infant child.

In early 1987, a Los Angeles Superior Court judge ruled that the dispute had been settled in an oral agreement reached by the parties.

According to news reports, the proposed settlement, which Redgrave's husband, John Clark, discussed with the president of Universal, in part, would have called for Universal to pay Redgrave's attorneys fees and court costs, and to take out trade paper advertisements containing an apology to the actress.

Redgrave contended that she had not signed the proposed settlement agreement and sought to reinstate the lawsuit. But Judge Jack Ryburn has denied Redgrave's request for a new trial. [July 1987] [ELR 9:2:20]

Capitol Records and record promoter Joe Isgro settle antitrust action

Independent promoter Joe Isgro has settled his claim against Capitol Records in a $25 Million antitrust action filed by Isgro against most of the major record companies and against the Recording Industry Association of America. Although its terms were not announced, the settlement apparently also covers an antitrust action filed by an independent record promotion firm named Bama Inc., which was being litigated jointly with the Isgro case. Isgro had claimed that the major record companies and the RIAA conspired to drive independent promoters out of business in order to decrease promotion expenses. [July 1987] [ELR 9:2:21]

Los Angeles Trial court denies writers' claim for credit on the upcoming film "Superman IV"

A Los Angeles trial court has found a lack of similarity between a Story treatment entitled "Superman: The Confrontation," written by Barry Taff and Kenneth Stoller and a story treatment for the upcoming film "Superman VI" by actor Christopher Reeve and two other writers. [July 1987] [ELR 9:2:21]

WASHINGTON MONITOR

United States Justice Department ends antitrust proceeding against Lorimar Telepictures' proposed sale of Metrocolor Labs; investigation of MTV exclusivity arrangement also is terminated

In December 1986, the United States Justice Department filed an antitrust lawsuit challenging the proposed sale of Metrocolor Labs by Lorimar Telepictures to MacAndrews and Forbes Group. The Justice Department contended that the transfer would reduce competition for processing motion picture studio film prints from three to two film labs. Soon after, according to news reports, Lorimar and MacAndrews (the owner of Technicolor lab) announced that the sale would not take place. However, the Justice Department did not terminate its lawsuit until Lorimar agreed to return about $22 million of the $60 million purchase price to MacAndrews and to continue operating, in a competitive manner, Metrocolor's film lab operations.

The Justice Department also had terminated an investigation into MTV's exclusivity arrangements with record and cable television companies. Hit Video USA, an affiliate of Wodlinger Broadcasting, filed a complaint with the Justice Department and with the Federal Trade Commission claiming that MTV illegally conspired to prevent Hit Video, a competing 24 Hour music video service, from gaining entry into Houston's cable television market. The Justice Department stated that it found no basis on which to proceed against MTV; the FTC apparently is continuing its investigation of the allegations. [July 1987] [ELR 9:2:21]

DEPARTMENTS

In the Law Reviews:

Communications and the Law, Volume 9, Number 2 has been published by Meckler Publishing, 11 Ferry Lane West, Westport, CT 06880, with the following articles:

Media Access to Military Courts: An Update by Louis A. Day, 9 Communications and the Law 3 (1987)

The Future of Alcoholic Beverage Advertising by Roxanne Hovland and Gary B. Wilcox, 9 Communications and the Law 5 (1987)

Pay TV: A Historical Review of the Siphoning Issue by James C. Hsiung and Peter J. Fadde, 9 Communications and the Law 15 (1987)

Propriety of Restrictive Guidelines for Cameras in the Court by Douglas P. Killian, 9 Communications and the Law 27 (1987)

The Cable Policy Act and Private Rights of Action by Kathy M. Silberthau, 9 Communications and the Law 45 (1987)

Cardozo Arts & Entertainment Law Journal, available from Cardozo Law School, 55 Fifth Ave., Room 121, New York, NY 10003, has published Volume 5 with the following articles:

Sculldguggery and Other Inequities: Scull v. Scull by Raoul Lionel Felder with Jeanne Wilmot Carter, 5 Cardozo Arts & Entertainment Law Journal 323 (1986)

Designations of Source-Are They Necessary to Support Entertainment Industry Merchandising Rights? by Paul D. Supnik, 5 Cardozo Arts & Entertainment Law Journal 363 (1986)

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Consequential Damages and Entertainers' Contracts-The Buck Stops Where? by Robert L. Gordon, 5 Cardozo Arts & Entertainment Law Journal 445 (1986)

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Plaintiffs in Pursuit of Privacy-Libel in Fiction, 5 Cardozo Arts & Entertainment Law Journal 545 (1986)

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Achieving Parity in the Taxation of Nonresident Alien Entertainers, 5 Cardozo Arts & Entertainment Law Journal 613 (1986)

Albany Law Review has published a Symposium on Intellectual Property as its Volume 50, containing the following articles:

Technology, the Law and the Courts by Howard T. Markey, 50 Albany Law Review 399 (1986)

A Primer on Intellectual Property Rights: The Basics of Patents, Trademarks, Copyrights, Trade Secrets and Related Rights by Gary M. Ropski and Michael J. Kline, 50 Albany Law Review 405 (1986)

An Outline of Enforcement of Intellectual Property Rights by Jesse J. Jenner, 50 Albany Law Review 437 (1986)

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Problems Connected with Acquisition, Licensing and Enforcement of Intellectual Property by Kenneth R. Adamo, 50 Albany Law Review 475 (1986)

Keynote Address: Law and Technology by George B. Cox, 50 Albany Law Review 495 (1986)

U.S. Trade Policy and Intellectual Property Rights by Emery Simon, 50 Albany Law Review 501 (1986)

Recent Revolutionary Changes in Intellectual Property and the Future Prospects by Roger B. Andewelt, 50 Albany Law Review 509 (1986)

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Establishing a Company Policy and Program for Intellectual Property Rights by Thomas 1. O'Brien, 50 Albany Law Review 53 (1986)

Recent Developments in Licensing Intellectual Property by Leonard B. Mackey, 50 Albany Law Review 577 (1986)

WIPO's Involvement in International Developments by Michael K. Kirk, 50 Albany Law Review 601 (1986)

Judicial Impropriety: Love, Friendship, Free Speech, and Other Intemperate Conduct by Steven Lubet, Volume 1986 Arizona State Law Journal 379 (1986)

Public Speech and Libel Litigation: Are They Compatible? by Donald Meiklejohn, 14 Hofstra Law Review 547 (1986)

Did Bose Speak Too Softly?. Product Critiques and the First Amendment by Vincent Brannigan and Bruce Ensor, 14 Hofstra Law Review 571 (1986)

Age Limitations and the National Collegiate Athletic Association: Discrimination or Equating Competition 9 by Kevin M. McKenna, 31 Saint Louis University Law Journal 379 (1987)

The Right of Publicity Run Riot: The Case for a Federal Statute by J. Eugene Salomon, Jr., 60 Southern California Law Review 1179 (1987)
[ELR 9:2:22]