

**BUSINESS AFFAIRS**

**Talent Agents and the New California Act**

**by Philip R. Green  
and Beverly Robin Green**

The California legislature has long been concerned with the welfare of artists in the entertainment industry, and it has demonstrated that concern by enacting protective legislation. This article is intended to address several issues of interest to the entertainment bar with respect to the latest developments in the California Talent Agency Act (Sections 1700-1700.47 of the California Labor Code).

Evolution of an Act

California's original talent agency law developed out of the 1913 Private Employment Agencies Law, which included specific regulations for theatrical employment agencies and theatrical contracts.

In 1923 that act was amended to empower the California Labor Commissioner to make rules and regulations, and it conferred jurisdiction on the Labor Commissioner to hear and determine all controversies, subject to appeal within ten days to the Superior Court on a trial de novo basis. Since then, the California Labor Commissioner's office has been heavily involved in the licensing and regulation of talent agencies, and the provision conferring initial jurisdiction on the Labor Commissioner to determine controversies has survived litigation and amendments to be retained as Section 1700.44(a) of the current Talent Agency Act.

In 1937 the Private Employment Agencies Law was incorporated into the California Labor Code, and finally,

in 1943, "Artists' Managers" became a separate category for regulation.

In 1959 the "Artists' Managers Act" became its own separate chapter of the Labor Code. This reflected the growing awareness by the legislature that the business of procuring employment in the entertainment industry, as well as the industry itself, is different and in many ways more complex than the business of the normal employment agencies the Labor Commissioner regulates.

The growing confusion over who and what to regulate in the entertainment industry was fueled by the development of the "personal manager" profession, which as the common title implies, often finds this kind of manager personally involved in all aspects of the artists' career, including (and not the least important to the artist) the procurement of a record contract for a recording artist. Of course, until the artist has developed to the caliber usually necessary to procure a record contract, most

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successful talent agencies are not available to the artist to help seek "gigs;" the live performance employment the performing artist needs. It is hard to avoid the growing confusion between "personal managers" and the employment or "talent agencies" in the entertainment industry.

### Confusion Between Talent Agencies and Personal Managers

In part to avoid the growing confusion between artists' "personal managers" and artists' employment or "talent agents," the "Artists' Managers Act" became the "Talent Agency Act" in 1978, and "Artists' Managers" within the meaning of the act, became "Talent Agencies." Meanwhile, the legislature was struggling with the distinction between a "talent agency," then defined as "a person or corporation who engages in the occupation of

procuring, offering, promising or attempting to procure employment or engagements for an artist or artists" and who "may, in addition, counsel or direct artists in the development of their professional careers," and "personal managers" who may counsel and direct artists and do a lot of other things for the development of the artist's career but who are not supposed to deal with employment, unless they become a licensed "talent agent;" subjecting themselves to the licensing and bonding requirements and contract approval regulations of the Labor Commissioner.

There is still some confusion of terms, and a tendency to fall back on the tradition by which licensed "talent agents" are known merely as "agents" or "booking agents," and unlicensed "personal managers" as "managers" or "artists' managers."

The 1978 act originally would have required a separate "personal manager" license but those provisions were

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deleted before the act was passed. The growing issue of the distinction between a "talent agent" and a "personal manager" had been avoided but not resolved.

### Introduction to the 1982, 1984 and 1986 Amendments

In 1982 two significant amendments were added to the act, but only on a trial basis, with built in expiration or "sunset" provisions.

One was the addition of language to Section 1700.44 which allowed an unlicensed person (presumably a personal manager) to act in conjunction with and at the request of a licensed talent agency in the negotiation of an employment contract.

The other significant 1982 amendment was the addition of language to Section 1700.4 providing that "the activities of procuring, offering or promising to procure recording contracts for an artist or artists shall not of

itself subject the person or corporation to regulation and licensing."

Both of these trial amendments were renewed in 1984 and then terminated automatically by their own sunset provisions, effective January 1, 1986, which brings us back to the latest amendments to the Talent Agency Act.

The current version of the Talent Agency Act is the product of AB 3649. Although this bill was enacted on July 24, 1986, the most controversial amendments (to Sections 1700.4(a) and 1700.44(c) and (d)) were made retroactive to January 1, 1986, the same date the sunset provisions on the earlier versions of these amendments had expired. From January 1, 1986 until July 24, 1986, the law was in limbo concerning who could legally procure record contracts for artists in California. Although the reenacted provisions were made expressly retroactive to January 1, 1986 and thus clarify the legislative intent not to let the provisions lapse, a number of

questions remain. Between January 1, 1986, when the provisions did lapse, and July 24, 1986, when the activity of procuring recording contracts was once again de-regulated, could only licensed "talent agencies" legally procure recording contracts for artists? What of unlicensed managers who sent artists away for record deals, only to find out in July that they could have legally procured such a deal? May an artist seek to void an agreement with an unlicensed manager who procured a record contract for the artist during the first half of 1986? May the artist argue that the unlicensed manager acted "willfully" under the expired statute? May the manager argue that he or she relied on word that the bill would become effective retroactively? Would an unlicensed manager who relied on the letter of the law in the interim period, and thus obtained a license, bond, office acceptable to the Labor Commissioner, and otherwise subjected himself to licensing and regulation under the Act, have a



claim for these now unnecessary expenses, when he only wanted to legally procure a record contract for an artist?

These and other questions were created by the legislative limbo in 1986. This flip-flopping by the legislature has caused confusion and anxiety in the entertainment industry among personal managers (and lawyers) who, relying on the text of the Talent Agency Act as it read on January 1, 1986, had to decide whether to subject themselves to licensing and regulation under the Act or avoid the negotiation of recording contracts for artists with whose careers they were so personally involved.

### The California Entertainment Commission

One might wonder why the legislature and governor of California allowed the experimental amendments to expire before reenacting them as retroactive permanent

provisions of the Talent Agency Act. As a leader in the entertainment industry, California must be and remain clear in its legislative intent.

In the 1982 amendments, the California legislature also enacted provisions establishing a California Entertainment Commission which was to study the 1982 amendments and to prepare a report to the governor containing recommended changes. This was to be completed by January 1, 1986, which does not seem to have allowed time for the legislature to react to the Commission's Report before the amendments were to lapse.

The Commission submitted its report December 2, 1985, recommending that all of the sunset provisions (other than the establishment of the Commission itself) be reinstated.

The Entertainment Commission, which consisted of three artists, three talent agents and three personal managers, sought to tackle the difficult question of when, if

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ever, a personal manager or anyone other than a licensed talent agent could procure employment for an artist without submitting to the Labor Commissioner's licensing and regulation. The Commission's members could find no clear legislative intent to assist them in answering this fundamental question.

They came to the same conclusion as the 1978 legislature, however, that there is no justification for licensing personal managers, as it is not classes of people who ought to be regulated and licensed by the State, but rather the activity of procuring employment.

Due to the ambiguity of the statutory phrase "procuring employment," the Commission recommended that the criminal penalties removed by the 1982 amendments not be reinstated and that the remaining misdemeanor penalty under Section 1700.30 be removed. The 1986 legislation reflects this recommendation. A new subdivision (b) was added under Section 1700.44 indicating that the

failure to obtain a license from the Labor Commissioner is no longer a criminal act under any law of the State of California. The ambiguity remains, however, in the definition of "procuring employment" under the statute for civil purposes, except that we now know that such activity with respect to "record contracts" is meant to be exempt.

What the Commission and 1986 legislation do not do, however, is to give free reign to personal managers and other unlicensed persons or corporations to procure employment for artists. The Commission considered and specifically rejected proposals to permit even "incidental, occasional or infrequent activities relating in any way to procuring employment for an artist."

### What Spurred Legislative Action

Why did the legislature pass experimental legislation, form a Commission and make retroactive amendments? In part, because of the history of litigation, abuses and problems between unlicensed managers and protected artists, including actors and actresses, directors, writers, cinematographers, composers, lyricists, arrangers, and now, models, in addition to musical artists and others.

The classic example of problems between unlicensed managers and musical artists are the infamous cases of *Buchwald v. Superior Court*, 254 Cal.App.2d 347, 62 Cal.Rptr. 364 (1967), and *Buchwald v. Katz*, 8 C.3d 493, 105 Cal.Rptr. 368 (1972), which involved a complex procedural web beyond the scope of this article.

The consolidated cases of *Buchwald v. Katz* represent nearly 21 years of litigation and appeals, starting with issue of whether the Labor Commission had original jurisdiction over a dispute between a manager who acted as an unlicensed "artists' manager" under the Act, and

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members of the first San Francisco rock group to become national recording artists, the Jefferson Airplane.

The Superior Court ruled originally against the Airplane parties (and the Labor Commissioner's jurisdiction) and was reversed on appeal. *Buchwald v. Superior Court* held that if Katz had promised to and did seek and procure bookings and employment for artists without a license, the Labor Commissioner would have original jurisdiction. The fact that Katz' agreements specifically stated that he would not procure employment would not control.

It was decided, then, that even an unlicensed person may come under the initial jurisdiction of the Labor Commissioner if he or she acts as a talent agent (at the time of the Katz case, an "artists' manager") without a license.

The Labor Commissioner found that the Airplane parties were "artists" under the Act, and that Katz was

acting as an unlicensed "artists' manager" in obtaining bookings and employment, and that, despite express contract language to the contrary, Katz did act as an "artists' manager." Since he was not licensed, the agreements with the Airplane parties were void, and Katz was ordered to refund to the Airplane more than \$49,000 paid to him in commissions up to the time of the dispute.

After the Labor Commissioner's determination in favor of the Airplane parties, Katz appealed for a trial de novo in the Superior Court. *Buchwald v. Katz* held that although original jurisdiction was with the Labor Commissioner, Katz was entitled to trial de novo, a complete new trial.

After the California Supreme Court determined that Katz had this right (despite his failure to post a bond ordered by the lower court), the cases were remanded to the Superior Court for trial. For years, one of these writers worked with the Airplane parties in attempting to

settle the cases, and final resolution of the issues was postponed while settlement negotiations were aborted and Katz hired and fired attorneys.

On May 4, 1987, the cases were dismissed by the Superior Court for Katz' failure to prosecute, in response to a motion filed on behalf of RCA Records which had been holding disputed funds pending the outcome of the litigation. The court found Katz had "sabotaged" settlement negotiations and had "not been diligent in prosecuting the litigation." And so the longest litigated case under the Act may come to an end without a clear judicial determination on the substantive issues.

The Airplane parties had contended that the separate but identical management and publishing agreements they had signed with Katz were void and not enforceable by Katz because Katz had acted as an unlicensed artists' manager and did not use a form agreement approved by the State Labor Commissioner. They



contended that Katz promised to and actually did procure employment for diem. They also claimed that the publishing agreements were a breach of Katz' fiduciary duties as their manager. Because the trial of the cases was never completed, these and other substantive issues were not clearly decided.

These types of problems and others (illustrated by such cases as *Raden v. Piper Laurie*, 120 C.A.2d 61, and *Collier & Wallis, Ltd. v. Mary Astor*, 9 Cal.2d 202) developed over the years to force California to enact what is hoped to be the best "model" talent agency law in the nation. The tangled web of talent agency law has seen some evolution since the 1913 Private Employment Agencies Law, but in that evolution, the complexities remain.

### Procuring Recording Contracts

As the California Entertainment Commission analyzed the Act to improve its clarity, it decided that the 1982 exemption for procuring recording contracts should be reinstated. This was due to the nature of a recording contract. The Commission's members found such agreements to be for the purpose of producing a "permanent and repayable showcase" of the talents of the artist. They recognized that many artists retain personal managers to handle record company deals, rather than talent agents who are more commonly used for booking tours, club dates, and other personal appearance employment. The Commission concluded that the activities involved in procuring recording contracts are too imprecise to be subjected to the requirements of licensure.

An interesting issue not decided in the Katz cases is whether Katz' activities in procuring the Jefferson Airplane's first recording contract with RCA, prior to the 1982 amendments, would have been a direct violation of

the Act because such activity was only later excluded from regulation, or whether it would have been an activity that by implication of the later amendments should have been interpreted as excluded from the regulation all along?

### Other Changes in the Act that Affect Past Practices

The 1986 amendments contain some provisions that would seem to deregulate talent agencies, while others impose stricter regulation. All of these changes were recommended by the Commission.

First, Section 1700.40 now prohibits a talent agency from collecting a "registration fee" which is defined in new Subsection 1700.2(b) to include any kind of charge made for (1) registration for employment, (2) letter writing, (3) photographs or videos, (4) costumes, and (5) "any activity of a like nature." What this seems to

prohibit may cause new problems of interpretation for future commissions and legislatures and for the courts. Although it is easy to see that such "registration fees" could be subject to abuse, the new prohibition could stifle genuine and useful creative marketing services offered by some talent agents to artists on the side, for photography, video production, and publicity and promotion services, such as maintaining and servicing mailing lists. The "registration fee" prohibition may cause some talent agents to stop furnishing coordinated promotional services, leaving their artists to seek outside services or without practical access to such services.

Other areas of stricter regulation include the new requirement in Section 1700.25 that the talent agent "who receives any payment of funds on behalf of an artist shall immediately deposit that amount in a trust account to be maintained by him or her in a bank or other recognized depository" and to disburse such funds, less only

the talent agent's commission, to the artist within 15 days after receipt. It has been a common practice for agents to advance funds for artists, and then automatically deduct and retain these funds from the artist's earnings. The present provisions would seem to prohibit this practice. The agent also is required to maintain separate records of all funds received on behalf of each artist, indicating the disposition of the funds.

Talent agencies now are specifically prohibited from refusing to represent an artist based on race, color, creed, sex, national origin, religion or handicap. It will be interesting to see the outcome of the first case of an unknown artist suing a successful, major talent agency for allegedly refusing to represent the artist on this basis.

On the other hand, talent agents are deregulated in that they do not necessarily need to spend time and money on an office outside of their homes, although the law is unclear on what will be acceptable as an office. The

prospective office of the talent agency is subject to Labor Commission inspection and approval. Under prior Section 1700.9, no license would have been granted for premises in rooms used for living purposes, where boarders or lodgers were kept, where meals were served, where persons sleep, or in connection with a building or premises where intoxicating liquors were sold or consumed. This resulted in a situation where home offices were rarely approved, and then only if they were in a distinct and separate building on the home complex, not a help to the shoe-string agent in an apartment or small house.

The present version of Section 1700.9 provides that a license may not be granted simply "in a place that would endanger the health, safety, or welfare of the artist." This makes it possible for many more persons to obtain licenses than previously, but leaves the ultimate determination to the Labor Commissioner, who will still

investigate the nature of the home office for suitability and business-like atmosphere. Curiously, Section 1700.19, which used to refer to the address of the "house" in which the talent agency is conducted, has now been changed to refer to the "premises." Even if talent agents may now be able to save money on the type of premises in which they conduct business, they may have to spend more to obtain a bond. Previously, Section 1700.15 only required that the talent agent maintain a surety bond in the penal sum of \$1,000 to obtain a license. This has been raised tenfold, to \$10,000. According to the Entertainment Commission and Labor Commissioner's office, the amount was raised because the old amount was inadequate. Also, the Commission cited a "truer test of financial credibility" as one of their reasons for the increased bond amount. The increased premiums involved, however, have become a major concern for many talent agencies working with newer and

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less successful acts, who the wealthier and more established talent agencies do not rush to represent.

The new Section 1700.33 compares with the prior section in an interesting way. The older version included language that made common sense: a talent agent could not send any "woman or minor as an employee to any house of ill fame, to any house or place of amusement for immoral purpose, to places resorted to for the purposes of prostitution, the character of which places the talent agency could have ascertained upon reasonable inquiry." The new section eliminates these express prohibitions. It has been modified to substitute language prohibiting a talent agent from sending "any artist" to "any place where the health, safety or welfare of the artist could be adversely affected, the character of which the talent agency could have ascertained upon reasonable inquiry."



## Conclusion

This is but an overview of where the Talent Agency Act has come from and where it may be going. Either we cannot take some of its new sections too literally, or we must be prepared for further commissions, litigation, and legislative changes. Hopefully they will not come after long, protracted litigation affecting talented people, and hopefully, with the help of the entertainment bar, California will be able to untangle the tangled web of California's law on talent agents.

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Starship, Night Ranger, The Doobie Brothers, Commander Cody, and other bands, managers, songwriters, publishers, producers, and independent record labels. Ms. Green teaches The Legal Aspects of the Music Business at San Francisco State University for the Music/Recording Industry Certificate Program. Both have been speakers for numerous arts and entertainment societies, and they have produced a PBS special on law of artists' rights. Copyright 1987 by Green & Green. [ELR 9:4:3]

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## **Criminal Copyright and Trademark Law Update**

**by David Nimmer**

In my recent "Business Affairs" article on criminal copyright and trademark law, I concluded by noting the

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advantages of criminal contempt prosecutions, in which the aggrieved litigant's counsel acts as a court-appointed special prosecutor. (ELR 9:1:3) As set forth in the article, the Supreme Court was then in the process of reviewing a conflict between the Second Circuit's approval of that procedure in the "Bagscam" case, *United States ex rel. Vuitton et Fils S. A. v. Klayminc*, 780 F.2d 179 (2d Cir. 1985), cert. granted, 106 S.Ct. 3270 (1986), and the Sixth Circuit's exercise of its supervisory powers to forbid such an interested advocate from serving at least as primary (as distinguished from assisting) prosecutor, *Polo Fashions, Inc. v. Stock Buyers Int'l Inc.*, 760 F.2d 698 (6th Cir. 1985).

The Supreme Court has now spoken. Setting aside the convictions won by plaintiff Louis Vuitton's attorney acting as court-appointed special prosecutor, the Court ruled almost unanimously that counsel for a party that is the beneficiary of a court order may not be appointed to

undertake contempt prosecutions for alleged violations of that order. *Young v. United States ex rel. Vuitton et Fils, S.A.*, 107 S.Ct. 2124, 55 U.S.L.W. 4676 (1987). Justice Brennan's opinion held that the conflict that is engendered from serving two possibly conflicting masters is inconsistent with the public-servant obligations of the prosecutor. Although splitting on the question whether this procedure can ever constitute harmless error, six justices held, in the exercise of the Court's supervisory powers over inferior federal tribunals, that appointment of an interested counsel "at a minimum created opportunities for conflicts to arise, and created at least the appearance of impropriety."

Two justices would have gone even further. Justice Blackmun's concurrence, beyond merely addressing court supervisory powers, would have reached the constitutional issue to hold the appointment of interested counsel violative of the due process clause. Going

further still, Justice Scalia's concurrence would have barred all court appointment of special prosecutors, holding that the judicial power of the United States does not extend to that executive function. (This concurrence will undoubtedly form part of the groundwork for Justice Scalia's reaction to challenges directed at the Iran-gate and other independent counsels.)

Only Justice White's dissent expressed disagreement with the proposition that it is improper to appoint an interested attorney as special prosecutor; and even he stated that the practice violates his preference. Thus, Vuitton's attorney, who had been appointed special prosecutor to pursue chronic violators of Vuitton's mark in jurisdictions all over the United States, won the tepid support of only one justice, coupled with disapproval in varying degrees from the balance of the Court.

There are several lessons to be gleaned from Young. First, violation of an injunction or consent decree in a

copyright or trademark case may still give rise to a criminal contempt prosecution. The Supreme Court reaffirmed the federal courts' power to appoint special prosecutors even for outof-court contempt such as was involved in this case. The proper procedure at the outset is for the district judge to refer the matter for prosecution to the United States Attorney. If the U.S. Attorney declines to handle the matter, then the judge may still appoint a private attorney as special prosecutor to vindicate the court's authority.

Second, the special prosecutor must be fully disinterested. Thus, the Supreme Court exercised its supervisory power's even further than did the Sixth Circuit in *Polo*, which left open the possibility that plaintiffs counsel could function as assistant to a disinterested lead prosecutor. Given that court-appointed special prosecutors, under the Supreme Court's rule, may not derive any direct or indirect benefit from criminal contempt

proceedings, and given further the absence of public funds from which to pay disinterested counsel, the practical effect of Young may be to make the U.S. Attorney's declination of prosecution dispositive.

Finally, even after Young, the possibility remains for a state court judge to appoint interested counsel in lieu of the district attorney to prosecute violation of a trademark consent decree entered in state court. This result follows because the Supreme Court merely articulated a supervisory rule, which is not binding upon state courts. Only if Justice Blackmun's view gains sway-that the due process clause of the Constitution bars prosecution by an interested counsel-would Young reach state court appointments of special prosecutors.

In sum, Young largely closes the door (albeit not slamming it tight) on criminal contempt proceedings as a simple and effective auxiliary prosecutory tool for use against repeat violators of copyrights and trademarks.

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## LEGAL AFFAIRS

### **Update on the Film Colorization Debate Copyright Office Issues Registration Decision and Congress Considers Proposed Legislation**

**by Richard J. Greenstone**

The controversy over the color conversion of black and white motion pictures first arose in the spring and summer of 1986. Since then, Congress has held hearings on the matter and Representative Richard Gephardt has



proposed legislation n1 amending the Copyright Act of 1976 n2 limiting material alteration, including colorization of motion pictures. Most recently, the Copyright Office issued its Registration Decision.

The Copyright Office issued a Notice of Inquiry n3 on September 15, 1986, after receiving applications for registration of colorized versions of ten motion pictures and one television program. Comments were solicited in the following four areas:

"1. Which steps, if any, in the colorization processes involve individual creative human authorship?

"2. Who are the authors of the copyrightable elements, if any, in colorized film?

"3. With specific reference to the role of computer programs in colorization processes: (a) How are colors selected? How are colors made available for selection? What factors influence color selection? How wide is the range of choice? (b) In addition to coloring in the strict

sense, are other cinematographic contributions, such as animation or other hand or computer assisted effects, utilized in colorizing?

"4. Are all colorization processes intended solely to create videotapes in color? Are any methods now available or under development that would permit the commercially feasible colorization of 35mm prints of a quality that would permit theatrical distribution?" n4

The Copyright Office - in a decision dated June 11, 1987, signed by Ralph Oman, the Register of Copyrights - issued its decision and proposed rule n5 on the copyright registration of colorized versions of black and white motion pictures. The 14-page notice provides for copyright registration of colorized motion pictures based on similar processes developed by Colorization, Inc., of Toronto, Canada, and Color Systems Technology, Inc., of Hollywood, California. The decision also invited public comment for a 30-day period "with respect to

proposed regulations that would require the deposit of a black and white print along with a copy of the computer-colored version in order to register a claim to copyright in the selection of colors." n6

The decision notes that 46 comments were filed, with the majority directed towards aesthetic considerations. Only a few comments responded to the four questions set out above. Of those comments, only the two pictures involving color conversion with the aid of a computer were discussed. No comments addressed the chromoloid method n7 of color conversion, and as a result, the Copyright Office Registration Decision does not apply to that process. n8

The Registration Decision summarizes the submitted comments in two parts: first, the process of conversion from black and white to color, and second, legal arguments for and against colorization.

## Color Conversion Process

The colorization process covered by the Registration Decision involves the transfer of an unblemished black and white print to videotape. The tape is broken down into discrete scenes and sequences. A color plan is developed for each scene as well as the entire work. Color selections are made from a universe of 16 million colors with a possible 4,096 colors for each movie with 64 colors available for each scene. Colors are selected to convey a time period, create a mood and ensure historical accuracy as to color and tint of the actors and actresses. An artist uses a graphics tablet and electronic palette to hand-color key frames. A computer then colors the intervening frames adjusting to variations in the luminosity of the black and white motion picture. Finally, each color scene is reviewed and revised where

necessary to ensure consistency between the computer-colored frames and the hand-colored key frame.

## Legal Arguments

The Registration Decision reviewed the legal arguments from both those for and against the colorization process. The decision notes a consensus among the submissions that original authorship is inherent in a colorized version of a black and white motion picture making that work proper copyright subject matter. The decision examines various rationales for this consensus, stating: "The more prevalent justification is that the selection, coordination and application of color, and the review of the final product amount to 'individual creative human authorship.'" n10

The Registration Decision notes that the comments opposing registration assert "that colorizing is a technical

process that does not have sufficient human authorship to merit copyright protection." n11 The decision cites reasons given for this position. First, "selection of palette is an idea that has not as yet produced any copyrightable expression." n12 Second, color facts n13 are integrated into preexisting visual patterns in the black and white film with these patterns serving as the actual expression. Third, copyright in the computer colorization software cannot support a claim in the output-the color-converted work. The Registration Decision only refers to these arguments; responses to the arguments are not incorporated in the final decision.

One other issue appears to have influenced the Copyright Office: "[E]ven if sufficient human authorship exists given today's colorization technology, what happens to a copyright claim when the complete coloring process is done by a computer program?" n14 The Copyright Office answered by indicating that it will monitor

"technological developments, and may reconsider the issue if the role of the computer in selecting the colors becomes more dominant. n15

### Statutory, Regulatory, and Judicial Foundations

The Copyright Office Registration Decision examines both legislation and judicial opinion in rendering its opinion.

Two statutes and a regulation lay the foundation of the decision. First, a derivative work, as defined by the Copyright Act, is "a work based upon one or more pre-existing works... [which] may be recast, transformed, or adapted... [and consists of] modifications, which, as a whole, represent an original work of authorship." n16 Second, copyright protection in a derivative work "extends only to the material contributed by the author of such work, as distinguished from the preexisting

material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material."n17 Third, mere variations of coloring are not subject to copyright. n18

The decision also reviews two judicial standards. *L. Batlin & Son, Inc. v. Snyder* n19 is cited for the proposition that a derivative work merits copyright protection if it is a distinguishable variation that is not merely trivial. There was disagreement among the submitted comments as to what makes a variation distinguishable, and whether a higher standard is required for a derivative work based on a work already in the public domain. The Registration Decision invokes *Batlin* stating that a higher standard is necessary for examining additions to public domain works. The Copyright Office decision



highlights two important limitations of derivative works which appear to directly circumscribe protection for colorized works.

"1. [T]o support a copyright the original aspects of a derivative work must be more than trivial.

"2. [T]he scope of protection afforded a derivative work must reflect the degree to which it relies on the preexisting material and must not in any way affect the scope of any copyright in this preexisting material." n20

In addition, the Registration Decision relies on *Pantone, Inc. v. A.I. Friedman, Inc.*, n21 in support of registration for colorized works where a compilation of colors on the basis of color selection requires "careful consideration of numerous artistic factors including the aesthetic attributes of each shade and its use in the commercial art field." n22

Standard for Registration

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The Copyright Office concludes in its decision that computer-colored black and white motion pictures are registrable as derivative works where those works "reveal a certain minimum amount of individual creative human authorship." n23 The Copyright Office Registration Decision notes that determining the presence of human authorship in colorized works is quite difficult.

The decision also reaffirms the present regulation n24 prohibiting the registration of works which exhibit only mere variations of coloring. In the future, the regulation will deny registration where authorship consists of the addition of a "relatively few number of colors to an existing design or work." n25 or where registration is claimed based on the arrangement or combination of colors "because the original black and white film predetermines the arrangement of colors." n26 But, "[r]egistration is not precluded ... where the work consists of

original selection, arrangement, or combinations of a large number of colors, or where the lines of an original design are fixed by gradations of numerous colors." n27

The Copyright Office, in determining whether the addition of color represents an original work of authorship, will apply the following criteria:

"(1) Numerous color selections must be made by human beings from an extensive color inventory.

"(2) The range and extent of colors added to the black and white work must represent more than a trivial variation.

"(3) The overall appearance of the motion picture must be modified; registration will not be made for the coloring of a few frames or the enhancement of color in a previously colored film.

"(4) Removal of color from a motion picture or other work will not justify registration.

"(5) The existing regulatory prohibition on copyright registration based on mere variations of color is confirmed." n28

### Scope of Protection

The scope of registration is limited by the Copyright Office Registration Decision, which reaffirms the statutory division between protection for derivative works and for preexisting works without copyright protection. n29 Thus, the underlying black and white work, if in the public domain, will retain that status so that others, such as competing colorizers, may exploit the work.

### Proposed Deposit Requirement

The Copyright Office also proposes that the copyright claimant submit the original black and white version of

the work along with the colorized version. The reasons are twofold: first, so that a copyright examiner can compare the two works facilitating determination whether the colorized version satisfies the standards for copyright registration; and, second, to enrich the black and white film collection at the Library of Congress. n30

### Proposed Legislation

Another major development in the colorization debate is the introduction of proposed legislation by Representative Richard Gephardt of Missouri. This legislation, known as the Film Integrity Act of 1987, would add a section 119 to the Copyright Act of 1976 limiting exclusive rights to motion pictures.

The proposed legislation provides that "qualified consent" for materially altering and colorizing motion pictures could be given only by "artistic authors" n31 or

their assignees (who also must be artistic authors). In addition, heirs inheriting such qualified consent rights may assign only to other artistic authors. Such right of consent does not expire when the copyright expires. A material alteration (including colorization) by someone who is not the artistic author (or a qualified assignee) would be tantamount to copyright infringement. Finally, any material alteration or colorization of a motion picture without the consent of its artistic authors would be ineligible for copyright protection.

## Conclusion

The summary of developments just described raises interesting, ongoing issues in the colorization debate. The Copyright Office states in its Registration Decision that the Copyright Office "will monitor technological developments, and may reconsider the issue if the role of the

computer in selecting the colors becomes more dominant." n32 Would the colorizers serve their best interest by freezing the level of automation now used in the process so that their versions will qualify for copyright protection? Will the proposed legislation finally bring the right of droit moral (moral rights) into United States Copyright law, or will the proposal be the final impetus for the United States to accede to or reject the Berne Convention? These and other issues will arise upon implementation of the new Copyright Office regulation, and as interested parties debate the merits of the Gephardt bill.

## NOTES

1. Film integrity Act of 1987.

2. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C.A. Secs. 101-914 (West 1977 & Supp. 1986)).

3. 51 Fed. Reg. 32665 (1986) (Registration of Claims to Copyright, Notice of Inquiry; Colorization of Motion Pictures).

4. Registration Decision 34.

5. Copyright Registration for Colorized Versions of Black and White Motion Pictures. Notice of Proposed Rulemaking. Docket No. RM 86-IA [hereinafter cited as Registration Decision].

6. Registration Decision 1.



7. The chromoloid process reproduces three black and white prints, from a master positive, which key to one primary color each-red, blue and green. The three prints are combined onto a single full color film.

8. Registration Decision 10.

9. Id. at 5, citing comments submitted by Colorization, Inc.

10. Id. at 6.

11. Id. at 7.

12. Id.

13. Copyright does not protect facts.

14. Registration Decision 8.

15. Id. at 11.

16. 17 U.S.C.A. Sec.101 (West 1977).

17. 17 U.S.C.A. Sec.103(b) (West 1977).

18. 37 C.F.R. Sec.202.1(a).

19. 536 F.2d 486 (2d Cir.), cert. denied, 429 U.S. 857 (1976).

20. Registration Decision 8, quoting Durham Indus., Inc. v. Tomy Corp., 630 F.2d 905, 909 (2d Cir. 1980).

21. 294 F.Supp. 545 (S.D.N.Y. 1968).

22. Registration Decision 9, quoting *Pantone, Inc. v. A.I. Friedman, Inc.*, 294 F.Supp. 545, 547 (S.D.N.Y. 1968).

23. Registration Decision 10.

24. 37 C.F.R. Sec.202.1(a).

25. Registration Decision 10.

26. *Id.* at 11.

27. *Id.* at 10 (emphasis added).

28. *Id.* at 11-12.

29. *Id.* at 12.

30. Id. at 12-13.

31. The legislation proposes to add the following definition to 17 U.S.C. Sec.101: "Artistic authors' of a motion picture shall be the principal director and principal screenwriter of the work."

32. Registration Decision 11.

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## RECENT CASES

### **Dismissal of book author's copyright infringement suit against producers of movie "Fort Apache: The Bronx" is affirmed by Federal Court of Appeals because of lack of substantial similarity**

In *Walker v. Time Life Films, Inc.*, a Federal District Court in New York granted summary judgment to Time Life Films in a copyright infringement action brought by the author of the book "Fort Apache" (ELR 7:9:9). A Federal Court of Appeals has affirmed the judgment, agreeing with the District Court's finding that no reasonable observer could find substantial similarity between the protectible elements of Walker's book and Time Life's movie "Fort Apache: The Bronx."

Chief Judge Feinberg, although noting that, at a general level, the movie and the book both recounted the

experiences of policemen "battling the hostile environment of the 41st Precinct," stated that the differences in the plot, dramatic structure and pace of the works outweighed any general likeness. It was further observed that the idea of a police story set in the 41st Precinct was not copyrightable; that Walker's "diary-like" book, in contrast to the film, did not contain significant character or plot development; and that any remaining similarities between the works were unprotectible "scenes a faire" or "stock" themes. The dismissal of Walker's Lanham Act and pendent state law claims also was upheld.

Walker v. Time Life Films, Inc., 784 F.2d 44 (2d Cir. 1986) [ELR 9:4:11]

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**Lee Iacocca's barber may proceed with action against Bantam Books to recover a literary agent's commission on publication contract for Iacocca's autobiography, rules New York trial court**

A New York trial court has shorn Bantam Books of its statute of frauds defense in an action brought by barber Gio Hernandez in connection with Bantam's best-selling autobiography of Hernandez' client, Chrysler chairman Lee Iacocca.

Hernandez, a barber with a salon at the Hotel Pierre, claimed that one of his customers, Bantam Books vice-president Stewart Applebaum, asked Hernandez to suggest to Iacocca that he consider the autobiography project. Iacocca subsequently entered a publication contract with Bantam Books; the autobiography went on sale in October 1984, and was highly successful.

In November 1984, Hernandez received a check in the amount of \$5,000 from Bantam Books, apparently as remuneration for his "match-making" services. Hernandez refused the check, claiming that he had agreed to serve as a literary agent, and was entitled to the standard remuneration of ten percent of the gross sales of the Iacocca book.

New York County State Supreme Court Justice Harold Baer, Jr. has found that Bantam's \$5,000 check and an accompanying invoice indicating that Hernandez was being paid for a "consultant fee re: Iacocca" amounted to a sufficient memorandum of an oral agreement to satisfy the statute of frauds, and to preclude granting summary judgment to Bantam Books with respect to the breach of contract claim. The amount of the payment due to Hernandez must be determined at trial. Summary judgment was granted to Bantam on Hernandez' unjust enrichment and fraudulent misrepresentation claims.



Hernandez v. Bantam Books, Inc., New York Law Journal, p.6, col.6 (N.Y.Cnty., Aug 4, 1987) [ELR 9:4:11]

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**Appeals court orders reconsideration of request for pre-injunction by Estate of George Balanchine in lawsuit against publisher alleging that book "The Nutcracker: A Story and A Ballet" infringes copy-right to Balanchine's choreography**

In Horgan v. Macmillan, Inc., a Federal Court of Appeals in New York has reversed a District Court decision (ELR 7:7:8) denying a motion for a preliminary injunction sought by the executrix of the estate of George Balanchine to prevent the publication of a book entitled "The Nutcracker:A Story & A Ballet." The book depicted, in text and in 60 color photographs, the New

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York City Ballet Company's production of *The Nutcracker* ballet, choreographed by Balanchine. Chief Judge Feinberg declared that the District Court applied the wrong legal standard for determining whether the photographs infringed the copyrighted choreography, and remanded the matter.

Recognizing that the question of whether still photographs of a ballet can infringe the copyright on the choreography for the ballet was a matter of first impression, Judge Feinberg reviewed the development of copyright protection for choreography. In the District Court's view, such protection did not extend to Balanchine's work in this case because the photographs portrayed the dancers "in various attitudes at specific instants of time," rather than "the flow of steps in a ballet." Therefore, the staged performance could not be recreated from the photographs.

However, the standard which should have been applied, stated Judge Feinberg, was not whether the original could be recreated from the allegedly infringing copy, but whether the copy was substantially similar to Balanchine's copyrighted work. For "even a small amount of the original, if it is qualitatively significant, may be sufficient to be an infringement although the full original could not be recreated from the excerpt."

The court concluded by pointing out that a photograph of "a single moment in a dance sequence may communicate a great deal." The District Court, on remand, was asked to consider, on a full record; the validity of Balanchine's copyright; the amount of original Balanchine choreography in the New York City Ballet production of *The Nutcracker* and in the photographs; whether all of the photographs in the book were of sufficient quantity or sequencing to constitute infringement; whether the New York City Ballet was authorized to license the use

of the photographs; and whether a fair use claim might apply if copying indeed did occur.

A factual question also was raised concerning Horgan's alleged delay in filing the lawsuit, but the alleged undue delay was less significant, stated the court, in view of the holding that the wrong standard of law was applied on infringement and the court's "strong view" that the case should proceed to a final disposition on the merits.

Horgan v. Macmillan, Inc., 789 F.2d 157 (2d Cir. 1986)  
[ELR 9:4:11]

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**Saturday Evening Post's dispute with maker of porcelain dolls based on Norman Rockwell illustrations was properly ordered to arbitration although issue arose concerning validity of copyright; no-contest clause in licensing agreement also was found valid**

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In 1979, the Saturday Evening Post Company granted Rumbleseat Press, Inc. an exclusive license to manufacture porcelain dolls derived from certain Norman Rockwell illustrations published in the Saturday Evening Post magazine. Rumbleseat agreed, in part, not to contest the validity of any of the copyrights which the Post had obtained, and also agreed to arbitrate any controversy or claim between the parties.

In March 1983, the Post notified Rumbleseat that it intended to terminate the agreement at the end of the year. When Rumbleseat continued to make the dolls, the Post attempted to arrange an arbitration proceeding. Rumbleseat declared that it would try to enjoin any arbitration. The Post then sued Rumbleseat in a Federal District Court alleging copyright infringement and seeking, among other relief, a preliminary injunction against Rumbleseat's withdrawal from the arbitration.

The District Court issued an order to arbitrate; the arbitration was held; and Rumbleseat was enjoined from making or selling porcelain dolls modeled on the Rockwell illustrations covered by the license. Rumbleseat also was ordered to transfer to the Post the derivative-work copyrights that Rumbleseat had obtained on the dolls and to pay the magazine \$200,000 in damages. The District Court then confirmed the arbitration award under the arbitration code. Federal Court of Appeals Judge Posner, in affirming the District Court's decision, first noted that even if the Post was seeking to compel arbitration, rather than pursue its copyright infringement claim, federal jurisdiction was present under the federal arbitration code. The code, although not cited in the Post's complaint, was the apparent basis for the request for an order to arbitrate. And while state courts generally have jurisdiction in disputes over compliance with a copyright licensing agreement, federal jurisdiction in this

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case was established by the diversity of citizenship of the parties.

The court next declared that although it could find no cases on whether the validity of a copyright is arbitrable, various practical and policy considerations compelled the court to hold that "federal law does not forbid arbitration of the validity of a copyright, at least where that validity becomes an issue in the arbitration of a contract dispute."

The court also concluded that the clause in the licensing agreement forbidding Rumbleseat from contesting the validity of the copyright was not unenforceable as against public policy. A rule outlawing no-contest clauses without evidence of any monopolistic danger or effect would not be justified, in Judge Posner's view. Without a no-contest clause, a licensee may threaten to challenge the copyright's validity if a dispute arises; such threats would discourage copyright licensing, and

"therefore retard rather than promote the diffusion of copyright works."

Judge Posner observed that the fact the court found no cases dealing with a no-contest clause in a copyright license was evidence that the clauses were not such a source of significant restraints on freedom to compete as might warrant a per se rule of illegality. In all, no-contest clauses were held to be valid in copyright licenses, and valid when no issue of copyrightability is presented-these were the broad and narrow holdings, respectively, of the court; both will bind the District Courts of the Seventh Circuit.

Saturday Evening Post Co. v. Rumbleseat Press, Inc.,  
816 F.2d 1191 (7th Cir. 1987) [ELR 9:4:12]

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## **Painting by Claude Monet is ordered returned to original owner, notwithstanding good faith purchase**

Edith Marks Baldinger must return a painting by Claude Monet entitled "Champs de Ble a Vetheuil" to Gerda Dorothea DeWeerth, a Federal District Court in New York has ruled.

Mrs. DeWeerth's father purchased the painting in 1908, and kept it in his house in West Germany. DeWeerth inherited the painting in 1922. In 1943, DeWeerth sent the Monet to her sister in Southern Germany for safekeeping. In 1945, some American soldiers were quartered in the sister's house; soon after the soldiers departed, the disappearance of the painting was noted. DeWeerth's efforts to locate the painting were unsuccessful.

By 1956, the Monet had made its way to the United States. Wildenstein & Co., Inc., an art gallery in New

York City, acquired the work on consignment from an art dealer from Switzerland. Baldinger purchased the Monet from Wildenstein in June 1957.

Eventually, DeWeerth learned of the gallery's connection with the painting and, in 1982, obtained a state court order directing Wildenstein to reveal the identity of the possessor. The instant action followed.

Judge Vincent L. Broderick first determined that New York law governed all issues in the case. Under New York law, DeWeerth's action was timely since it was instituted within three years of the accrual of the cause of action, i.e., when DeWeerth demanded the return of the property and the demand was refused. Furthermore, DeWeerth had undertaken a "diligent, although fruitless effort" to find the Monet, and did not unreasonably delay her demand for the return of the work.

Judge Broderick then found that DeWeerth had an immediate and superior right to the possession of the

painting. Baldinger could trace her title back to the art dealer, but there was no evidence as to how the dealer came into possession of the Monet.

Baldinger's counterclaim against DeWeerth, whether characterized as a claim for intentional infliction of emotional distress or as a claim for malicious prosecution, was denied, as were defenses based on adverse possession or gratuitous bailment, even assuming the delivery of the Monet to her sister was a bailment by DeWeerth.

DeWeerth v. Baldinger, 658 F.Supp. 688 (S.D.N.Y. 1987) [ELR 9:4:12]

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**Holder of exclusive video cassette rights to "Debbie Does Dallas" obtains restitution of royalty payments of \$225,440 due to grantor's failure to copyright the film**

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A contract conveying exclusive video cassette rights to the film "Debbie Does Dallas" implied that the conveyor of such rights, M&A Associates, Inc., would obtain copyright protection for the film, a Federal District Court in Michigan has ruled.

In exchange for the exclusive right to sell video cassette copies of the film, VCX, Inc. paid M&A an advance of \$25,000 and a \$10 royalty for each video cassette copy sold; from February 1979 until March 1982, VCX paid a total of \$235,440 in royalties to M&A. When M&A sued VCX for breach of contract, VCX argued that in the absence of a copyright notice on prints of the film in theatrical distribution, the "exclusive right" to duplicate the film on video cassettes was worthless since any third party could freely sell video cassette copies of the film.

Federal District Court Judge Woods found that M&A's failure to add a copyright notice to the film breached the warranty of title contained in the agreement with VCX, and granted VCX restitution in the amount of \$225,440-the amount paid to M&A in excess of the fair market value of \$10,000 for non-exclusive video cassette rights in the film.

M&A Associates, Inc. v. VCX, Inc., 657 F.Supp. 454 (E.D.Mich. 1987) [ELR 9:4:13]

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**Local television stations are ordered to pay \$60 million annual interim blanket license fee to ASCAP; Federal District Court Magistrate orders setting of interim per-program license at a rate commensurate with a station's pro-rata share of industry fee**

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Federal District Court Magistrate Michael Dolinger, although noting the absence of any precise guidelines for setting an interim fee payment by approximately 750 local television stations to ASCAP, has adopted the figure of \$60 million as an appropriate annual blanket license fee to be paid by the stations on an interim basis for the period April 1, 1985 through March 31, 1988.

Upon lengthy consideration, Magistrate Dolinger rejected ASCAP's proposal for a per-program license fee set at nine percent of "revenue subject to fee" (as defined by a formula intended to approximate the revenue earned by each program for which a license might be sought). It was found that there was no compelling economic justification for setting the price of an interim per-program license at a figure that would make its use by a station for syndicated programming more expensive-exclusive of administration costs-than a blanket license.

Thus, the per-program license fee was set, on an interim basis, at such a level "that if the station used it for all of its syndicated programs, the total per-program fees would equal the amount payable by the station for a blanket license." For this purpose, stated Magistrate Dolinger, "each station Is blanket license fee shall be calculated as its share of the \$60 million industry fee pro-rated on the basis of the stations' respective gross revenues." ASCAP was found to be entitled to a surcharge, in an amount to be established, for the additional costs incurred by the organization in connection with processing and administering the per-program license over and above the costs normally incurred with the handling of the blanket license.

United States of America v. American Society of Composers, Authors and Publishers, Case No. Civ. 13-95 (S.D.N.Y., Feb.17, 1987) [ELR 9:4:13]

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**Federal Court of Appeals orders recalculation of short swing profits owed to Walt Disney Productions in connection with stock purchase by Saul P. Steinberg's companies**

Reliance Group Holdings, Inc. and Reliance Insurance Company began to acquire large amounts of the stock of Walt Disney Productions Corporation in March 1984; by May 1984, the Reliance companies (controlled by Saul P. Steinberg) had become a beneficial owner of more than ten percent of Disney's outstanding common stock. Reliance purchased an additional 100 shares of Disney stock on June 1, 1984, paying \$64.50 per share. Soon after, Reliance announced its intention to take over Disney through a tender offer for additional Disney shares sufficient to increase its holdings to at least 49%.



On June 11, 1984, Reliance agreed to cancel its tender offer and sell back to Disney approximately 4.2 million shares of Disney for about \$300 million. Disney also agreed to pay Reliance \$28 million for expenses incurred in preparing for the tender offer.

Disney stockholders Jeffrey W. Herrmann and Linda J. Herrmann brought an action on behalf of Walt Disney Productions under section 16(b) of the Securities and Exchange Act of 1934 to recover the short swing profit realized by Reliance on the 100 Disney shares purchased on June 1, 1984.

Reliance agreed that it was liable under section 16(b) to Disney; the parties differed on the manner of calculating the \$28 million received by Reliance into the short swing profit.

A Federal District Court stated that the tender offer expenses were not deductible from the short swing profit, added the \$28 million to the purchase price, and arrived

at a \$77.50 per share sale price. The court multiplied the \$77.50 figure by one hundred, subtracted the \$6,460 paid by Reliance for the shares, and calculated Reliance's short swing profit at \$1,290.

On appeal, Reliance argued that short swing profit does not include payments made to reimburse a party for takeover expenses unless those expenses were incurred in the purchase and sale of stock in violation of section 16(b). In this case, the proposed tender offer was separate from the 100 shares of stock at issue and thus, stated the company, the tender offer did not help it realize any "illicit" short swing profit.

The Herrmanns, characterizing the \$28 million as a "greenmail kicker," claimed that the court should have awarded the entire amount to Disney as short swing profit. A Federal Court of Appeals has vacated the District Court's judgment and remanded the matter for further findings on the question of damages. Federal

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District Court Judge Charles E. Stewart, Jr., sitting by designation, stated that the District Court did not find a sufficient connection between the \$28 million and the purchase and sale of shares subject to section 16(b) to justify its inclusion of the \$28 million in the calculation of short swing profits; on remand, the role of the \$28 million in the Disney-Reliance transaction should be further examined, suggested Judge Stewart. The factors requiring further review will include the different types of expenses reimbursed by the \$28 million payment (expenses incurred in purchasing section 16(b) stock are not deductible from short swing profits), and the possibility that some portion of the \$28 million was paid by Disney as consideration for Reliance's sale of its Disney shares. The District Court therefore will add to the \$300 million purchase price paid by Disney any part of the \$28 million that was reimbursement for expenses incurred in the actual purchase of shares, and that portion

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of the \$28 million that was paid in consideration for Reliance's sale of its Disney holdings; this amount then will be divided by the total number of Disney shares sold by Reliance to Disney, resulting in a per-share purchase price-multiplying this amount by 100 and subtracting the \$6,460 that Reliance paid for the 100 shares subject to 16(b) will yield the short swing profit due from the company, concluded the court.

Herrmann on behalf of Walt Disney Productions v. Steinberg, 812 F.2d 63 (2d Cir. 1987) [ELR 9:4:13]

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**Former major league umpire's libel action against George Steinbrenner and the New York Yankees is dismissed**

A New York appellate court has dismissed a libel action brought by former major league umpire Dallas Parks against George Steinbrenner, the principal owner of the New York Yankees.

In a press release issued by Steinbrenner in August 1982, after the Yankees played a two-game series with the Toronto Blue Jays, Steinbrenner referred to Parks' officiating during the games in less-than-complimentary terms. Parks sued Steinbrenner and the Yankees, claiming that the press release falsely impugned his ability, competence, conduct and fairness as a baseball umpire.

The trial court agreed with Steinbrenner that the statement was expressed as an opinion, but refused to dismiss the complaint on the ground that the press release did not set forth an adequate statement of facts which would support that opinion (ELR 7:7:14).

In reversing the trial court's decision, Judge Ellerin stated that the press release constituted a

constitutionally protected expression of opinion. It was observed that "from the late nineteenth century on, the baseball umpire has come to expect not only verbal abuse, but in many cases, physical attack as well, as part of the 'robust debate' ingrained in the profession." Given this historical perspective, the court found it clear that the average reader would perceive Steinbrenner's remarks as a statement of opinion, particularly since several qualifying phrases were used in the press release. And Steinbrenner's statement did include the "facts" upon which it was based, although parties might dispute the conclusions drawn from those facts. In all, the press release, even read apart from "the dynamics of the baseball world and its customs," qualified as a protected expression of pure opinion.

Parks v. Steinbrenner, New York Law Journal, p.1., col.6 (N.Y.App., July 23, 1997) [ELR 9:4:14]

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**Record producer may proceed with libel action against author of article about musician Jimmy Hendrix's early career, rules New York appellate court**

In contrast to the decision in *Parks v. Steinbrenner*, above, a New York appellate court, in an opinion also written by Judge Betty Weinberg Ellerin, has reinstated a \$500,000 libel action brought by Edward Chalpin against author David Marsh.

In October 1980, the small monthly magazine "Musician, Player and Listener" published by Amordian Press, printed an article by Marsh entitled "Jimi Hendrix-the Voodoo Lives On." In describing Hendrix's early career, the article stated, in part, "To record as a sideman with Curtis Knight, he'd been forced to sign a \$1 contract with an unbelievably unscrupulous character named Ed

Chalpin, who later won two percent of his record royalties and the right to the Band of Gypsies live album in an out-of-court settlement. . ."

Hendrix had signed a contract with Chalpin's company, PPX Enterprises, Inc., in 1965. PPX was granted exclusive rights to the performer's services for a three-year period in exchange for \$1, plus one percent of the retail selling price of all records sold, and minimum scale for arrangements produced. The terms of the contract appeared in a 1978 biography of Hendrix written by David Henderson; Marsh stated that the Henderson work was the primary source for his research into the facts of Hendrix's life and business dealings.

The trial court found that the alleged defamatory statement was a protected expression of opinion and directed dismissal of the complaint (ELR 7:3:12). In reversing the trial court's decision, Judge Ellerin noted Chalpin's argument that the facts which were set forth in the

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article in support of Marsh's opinion were false and distorted, given the actual terms of the contract. Marsh's statement was a "mixed opinion" according to the court, and as such, was actionable. Furthermore, even if the parties agreed, as they did not, that a one percent royalty was grossly inadequate, the article still materially misrepresented the facts which were set forth therein as the basis for Marsh's opinion of Chalpin.

The appellate court also found that an issue of fact was present as to whether Marsh acted in a grossly irresponsible manner by "untruthfully characterizing and distorting" the terms of the Hendrix-PPX contract. However, summary judgment was upheld with respect to Amor-dian since the publisher relied upon the integrity of a reputable author and had no substantial reason to question the accuracy of the information provided.

Chalpin v. Amordian Press, Inc., New York Use Journal, p.1, col.6 (N.Y.App., May 22, 1987) [ELR 9:4:14]

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### **Federal Court of Appeals orders reconsideration of Fort Lauderdale zoning ordinances regulating location of nude bars**

A Federal Court of Appeals in Florida has remanded for further consideration a judgment of a Federal District Court which permanently enjoined the city of Fort Lauderdale from enforcing ordinances which imposed location restrictions on nude bars, i.e., bars which sell liquor under license and which have partly or wholly nude persons on the premises as waitresses, performers, or customers. The District Court held that nude dancing in a business establishment was a constitutionally protected form of expression, and that the Fort Lauderdale

ordinances were an unconstitutional suppression of the First Amendment rights of the proposed owner of a bar featuring nude dancers. Furthermore, it was found that the number of sites assigned by the city for nude bars, approximately 12 sites for new nude bars added to 10 already operating as "nonconforming uses," was inadequate.

The Court of Appeals pointed out that the constitutional protection of nonobscene nude dancing as a mode of expression is not absolute, but is subject to reasonable contentneutral, time, place and manner regulations which serve a substantial government interest. Senior Federal Court of Appeals Judge Nichols stated that the record did not disclose any evidence to support the existence of an intent to suppress by the city. There also was no evidence, stated Judge Nichols, to support the District Court's finding that the city commissioners intended to "make a moral statement." Furthermore, the District

Court relied on a Federal Court of Appeals decision which was reversed by the United States Supreme Court in *City of Renton v. Playtime Theatres, Inc.* (ELR 8:5:14). In *Renton*, the Supreme Court sustained a city zoning ordinance regulating the location of theaters exhibiting "adult motion pictures" as a valid time, place and manner regulation.

Judge Nichols therefore vacated the District Court judgment and remanded the case for reconsideration in light of the *Renton* decision; it was suggested that on remand, the District Court review community needs, the incidence of nude bars in other comparable communities, and the goals of the city plan, as well as the association of drinking and nude dancing, a matter which was not briefed below.

International Food & Beverage Systems v. City of Fort Lauderdale, 794 F.2d 1520 (11th Cir. 1986) [ELR 9:4:15]

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**Michigan television reporter was required to provide grand jury with videotapes sought in connection with murder investigation, notwithstanding First Amendment and equal protection claims**

Bradley Stone, a television reporter, was found in contempt by the Wayne County Circuit Court as the result of his failure to comply with a subpoena duces tecum issued by a county grand jury; Stone had been directed to produce videotapes he compiled when he reported on the activities of Detroit youth gangs. The videotapes were sought in connection with an investigation into the murder of a state police officer, allegedly committed by

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two gang members who may have been present during a taping conducted by Stone in July 1985, one month before the murder.

After Stone exhausted his state court remedies, he filed for a writ of habeas corpus in a Federal District Court. The court found that Stone's First Amendment rights had not been violated and denied the writ.

A Federal Court of Appeals has agreed with the District Court that reporters do not possess a qualified testimonial privilege. Furthermore, even if the court agreed that such a privilege existed, Stone would be required to disclose the videotapes in this case because a clear and convincing showing was made that the reporter had information that was clearly relevant to a specific violation of criminal law, that the information was not available from alternative sources, and that the state had a compelling and overriding interest in obtaining the information.

Stone also had challenged, as a denial of equal protection of state law as guaranteed by the Fourteenth Amendment, the decisions of several state courts that he was not entitled to the benefit of a Michigan statutory privilege against revealing communications between news reporters and their sources. Federal Court of Appeals Judge Norris stated that the Michigan courts construed the language of the statute as not including Stone within its coverage, and declared that the "proper" construction of the statute was "settled."

Judge Norris further noted that the statute granting newspaper reporters a privilege against grand jury testimony, without mentioning broadcast media reporters, did not interfere with a fundamental right of the broadcast reporters, and that the classification set forth in the statute was rationally related to a legitimate government purpose.

The judgment of the District Court was affirmed, and the stay of the Michigan trial court's contempt order was dissolved by the Court of Appeals.

A concurring judge emphasized that even under a balancing test, the disclosure of Stone's videotapes was required in the circumstances before the court.

In re Grand Jury Proceedings (Storer Communications, Inc.), 810 F.2d 580 (6th Cir. 1987) [ELR 9:4:15]

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### **Briefly Noted:**

#### **Libel.**

An article in the October 3, 1983 edition of the Adirondack Daily Enterprise was highly critical of the purported conduct of a local high school's head football

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coach during and after one of the school's games. The article stated that coach Jeremiah Mahoney's behavior, including the alleged repeated and vulgar, scolding of the team quarterback, furnished a "dark glimpse of high school football coaching." In response to Mahoney's libel action, a New York appellate court has found that the accusations set forth in the article could readily have been understood as charging the coach with unethical or incompetent conduct in his professional occupation. Furthermore, there was sufficient evidence to support the jury's finding that the writer of the article acted with malice in publishing the piece. The court therefore upheld the jury's award to Mahoney of \$10,000 compensatory damages. However, a \$5,000 punitive damage award was reversed; although sufficient evidence of constitutional malice was presented, Mahoney did not establish common-law malice, i.e., that the newspaper published the article with a desire to harm him, or with a

reckless disregard for its injurious effects on his reputation.

Mahoney v. Adirondack Publishing Company, 509 N.Y.S.2d 193 (N.Y.App. 1986) [ELR 9:4:16]

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### **Copyright/Sculpture.**

The Community for Creative Non-Violence, a non-profit association working on behalf of the homeless, was the owner of the copyright in a sculpture entitled "Third World America," a Federal District Court has ruled.

In October 1985, the association orally agreed to hire artist James Earl Reid to construct a sculpture portraying a modern Nativity scene in which two adult figures and an infant would appear as contemporary homeless

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people huddled on a steam grate. The sculpture was displayed near the Ellipse in Washington, D.C. during the Christmas season. In early 1986, a dispute arose between Reid and the association concerning the ownership of the copyright in the sculpture.

The court declared that the copyright in "Third World America," a work made for hire, belonged to Mitch Snyder, as trustee for the use and benefit of the Community for Creative Non-Violence. It was noted that the association was "the motivating factor in the procreation of "Third World America"; engaged Reid to utilize his representational skills rather than his original artistic vision to execute the work; and paid the balance of Reid's \$15,000 fee when it appeared that the sculpture indeed conveyed its intended message. Reid did not bargain with the association for the copyright, and in view of the above factors and the absence of any writing to the

contrary, Reid's certificate of copyright registration for the work was ordered canceled.

Community for Creative Non-Violence v. Reid, 652 F.Supp. 1453 (D.D.C. 1987) [ELR 9:4:16]

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### **Attachment Order/"Porky's".**

Producer Arnold Kopelson's second application for an order to attach the assets of director Bob Clark was properly granted by a trial court, although there was no showing of facts materially different from those presented on a prior denied application, a California appellate court has ruled.

When Film Packages, Inc. (Kopelson) sued Brandywine Film Productions, Ltd. (Clark) in a dispute involving a percentage of profits from the film "Porky's," the

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trial court found that Film Packages failed to establish the probable validity of its claim against Brandywine. About seven months after the denial of its application, Film Packages renewed its motion and obtained a right to attach order. Apparently, although new facts may not have been shown, "new evidence of the meaning of those facts was produced." Depositions taken after the previous attachment hearings made available new information, stated California Court of Appeal Judge Cole; the information was of enough significance that it caused the trial court to credit Film Packages' witnesses, and find the company's claim "probably valid" for purposes of the attachment proceeding.

Film Packages Inc. v. Brandywine Film Productions, Ltd., Case No. B016962c/w No. B017636 (Ca.Ct.App., July 20, 1987) [ELR 9:4:16]

## **Contracts.**

The producer of a road show production of Tennessee Williams' play "The Night of the Iguana" was not entitled to seek damages for breach of contract against the Baltimore Center for Performing Arts in federal court on the basis of diversity jurisdiction because the amount allegedly withheld by the Center was exactly \$10,000. Federal District Court Judge Smalkin noted that the amount in controversy was not "in excess of" \$10,000, and that dismissal therefore was warranted for failure to satisfy the jurisdictional amount. The claimed expenses of collecting the money, absent a contractual provision to the contrary, would have to be treated the same as litigation expenses which are unrecoverable under Maryland law in ordinary breach of contract actions. Any interest claim also was not an integral part of the

producer's damages and thus could not be considered in calculating the amount in controversy.

Iguana Co. v. Baltimore Center for Performing Arts, 651 F.Supp. 1348 (D.Md. 1987) [ELR 9:4:17]

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### **Radio Station Promotion.**

A Texas appellate court has reversed a decision granting summary judgment to radio station KIKK in a breach of contract action filed by George Gunter. In September 1981, KIKK announced that its policy was to play at least three consecutive songs "commercial free", and that the station would pay \$25,000 to the first person who called to point out that a commercial had aired before three consecutive songs were played. In late September, Gunter heard the phrase "hi and welcome to

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"Mossy Oldsmobile" during the second song of a three-song set and called to claim his \$25,000. KIKK refused to pay Gunter, stating that the phrase did not constitute a commercial and was played by mistake.

The appellate court stated that although radio commercials usually contain more than the mere mention of a name, this did not mean that as a matter of law, a six-word phrase containing a business entity's name could not be considered a commercial. And "the fact that a commercial message was broadcast inadvertently or at an unscheduled time would not make it any less a commercial." It will remain for a jury to decide whether KIKK played three consecutive songs "commercial free."

Gunter v. KIKK Radio Station, 727 S.W.2d 650  
(Tex.App. 1987) [ELR 9:4:17]



## **Cable Television/Antitrust.**

City Communications, Inc. the disappointed bidder for an exclusive contract to install cable television in the city of Detroit was not entitled to proceed with its anti-trust claims against the city, a Federal District Court has ruled. The state action exemption immunized the city from antitrust liability, because the city acted "pursuant to a clearly expressed state policy that had as a foreseeable effect some limitation on competition." However, the successful franchisee was not so immunized from antitrust liability. Furthermore, certain issues of material fact were raised which precluded summary judgment in favor of the franchisee based on the Local Government Antitrust Act of 1984. The court concluded by rejecting City's claim for denial of procedural due process since the company had no protected property interest in the operation of the cable bidding process.

City Communications, Inc. v. City of Detroit, 650 F.Supp. 1570 (E.D.Mich. 1987) [ELR 9:4:17]

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### **New York Civil Rights Law.**

A newspaper's unauthorized use of a file photograph in an article on child pornography, although a use for trade purposes within the meaning of sections 50/51 of New York's Civil Rights Law, was not shown to have been published with the requisite fault, a New York appellate court has ruled.

Enlightenment Press, doing business as the Chelsea Clinton News, published Ketty Fils-Aime's photograph in a 1981 article; the picture, which was taken in 19172 to illustrate a report on the new school year, appeared in the 1981 article with the words "rated x" imprinted on Fils-Aime's face.

A New York trial court ordered a trial on Fils-Aime's libel claim, but granted summary judgment on her behalf on the Civil Rights Law privacy claim (ELR 8:5:12). The appellate court has ordered the privacy cause of action to proceed to trial, stating that the standard of "gross irresponsibility" set forth in *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, should apply in private party privacy actions as well as in private party defamation actions involving newsworthy communications. In this case, factual questions existed as to whether the Chelsea Clinton News, in publishing the challenged photograph, acted with gross irresponsibility, i.e., "without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties."

*Fils-Aime v. Enlightenment Press, Inc.*, 507 N.Y.S.2d 947 (N.Y. App. 1986) [ELR 9:4:17]

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## **Trademark Infringement/Attorney Fees.**

A Federal Court of Appeals has reversed a District Court decision granting about \$35,000 in attorney fees to WSM, Inc. in an action involving the service mark "The Nashville Network." WSM, a part of Opry Land, Inc., claimed that it owned the mark. Wheeler registered the trademark "Nashville Network, Inc." with the Tennessee Secretary of State in 1981, but never provided services under the mark.

A Federal District Court granted summary judgment to WSM on the company's trademark infringement and unfair competition claims, and awarded attorney fees under the Lanham Act, finding that Wheeler unnecessarily prolonged the litigation.

Federal Court of Appeals Judge Engel, in concluding that it was an abuse of discretion to allow attorney fees, pointed out that WSM's ownership of the mark remained in question for some time, and that the record as a whole did not indicate that the litigation was "uncommon or exceptional."

WSM, Inc. v. Wheeler Media Services, Inc., 810 F.2d 113 (6th Cir. 1987) [ELR 9:4:17]

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### **Trademark/Corporate Name.**

A Federal Court of Appeals has affirmed a District Court decision dismissing a claim for common law unfair competition and for violation of section 43(a) of the Lanham act brought by American Television and Communications Corporation against American

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Communications and Television, Inc. The court pointed out the neither company conducted its business with the service buying public under its corporate name - both companies negotiated franchises, licenses or contracts with various government bodies, condominium associations, etc. under the names of subsidiaries, affiliated companies, or franchises. Senior Court of Appeals Judge Fairchild stated that the District Court correctly found that American Television failed to prove that its corporate name had acquired a secondary meaning.

American Television and Communications Corporation v. American Communications and Television, Inc., 810 F.2d 1546 (11th Cir. 1987) [ELR 9:4:18]

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**Unicorn Toy.**

William Shaland Corporation has been denied summary judgment in an action brought by Nadel & Sons Toy Corp. alleging that Shaland infringed a copyrighted "fanciful inflatable unicorn animal." A Federal District Court in New York found that genuine issues of material fact were raised concerning Nadel's claim that the unicorn toy was a work made for hire. The evidence suggested that final decisions relating to the design of the unicorn were within the company's control and that the company may have exercised this control by requiring its supplier's artist to change certain elements of the design. In all, the level of Nadel's involvement in the creation of the unicorn was an issue best resolved at trial, stated the court.

Nadel & Sons Toy Corp. v. William Shaland Corporation, 657 F.Supp. 133 (S.D.N.Y.1987) [ELR 9:4:18]

## **Copyright Infringement.**

A jury verdict finding Lee William Sachs guilty of aiding and abetting in the infringement of copyrights in motion pictures and guilty of conspiring to infringe copyrights in motion pictures has been affirmed by a Federal Court of Appeals. The court found that the government had met its burden under the first sale doctrine of proving that the copies of the motion pictures sold by Sachs were unauthorized copies; that the evidence established that Sachs was operating a business known as "Video Graphics, Inc.," that Sachs had in his possession master tapes, blank tapes and electronic machinery used to duplicate videotapes; and that Sachs told an undercover agent that he was going to "duplicate" the films which the agent eventually purchased. Videotapes of the films, including "Shampoo," "Blazing Saddles," and "Smokey and the Bandits," either were not being sold at



the time of the crimes charged, or were sold in a different form than the copies which were sold by Sachs.

United States v. Sachs, 801 F.2d 839 (6th Cir. 1986)  
[ELR 9:4:18]

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### **Copyright Infringement.**

A Federal District Court in New Hampshire has found the Mai Kai Restaurant in Concord and the owner of the restaurant liable for copyright infringement. Neither ASCAP nor the owners of the copyrights in musical compositions including "Ghostbusters", "Born in the USA," and "Like a Virgin" granted permission to Mai Kai to perform their works. The court granted summary judgment to the copyright owners, as well as injunctive relief, statutory damages of \$550 and attorneys fees.

Sailor Music v. Mai Kai of Concord, Inc., 640 F.Supp. 629 (D.N.H. 1986) [ELR 9:4:18]

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### **Copyright Infringement.**

A Federal District Court in Florida has held that a record store proprietor's reckless disregard of the rights of copyright holders warranted an assessment of statutory damages for willful infringement. Casino Record Distributors of Florida, Inc. was found liable to CBS Inc. and RCA/Ariola International for buying and selling parallel imports, records of foreign manufacture distributed in the United States in violation of exclusive copyright distribution rights. However, because Casino failed to keep records of the specific records it bought and sold, the store's profits from the sale of the infringing imports could not be calculated as a measure of damages.

Relying on Section 504(c) of the Copyright Act to determine the amount of damages, the court concluded that because Casino continued to infringe the copyrights even after receiving a cease and desist letter, and in light of the serious problems parallel imports create for record companies, each copyright owner was entitled to \$3000 for each infringement of its copyright. The court awarded \$6000 to both CBS and RCA/Ariola and reserved jurisdiction to consider attorneys' fees and costs.

CBS, Inc. v. Casino Record Distributors Of Florida, Inc., 654 F.Supp. 677 (S.D.Fla. 1987) [ELR 9:4:18]

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### **RICO/Film Sales Agent.**

In May 1976, a company affiliated with Penthouse International hired Don Getz to act as the exclusive sales

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agent for the film "Caligula" in all countries except the United States, Canada, and Italy. Getz was to receive ten percent of all remittances as a commission; the contract also provided that if Getz did not obtain sales of \$1 million prior to November 17, 1976, Penthouse had the right to cancel the contract for all territories that remained unsold.

In July 1984, Getz sued Penthouse, claiming that the organization wrongfully terminated the contract in April 1979 even though he had secured sales in excess of \$1 million. Getz sought damages under the Racketeer Influenced and Corrupt Organizations Act, alleging a pattern of racketeering activity, consisting of at least two acts of mail fraud and wire fraud.

In granting summary judgment to the Penthouse parties, a Federal District Court judge in New York noted that the most recent alleged act of racketeering was the purported termination of the agency contract in 1979.

The court determined that New York's three year statute of limitations governing actions to enforce a liability created by statute was the most appropriate limitations period to apply to Getz' civil RICO claim; rejected Getz' argument that he was defrauded by Penthouse's use of various corporate entities to conceal the true party to the contract, and that such alleged fraudulent acts continued after the termination of the contract; and held that Penthouse was entitled to summary judgment since the civil RICO claim was barred by the applicable three-year limitations period.

Getz v. Penthouse International, Ltd., 655 F.Supp. 1203 (S.D.N.Y. 1997) [ELR 9:4:18]

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IN THE NEWS

**Directors Guild of America and Alliance of Motion Picture and Television Producers agree on new contract**

The Directors Guild of America has agreed to a new three-year film and television contract with the Alliance of Motion Picture and Television Producers. The terms of the contract were agreed upon shortly after the Guild began the first strike in its 51-year history.

The contract includes a new formula for calculating residual payments for reruns in syndication of one-hour prime time television series. Under the formula, a director's residual fee, rather than a fixed dollar amount, will be based on percentages of a program's syndication licensing fee.

Other significant points included the withdrawal by the Alliance of its proposal for a rollback of residuals from theatrical films shown on a pay-per-view basis to home viewers; a five percent increase in basic minimum wages for directors, retroactive to July 1, 1987 and an additional five percent increase in 18 months; a reduction in the number of credits that must appear in print advertising; and an agreement by producers giving directors the right to "consult" in the event their black and white films are to be colorized.

An agreement also was reached between the Guild and NBC on a separate network staff contract. The Guild stated that NBC had agreed to withdraw its broad "Take-back" editing proposal; however, the Guild will lose jurisdiction with respect to remote, single-camera directing for certain segments. The network will be entitled to "set aside" twenty percent of its less senior Guild personnel and protect them, in the event of layoffs, by

laying off other more senior Guild members. But NBC agreed to pay substantially more severance pay for individuals laid off out of seniority, and to make additional payments to individuals laid off as a result of jurisdictional changes. [Sept. 1987] [ELR 9:4:19]

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### **Dismissal of Michael Caine's action against French producers of "The Name of the Rose" is upheld**

The California Supreme Court has affirmed a trial court decision dismissing, on the basis of a lack of jurisdiction, actor Michael Caine's action against Films Ariane. Caine had alleged that the French company had offered him a leading role in the film "The Name of the Rose," and agreed to pay the actor \$1.5 million and ten percent of the gross, if Caine agreed to lose 20 pounds



before filming began. The role at issue eventually was played by Sean Connery. [Sept. 1987] [ELR 9:4:19]

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**Israel Horowitz obtains writer's credit on the rim "A Man in Love" pursuant to Writers Guild arbitration proceeding**

The Writers Guild of America East has determined that Israel Horowitz was entitled to screenwriting credit for the film "A Man in Love." The sole writing credit given to the film's director and coproducer Diane Kurys, must be changed on the prints of the film and in advertising to "Written by Diane Kurys and Israel Horowitz." Apparently, Kurys' argument that, as a French film, "A Man in Love," was not subject to the jurisdiction of the Guild, was rejected. The project originated with Warner Bros. and Irwin Winkler. And although the film subsequently

was made with French financing, Kury's company had assumed Warner Bros.' obligations, including, according to the Guild, the obligation to arbitrate disputes concerning material written during the period when the project was at Warners. [Sept. 1987] [ELR 9:4:19]

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### **Seattle judge issues temporary restraining order barring University of Washington from conducting drug tests of student athletes**

A trial court judge in Seattle has issued a temporary restraining order preventing the University of Washington from conducting drug tests of student athletes. The court found that the drug test program, under which all athletes would undergo annual testing, was an unconstitutional violation of the student athletes' right to privacy. And although the National Collegiate Athletic

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Association was not party to the action, the court ordered the association not to act against the University of Washington for not participating in the association's drug testing program. [Sept. 1987] [ELR 9:4:19]

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## DEPARTMENTS

### **In the Law Reviews:**

Loyola of Los Angeles Entertainment Law Journal has published Volume 7, Number 2 with the following articles:

Radio-active Fallout and an Uneasy Truce - The Aftermath of the Porn Rock Wars by Jonathan Michael Roldan, 7 Loyola Entertainment Law Journal 217 (1997)

Copyright Versus the First Amendment: Forecasting an End to the Storm by James L. Swanson, 7 Loyola Entertainment Law Journal 263 (1987)

Musical Parody: Derivative Use or fair Use? by Kenneth J. Nunnenkamp, 7 Loyola Entertainment Law Journal 299 (1987)

An Analysis of athlete Agent Certification and Regulation: New Incentives with Old Problems by Bart Ivan Ring, 7 Loyola Entertainment Law Journal 321 (1987)

Constitutional Law - Is the NCAA Eligible for a New Interpretation of State Action? Arlosoroff v. National Collegiate Athletic Association, 7 Loyola Entertainment Law Journal 337 (1987)

Constitutional Law: Gag Me With a Prior Restraint: A Chilling Effect That Sends Shivers Down the Spines of Attorneys and the Media, Radio and Television News Association v. United States District Court, 7 Loyola Entertainment Law Journal 353 (1987)

Constitutional Law: Cubs Lose on Justice Ward's Error, Chicago National League Ballclub v. Thompson, 7 Loyola Entertainment Law Journal 371 (1987)

Constitutional Law: The League of Women Voters Caught in the Quagmire of a State Action, WPIX, Inc. v League of Women Voters, 7 Loyola Entertainment Law Journal 385 (1987)

Constitutional Law: Utah's Cable Decency Act: An Indecent Act? Community Television v. Wilkinson, 7 Loyola Entertainment Law Journal 401 (1997)

Criminal Copyright Infringement: Music Pirates Don't Sing the "Jailhouse Rock" Ken They Steal From King, Dowling v. United States, 7 Loyola Entertainment Law Journal 417 (1987)

Copyright Infringement: All Is Fair As Falwell Hustles Flynt, Hustler Magazine, Inc. v. Moral Majority, Inc., 7 Loyola Entertainment Law Journal 439 (1987)

Copyright Infringement: When Is A Swimsuit Not A Swimsuit? Poe v. Missing Persons, 7 Loyola Entertainment Law Journal 453 (1987)

Tort Law: McEnroe Tries a Different Court: No Injury From a Big Mac Attack, Schneider v. McEnroe and USAA Casualty Insurance Co. v. Schneider, 7 Loyola Entertainment Law Journal 465 (1997)

International Copyright: Protecting Canadian and United States Works by Joseph Taubman, 3 Intellectual Property Journal 201 (1987)

Radio Licenses and Frequency Spectrum Use Property Rights by Douglas W. Webbink, 9 Communications and the Use 3 (1987) (published by Meckler Corporation, 11 Ferry Lane West, Westport, CT 06880)

The FCC in Matters of Church and State by Ronald Garray, 9 Communications and the Law 43 (1997) (for address, see above)  
[ELR 9:4:21]