

LEGAL AFFAIRS

**Copyright Inroads on the Public Domain
in the Ninth Circuit**

by Anthony Liebig

"Patents and Copyrights approach nearer, than any other class of cases belonging to forensic discussions, to what may be called the metaphysics of the law, where the distinctions are, or at least may be, very subtle and refined, and, sometimes, almost evanescent..." n1

"The Copyright Law, like the patent statutes, makes reward to the owner a secondary consideration." n2

"We cannot recognize copyright as a game of chess in which the public can be checkmated." n3

American Copyright Law is based on a statute based on a Constitutional provision. Under the Constitution (Art. I, Sec. 8, Cl. 8) copyright and patent are drastically limited exceptions to the public domain, and there are no others. To obtain these limited monopolies the creator must dedicate his entire creation to the public domain after expiration of the copyright or patent.

The United States Copyright Act n4 entitles the proprietor of an original work who has perfected his copyright to enjoin and recover damages for infringement (that is, an unauthorized reproduction or performance of his work) and it thereby creates a species of property.

The hardest, most "metaphysical" question in copyright law is how to determine whether a work which is not identical or closely similar to the copyrighted work is an

"infringing copy" You will not find the answer, or even a respectable formula, in the Copyright Act or in any U.S. Supreme Court decision handed down in the Twentieth Century! It is a question which frequently pits creators, each with a large investment in his work, against each other. It is often a question of vast economic consequences.

In Ninth Circuit copyright infringement cases the concept of a copyright as a definable protected property which has either been "taken" or not "taken" has lately given way to what we may as well call "the tort of copying." This evolution has differed from the typical common law development in that definition has become less, rather than more, precise. Meanwhile the factual question of infringement has more and more frequently been going to juries. n5 The result is that copyright infringement cases go to juries in the Ninth Circuit like negligence cases rather than trespass cases. If a Court were

to try a property boundary dispute the same way, the loser would have good reason to claim he had been deprived of property without due process of law.

The operation of the Copyright Law has thus become unpredictable in a locale which has become the entertainment capital and media center of the United States. The author's favorite example of this lack of predictability is *Goodson-Todman Enterprises, Inc. v. Kellogg Company*⁶ where four judges considered whether a 30 second TV commercial infringed a 30 minute TV program: one judge thought it did as a matter of law, one thought it did not as a matter of law, and the other two opined it was a jury question.

This is not the way copyright was intended to operate. It is not the way it should operate under our Constitution.

What happened?

Public Domain

The over-arching national policy has been to preserve and enlarge the public domain, public commons, *n7* or *publici juris*, the cumulation of mankind's knowledge, experience, ideas, literature, music, in short everything ideational. Ideas have always been recognized to be "free as the air." *n8* The most succinct rationale for the rule was Lord Mansfield's in the 1785 case of *Sayre v. Moore*:

"The rule of decision in this case is a matter of great consequence to the country. In deciding it we must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community may not be deprived of their just merits, and the reward of the ingenuity and labour; the other, that the world may not be

deprived of improvements, nor the progress of the arts be retarded." n9

This policy has been adopted and consistently enforced by our Supreme Court in many cases, n10 and the principle has been incorporated in the Copyright Act in the requirement that only "original works of authorship" may be protected and the specific statement that:

"In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." n11

In this context, "fair use," which has been discussed so much recently, n12 is perhaps best understood as the consequence of a partial dedication of the author's "expression" at the time of "publication." n13

That there is a public domain has been so universally accepted and understood that it is taken for granted and largely ignored. n14

The public domain has never been inventoried or mapped. In this age of entertainment when the monopoly of exclusivity is the goal, copyright proprietors and attorneys look upon it only as a graveyard or a place to stake a novel claim.

The public domain should be acclaimed and protected as an asset of the citizenry more precious than the mountains, streams, scenic wonders and redwoods that exist in the physical domain, for what writer, composer, artist, scientist, researcher, or scholar or any sort does not learn and derive inspiration and technique from those who have gone before? Like Newton, we should all acknowledge we stand on the shoulders of giants.

Copyright Inroads

What has happened is that no one has been defending the public domain against depreciations and specious claims. As a result the scope of copyright, and non-copyright n15 ideational protection, has expanded into a vacuum. Without adversary balance copyright has become all sail and no anchor.

In copyright infringement cases there is now very little judicial inquiry into what the plaintiff "owns" in his work, i.e., what is really original and what is already in the public domain. The dispute is centered on "similarities" and "smoking guns" and big numbers. And each time technology presents a new means to record, reproduce, or entertain there is a rush into the undefended public domain reminiscent of the Oklahoma land rush, except instead of sodbusters driving covered wagons we see men in three piece suits driving Mercedes. n16

It was not always thus. In the nineteenth and early twentieth centuries judicial precedents applying and

construing copyright law were few and far between. During the 1930s and 1940s the law was shaped by a handful of thoughtful, unhurried judges in the Second Circuit who wrestled with what Justice Story had called metaphysics n17 and understood the primacy of the public domain. While their opinions were not always consistent, they were usually cogent. They were always premised on the principle that the boundaries of a copyright plaintiff's "property" must ultimately be defined by a judge, and always sought to more clearly define and articulate that boundary. n18

The Ninth Circuit

With the passing of the great thinkers of the Second Circuit and the westward tilt of the industries which give rise to copyright actions, the development of decisional copyright law has fallen more into the hands of the 38

active and senior judges of the Ninth Circuit Court of Appeals and the several dozen District Court judges who regularly sit with them. Spread over nine western states (and Guam and the North Mariana Islands) and with little copyright experience either on or off the bench, their decisions have shown little consistency and have encouraged trial judges to "give it all to the jury."

The 1977 decision of *Sid and Marly Krofft Television Productions, Inc. v. McDonald's Corp.*, n19 is easily the most foolish of the Ninth Circuit's copyright decisions. In it the Court promulgated new rules which greatly expanded copyright protection and by the same token diminished the public domain. The "total concept and feel" of an audio-visual work was for the first time held protected, and the previously discredited "inverse ratio rule" was utilized. n20 In addition, the Court apparently adopted a "children's viewers test" n21 which means that the boundaries of a plaintiffs property and the

defendant's stake in the public domain could forever vary with the audience. n22 Worst of all, Krofft promulgated a rule whereby no one in the Ninth Circuit can determine whether one work is too close to another until after a jury has conducted the "intrinsic test." n23

Krofft may have been an "opinion waiting for a case" because the announced rules did not fit well with the facts. Two pictures are worth many words. The absurdity of the Krofft "standards" can be demonstrated by a side by side comparison of plaintiffs' H. R. Pufnstuf and defendants' Mayor McCheese. According to the plaintiffs, Mayor McCheese was defendants' closest copy of one of their show's "copyrightable component parts." n24 According to the Court's opinion, these characters are "intrinsically" similar and "we do not believe that the ordinary reasonable person ... will even notice" the difference. n25

Worst of all, the Krofft "extrinsic/intrinsic" tests can't and don't work. Krofft speaks of "specific criteria which can be tested and analyzed." n26 But these are merely semantic traps. To demonstrate: if one categorizes Pufnstuf and Mayor McCheese as fantasy characters with disproportionately large heads, they are ideationally identical and therefore "extrinsically" similar. On the other hand, if Pufnstuf is seen as a dragon and McCheese as an animated cheeseburger, they are ideationally dissimilar and "extrinsically" different. n27 In practice the extrinsic test turns into a labeling contest.

As to the "intrinsic test" if we take Krofft seriously, we might just as well ask our jurors whether a defendant has "captured the total concept and feel" or "mood" n28 of the plaintiffs work. n29

The Aftermath of Krofft

Ten years of experience under Krofft has borne out these criticisms, particularly in the music area where the Ninth Circuit has recently ruled in *Thompson v. Lionel Richie* n30 that pitch, harmony, and tempo are ideas, and has stated in another case while reversing a trial court holding of no similarity as a matter of law, that:

"We do not suggest that our ears are any more sophisticated than those of the district court. Nevertheless, based on our review of the record, we are persuaded that reasonable minds could differ as to whether *Joy and Theme from E.T* are substantially similar. As in *Twentieth Century-Fox*, we do not suggest that the works are, in fact, substantially similar. We only state that reasonable minds could differ as to the issue and thus that summary judgment was improper. See *Twentieth Century-Fox*, 715 F.2d at 1329.

"Even were we to accept arguendo defendants' argument over Baxter's response that it is not a six-note

sequence but the entire work whose similarity is at issue, this argument ignores the fundamental notion that no bright line rule exists as to what quantum of similarity is permitted before crossing into the realm of substantial similarity... n31

Pity the poor copyright lawyer who is asked whether a new piece of music is too close to a copyrighted work or is merely a reprise of public domain material. He can only consult available "concept and feels" and issue the most cautious opinion. Which, as a practical matter, enlarges the scope of the copyrighted work's exclusivity.

There is no end in sight to these inconsistencies. Within the past two years the Ninth Circuit has blown both ways. In *Cooling Systems and Flexibles, Inc. v. Stuart Radiator, Inc.*, n31a the Court stated:

"What is important is not whether there is substantial similarity in the total concept and feel of the works ... but whether the very small amount of protectible

expression in Cooling Systems' catalog is substantially similar to the equivalent portions of Stuart's catalog..."

Yet in *McCulloch v. Albert E. Price, Inc.*, n32 it stated:

"Under our two-part test for copyright infringement, it is not necessary to determine the scope of copyright protection or to identify the idea behind the ORP plate as suggested by Price, Inc. Price, Inc. has not cited any authority which supplements this court's two-part test for copyright infringement with these additional elements, and our research has disclosed none. The district court did not err in failing to identify the idea behind the ORP plate or to determine the scope of copyright protection accorded the ORP plate...."

"Price, Inc. claims that the district court erred in considering the uncopyrightable phrase, 'You Are Special Today,' in evaluating substantial similarity. Relying on this court's decision in *Cooling Systems*, Price, Inc. argues that after discounting the uncopyrightable phrase,

the ORP plate and the Price, Inc. plate 'are not similar, much less substantially similar. . .' ORP responds that under *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 (9th Cir. 1970), a proper analysis of this issue requires that all of the elements of the work, including the uncopyrightable text, be considered as a whole in determining copyright infringement. We agree."

So where do we go from here?

Defending the Public Domain

In the best of all worlds a copyright litigation might be tri-partite, the third party being the public domain whose representative would fend off the specious claims of both plaintiff and defendant. While the defendant in an infringement case may - and frequently does - contend the allegedly taken similar item is in the public domain, he is usually not well situated to make the assertion

effectively. He is too busy trying to convince the jury that he did not copy and senses that the public domain argument be perceived by it as inconsistent and hurt his credibility on the copying issue.

The late Justice Douglas was incisive when he wrote it was a pity the objects and fauna of our physical public domain had no ability or standing in court to speak for themselves:

"The critical question of 'standing' would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage. Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation. See Stone, Should

Trees Have Standing? - Toward Legal Rights for Natural Objects, 45 S.Cal.L.Rev. 450 (1972). This suit would therefore be more properly labeled as *Mineral King v. Morton*.

"Inanimate objects are sometimes parties in litigation. A ship has a legal personality, a fiction found useful for maritime purposes. The corporation sole-a creature of ecclesiastical law-is an acceptable adversary and large for tunes ride on its cases. The ordinary corporation is a 'person' for purposes of whether it represents proprietary, spiritual, aesthetic, or charitable causes." n33

It is equally unfortunate that standing is denied to the cumulation of our culture in our non-physical public domain and the writers, composers and artists and future generations of writers, composers and artists who must draw from it. n34

Eventually there may be a case which will compel the Supreme Court to more clearly define the boundary

between expanding claims under copyright and the public domain values protected by the limitation of Article I, Section 8 and the First Amendment. But it makes no sense to await definition, as the Court has consistently turned down cases which present the problem. Interestingly, in 1985 the Court did note that "Especially in the realm of factual narrative, the law is currently unsettled regarding the ways in which uncopyrightable elements combine with the author's original contributions to form protected expression." n35

It would make even less sense to wait for legislative clarification, because the Congress has tended to follow the courts in these matters. n36

And it is probably too late to crusade for a copyright experienced Court of Appeals similar to the recently constituted Court of Appeals for the Federal Circuit which appears to be bringing consistency and predictability in the patent area. n37 The patent bar fought long

and hard for a patent experienced forum. Unfortunately, the copyright bar never mounted a similar crusade. The fallout from patent inexperienced judges was more noticeable to more people, for the volume of patent litigation was much greater than entertainment/media litigation, and the problem of the patent bar was nationwide while the bulk of entertainment/media litigation arose in two places, Southern California and New York City. But the fallout from entertainment/media inexperienced judges can be even more unsettling because the absence of statutory guidelines permits a broader range of mis-decision, the volume of litigation is smaller, a bad opinion is less likely to be ignored, and, as noted above, the affected industries are extrasensitive to decisional nuance.

Reform in the Ninth Circuit

By default, if for no other reason, today's answer lies in making the Ninth Circuit conscious of the very real problem which exists.

Better yet, the Circuit should be encouraged to form one or more panels of judges with elevated understanding of copyright law and issues to handle appeals in copyright cases.

The solution could be in something as simple as a one sentence Rule of Court.

This would result in a degree of judicial specialization. But lawyers have specialized; why shouldn't the judiciary? While copyright law is not an arcane body of law, an operable understanding of that law requires an unusual amount of study and deep thought. Copyright law is outside the experience of all but a few judges and it does not lend itself to instant expertise. Understanding only comes after a bit of steeping. Judges should not attempt to qualify themselves to write a precedential

opinion by spending an evening with "Nimmer on Copyright," a couple of Learned Hand decisions, and whatever law review commentary happens to have been cited. This is a fragile and subtle body of law and the volume of litigation is such that one or two ill advised opinions can bend it out of shape. n38

The answer lies also in raising the Court's, and/or our hypothetical panel's, consciousness of the existence and inviolability of the public domain and the destructive inadequacy of the current "concept and feel ... mood ... no bright line" thinking.

The key lies in re-recognition that copyright cases concern infringement, taking, not the "tort of copying."

Rethinking Originality

The next step may be to rethink the concept of "originality " The Copyright Act protects only an "author's"

"original" work, as distinguished from patent law which protects that which is novel. Presently copyright "originality" may be found in "almost any independent effort" and "distinguishable variation"; as a practical matter, it is usually presumed and the defendant has the burden of disproving it. n39 The formulae of Krofft actually makes originality irrelevant and immaterial.

While a copyright entitles its owner to important economic rights and privileges-including the right to formula damages which may greatly exceed the injury n40 and the ability to put a competitor out of business - it can be obtained by simply filling out a form and sending it with a small fee to the Copyright Office. n41 The validity and scope of the copyright are generally determined only in infringement litigation. This relaxed standard of originality makes it very easy to gain the privileges of copyright and, by the same token, makes it too easy for persons who have created little or nothing

to preempt portions of the public domain and require others to pay tribute. n42

It should be apparent to all that the public domain and important industries are threatened by a case law which holds that any banality which has been registered in the Copyright Office is presumed to be original and protected, and the "author" of any banality may have his "day" n43 in court perorating about "total concept and feels. . ." and "moods." n44 The Second Circuit Court of Appeals noted in 1976 that the current test of originality "leave[s] a lot to be desired" in that "the originality requirement does not perform the function of excluding commonplace matters in the public domain from copyright status very effectively," n45 but it then ducked the issue. Justice Brennan recently noted that "The 'originality' requirement of Sec. 102 of the Copyright Act is crucial to the maintenance of the appropriate balance between" authors' rights and "society's competing

interest in the free flow of ideas, information, and commerce," but he suggested nothing definitional. n46 Justice Douglas did favor facing the issue in *Runge v. Lee* when he dissented from the denial of certiorari:

"Petitioner argued that because the congressional power over copyrights and patents stemmed from the same constitutional provision, they both should be governed by the same standard. Thus, petitioner contended that the copyright was invalid because the book in question lacked 'novelty; but the Court of Appeals rejected this argument saying that the appropriate standard for a copyright was 'originality' and that the respondent's book met this criteria. The standard of copyrightability presents an important question concerning the scope of Congress' enumerated powers. It has not heretofore been decided by this Court and, arguably, it was wrongly decided by the Courts below....

"The respondent's rights are limited to that which is necessary to 'promote the Progress of Science and useful Arts' This requires a level of 'novelty' which respondent arguably has not satisfied." n47

The public domain and the entertainment/media industries can be adequately protected by consistent, thoughtful application of standards less rigorous than the patent law's novelty standard or a "recognized quality" standard. n48

Our enlightened Court could simply re-recognize that "while ... the task facing a court in determining the specific extent of plaintiffs property right in any particular work is not easy, it is more difficult in the definition than in the application" n49 and encourage trial judges to screen out unoriginal matters at the motion stage. Or it could require a showing by plaintiffs that the components of their work which are claimed to be infringed are more than marginally different from prior works. In

doing so it would dump Krofft and find ample rationale in the many First Amendment cases which have erected burden-of-proof standards, operable at the motion stage, to protect the freedom of speech, which is clearly a public domain value. n50

Conclusion

Originality is but one of several concepts which might be consistently rethought by our hypothetical panel of copyright-wise Ninth Circuit jurists as they ponder the "metaphysics" of copyright law. What is needed is coherent, consistent thought over time. Staking out and perfecting our public domain and rescuing copyright law from its present state is clearly an urgent task which requires "sensitive tools." n51

NOTES

1. Justice Story in *Folsom v. Marsh*, 9 Fed.Cas. 4901 (Cir.Ct.D. Mass. (1841)).
2. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158, 92 L.Ed. 1260, 1292-93, 69 S.Ct. 915 (1948).
3. *Morrissey v. Proctor & Gamble Co.*, 379 F.2d 675 (1st Cir. 1967).
4. 17 U.S.C. Sec. 101 et seq.
5. In his 1954 article "The Function of the Judge and Jury in the 'Literary Property' Suit," 42 Cal.Law Rev. 52, William B. Carman noted that "until recently ... the great majority" of infringement cases were court tried, but "recently" jury trials were being demanded "in almost every case."

6. 513 F.2d 913 (9th Cir. 1975), reversing 358 F.Supp. 1245 (C.D. Cal. 1973).

7. Carman, *supra* note 5.

8. *Desny v. Wilder*, 46 Cal.2d 715, 731 (1956). See Krasilovsky, "Observations on Public Domain," 14 Bulletin of the Copyright Society of the U.S.A. 205 (1967).

9. 1 East 361 n., 102 Eng. Rep. 139 n. (K.B. 1785). Lord Mansfield's full statement was: "The rule of decision in this case is a matter of great consequence to the country. In deciding it we must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community may not be deprived of their just merits, and the reward of their ingenuity and labour;

the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded. The act that secures copyright to authors guards against the piracy of the words and sentiments; but it does not prohibit writing on the same subject. As in the case of histories and dictionaries: In the first, a man may give a relation of the same facts, and, in the same order of time; in the latter an interpretation is given of the identical same words. In all these cases the question of fact to come before a jury is, Whether the alteration be colourable or not? there must be such a similitude as to make it probable and reasonable to suppose that one is a transcript of the other, and nothing more than a transcript. So in the case of prints, no doubt different men may take engravings from the same picture. The same principle holds with regard to charts; whoever has it in his intention to publish a chart may take advantage of all prior publications. There is no monopoly of the subject here,

any more than in the other instances; but upon any question of this nature the jury will decide whether it be a servile imitation or not. If an erroneous chart be made, God forbid it should not be corrected even in a small degree, if it thereby become more serviceable and useful for the purposes to which it is applied. But here you are told, that there are various and very material alterations. This chart of the plaintiffs' is upon a wrong principle, inapplicable to navigation. The defendant therefore has been correcting errors, and not servilely copying. If you think so, you will find for the defendant; if you think it is a servile imitation, and pirated from the other, you will find for plaintiffs."

10. E.g., *Twentieth Century Music Corp v. Aiken*, 422 U.S. 151, 156, 45 L.Ed.2d 84, 95 S.Ct. 2040 (1975); *Lear, Inc. v. Adkins*, 395 U.S. 653 23 L. Ed. 2d 610, 89 S.Ct. 1902 (1969); *Sears, Roebuck & Co. v. Stiffel Co.*,

376 U.S. 225, 11 L.Ed.2d 661, 84 S.Ct. 784 (1964); *Compco Corp v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 11 L.Ed.2d 669,84 S.Ct. 779 (1964); *Scott Paper Co. v. Marcalus Mfg. Co.*, 326 U.S. 249, 90 L.Ed. 47, 66 S.Ct. 101 (1945); *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111, 83 L. Ed. 111, 59 S.Ct. 109 (1938); *International News Service v. Associated Press*, 248 U.S. 215,63 L.Ed. 211, 39 S.Ct. 68 (1918); *Singer Mfg. Co. v. June Mfg. Co.*, 163 U.S. 169, 41 L.Ed. 118, 16 S.Ct. 1002 (1896).

11. 17 USC Sec. 102.

12. *Harper & Row v. Nation Enterprises*, 471 U.S. 539,85 L.Ed.2d 588,105 S.Ct. 2218 (1985); *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 78 L. Ed. 2d 574, 104 S.Ct. 774 (1984).

13. "Does this doctrine ['fair use'] - a floating one,... - bring into our inquiry anything new or special? We are told that the earliest American report in which the expression appeared - within quotation marks - was that of *Lawrence v. Dana* [15 Fed.Cas. 26, 60 (No. 8136) (C.C.D. Mass. 1869)]. On early usages of fair use or cognate expressions, see Cohen, 'Fair Use in the Law of Copyright' in 6 ASCAP COPYRIGHT LAW SYMPOSIUM 43, 48-49 (1955)] in 1869, where the defendant's edition of Wharton's 'Elements of International Law' was accused as a plagiarism of the plaintiffs earlier edition of the same work. Justice Clifford's opinion, sustaining the charge, followed Story on the factors to be considered in adjudging liability for the research uses of one scholarly book by another' [Justice Clifford relied particularly on *Folsom v. Marsh*, 9 Fed. Cas. 343, 348 (No. 4901) (C.C. D. Mass. 1841)], fair use emerged as the sort of taking which on such consideration would be held

noninfringing. Justice Clifford was not being consciously innovative. Judge Hand in the Nichols and Sheldon cases seemed also to speak of fair use as merely the contrary of infringement. [Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930), cert. denied, 282 U.S. 902 (1931); Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir.), cert. denied, 298 U.S. 669 (1936)]. But other authorities have taken fair use to refer to a set of justifications averting liability for what on the face of things is infringement. [Nimmer, Copyright Sec.145, at 654 (1965). See generally Cohen, *supra* note 89, at 45-48.] This tends to leave the impression that infringement itself is decided without contamination by notions of policy, with fair use coming in later to supply those notions. But policy runs throughout our subject, as much of the discourse to this point shows. B. Kaplan, AN UNHURRIED VIEW OF COPYRIGHT 67 (1967).

14. While you will not find it listed in the index to NIMMER ON COPYRIGHT, there is one recent wide ranging, informative and perceptive article on the subject: "Recognizing the Public Domain" by Professor of Law David Lang of Duke University in 44 Law & Contemporary Problems 149 (1982). See also Krasilovsky, *op.cit.* Note 8, *supra*.

15. "Trade dress," publicity, and dilution cases are coming close to recognizing intellectual property rights which are unlimited as to duration. As to this see discussion in Professor Lang's "Recognizing the Public Domain" 44 Law & Contemporary Problems 149 (1982).

16. Cf. *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 78 L.Ed.2d 574, 104 S.Ct. 774 (1984).

17. See supra note 1.

18. In the case of dramatic works boundary location became a problem of "abstracting" or "patterning," *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930), cert. denied, 282 U.S. 902, 51 S.Ct. 216, 75 L.Ed. 795 (1931); *Harold Lloyd Corp. v. Witwer*, 65 F.2d 1 (9th Cir. 1933); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir. 1936). *Shipman v. RKO Radio Pictures Inc.*, 100 F.2d 533 (2d Cir. 1938), where Judge Hand in his concurring opinion set forth the best capsulization of his *Nichols* formulation: "... there is a point where the similarities are so little concrete (are therefore so abstract) that they become only 'theme,' 'idea,' or skeleton of the plot, and that these are always in the public domain; no copyright can protect them. The test is necessarily vague and nothing more definite can be said about it. ..." *Id.* at 538.

19. 562 F.2d 1157 (9th Cir. 1977).

20. 562 F.2d at 1167, 1172.

21. 562 F.2d at 1166.

22. Which is not unlike the "community standards" bag in obscenity law.

23. The author acknowledges a heightened awareness of Krofft; he was counsel for defendants. Before concluding his statements are exaggerations, however, see Krofft's counsel's self-congratulatory article in the USC Law Review where they characterized the decision as a "subtle leap forward." Copyright Infringement of Audiovisual Works and Characters, by Bayard E Berman and Joel E. Boxer, 52 S.C.L.R. 315 (1979). See also

Dissecting Krofft: An Expression of New Ideas in Copyright?, 8 S.F.V. L. Rev. 109 (1980), where one of the former law clerks of Judge James Carter, author of the Krofft opinion, wrote: "It appears the court intended to announce, and we contend did in fact announce, several new and far reaching propositions of law" (110-11). Even Professor-attorney Nimmer, who participated in the appeal phase, believed Krofft broke new legal ground. See 3 NIMMER ON COPYRIGHT Sec. 13.03[E] at n. 121.1, which sections were superceded in 1980.

24. 1909 Act, 17 USC Sec. 3.

25. 562 F.2d at 1167. Visually, of course, the characters are very different. "Pufnstuf" is self-evidently a likeable dragon, complete with a prominent tail and red hair. "McCheese" is first and foremost a Cheeseburger with a

small human body underneath. His predominant feature is the cheeseburger head, which was made to look as much like the real thing as possible. "Pufnstuf" wears what can only be described as a yellow and green dragon suit with a blue cummerbund from which hangs a medal which says mayor" "McCheese" wears a version of pink formal dress"tails" with knicker trousers. He had a typical diplomat's sash on which is written "mayor,' the "M" consisting of the McDonald's trademark of an "M" made of golden arches.

The only abstract similarity between "Pufnstuf" and "McCheese" is that-like Humpty Dumpty, jack-o-lanterns, and thousands of other fanciful characters and caricatures-they both possess disproportionately large heads.

Any attempt to equate "Pufnstuf" and "McCheese" as literary or dramatic persona, in addition to being improper, likewise fails. While a character has yet to be

held protected by copyright, the criteria for protection and comparison has been stated by Judge Hand in Nichols: "If Twelfth Night were copyrighted, it is quite possible that a second-comer might so closely imitate Sir Toby Belch or Malvolio as to infringe but it would not be enough that for one of his characters he cast a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amorous of his mistress. These would be no more than Shakespeare's 'ideas' in the play, as little capable of monopoly as Einstein's Doctrine of Relativity, or Darwin's theory of the Origin of Species." Not only was "Pufnstuf" insufficiently delineated to merit protection as a literary character, "McCheese" was a different character. "Pufnstuf" was the featured character of the "Pufnstuf" series; indeed, it was named after him. He was the force of good. His voice was comic-dumb-Southern. As mayor he ran Living Island, he made

things happen, he was involved in the story and all the action in every episode. "McCheese" on the other hand, was but one of the fanciful beings who populated a fantasy land called McDonaldland, and he was used in but a fraction of the commercials. While he was called Mayor, he did not run McDonaldland; the Clown Ronald McDonald did. "McCheese" had no continuing role, he was not a force, things did not go on around him when he was used. He was just a big, likeable, animated cheeseburger.

26. 562 F.2d at 1164.

27. Krofft tells us, incidentally, that "analytic dissection and expert testimony are not appropriate" to help us determine which of these characterizations is correct. 562 F.2d at 1164.

28. See *v. Durang*, 711 F.2d 141, 144 (9th Cir. 1983) (substantial similarity in the expression of an idea may appear from the mood evoked by the work as a whole...")

29. Query: Would that entitle the lawyers to voir dire prospective jurors as to their capabilities as conceivers and feelers?

30. Unpublished opinion filed June 11, 1987. Nos. 86-6185 and 86-6505. (ELR 9:5:9)

31. *Baxter v. M.C.A., Inc.*, 812 F.2d 421, 425 (May 11, 1987, pet. cert. pending).

31a. 777 F.2d 485, 492 (9th Cir. 1985).

32. 823 F.2d 316, 320 (9th Cir., July 28, 1987).

33. Dissenting in *Sierra Club v. Morton*, 405 U.S. 727, 741-743, 31 L. Ed.2d 636, 92 S.Ct. 1361 (1972); see also, Lang, note 14, *supra*.

34. Cf., Liebig, "Style & Performance," 17 Copyright Bulletin of the U.S.A. (1969).

35. *Harper & Row v. Nation Enterprises*, 741 U.S. 539, 548, 85 L.Ed.2d 588, 105 S.Ct. 2218 (1985).

36. See, e.g., Report of the United States Senate Committee on the Judiciary on the Copyright Law Review, Section 120. Report No. 94-473, November 20, 1975, to accompany S.22. Reproduced at 1 CCH Copyright Reporter at Par. 15,566.

37. See, e.g., 1987 Committee Report of the Section of Patent, Trademark and Copyright Law, American Bar Association, pp. 195 et seq.

38. Just as a jury argument will bring out the ham in a lawyer, a literary property case will bring out the latent poet-pendant in a judge. See, e.g., *Fink v. Goodson-Todman Enterprises, Ltd.*, 9 Cal.App.3d 996 (1970).

39. See generally NIMMER ON COPYRIGHT, Sec. 2.01.

40. 17 U.S.C. Sec. 504.

41. The Copyright Office expects Copyright Registrations to reach 600,000 in 1987 according to a recent report of the Register of Copyrights to the American Bar

Association Section On Patent, Trademark, and Copyright Law.

42. See, e.g., *Doran v. Sunset House Dist. Corp.*, 304 F.2d 251 (9th Cir. 1962).

43. Usually weeks.

44. The late Judge Yankwich, who was undoubtedly the most erudite copyright judge we have had in this Circuit, understood this well. See Yankwich, "Originality in the Law of Intellectual Property," 11 FRD 457 (1951). But see *Bradbury v. Columbia Broadcasting System*, 287 F.2d 478 (9th Cir. 1961) reversing decision at 174 F.Supp. 733 (S.D. Calif. 1959) where Judge Yankwich was shot down by a district judge from Nevada.

45. *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486 (2d Cir.1976), the Uncle Sam bank case where the Court ruled en banc, 6 to 3, plaintiffs rendition of the public domain bank was insufficiently original to merit copyright status.

46. *Harper & Row v. National Enterprises*, 471 U.S. 539, 85 L.Ed.2d 588, 105 S.Ct. 2218, dissenting at 471 U.S. 580 (1985). 47 404 U.S. 887, 30 L.Ed.2d 169, 92 S.Ct. 197 (1971), footnotes deleted.

48. Cf. California Art Preservation Act, Civil Code sections 987 et seq., in particular Section 987(f): "In determining whether a work of fine art is of recognized quality, the trier of fact shall rely on the opinions of artists, art dealers, collectors of fine art, curators of art museums, and other persons involved with the creation or marketing of fine art."

49. See Yankwich, note 44, *supra*.

50. See *New York Times v. Sullivan*, 376 U.S. 254, 11 L.Ed.2d 686, 84 S.Ct. 710 (1964); and see rights of access cases, including: the right to receive important information, *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748, 48 L.Ed.2d 346, 96 S.Ct. 1819 (1976); the right of "suitable access to social, political, aesthetic, moral and other ideas and experiences," *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390, 23 L.Ed.2d 371, 89 S.Ct. 1794 (1969); the right to "receive information and ideas," *Kleindienst v. Mandel*, 408 U.S. 753, 760, 762-65, 33 L.Ed.2d 683, 92 S.Ct. 2576 (1972), *Stanley v. Georgia*, 394 U.S. 557, 564, 89 S.Ct. 1243 (1969); the right to receive printed matter, *Lamont v. Postmaster General*, 381 U.S. 301, 14 L.Ed.2d 398, 85 S.Ct. 1493 (1965); the right of access

to certain religious publications, *Cruz v. Beto*, 405 U.S. 319, 31 L.Ed.2d 263, 92 S.Ct. 1079 (1972); the right of access to the courts, *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 509, 513, 30 L. Ed. 2d 642, 92 S.Ct. 609 (1972); the right of addressees of letters to read the letters without censorship, *Procunier v. Martinez*, 416 U.S. 396, 40 L.Ed.2d 224, 94 S.Ct. 1800 (1974).

51. *Speiser v. Randall*, 357 U.S. 513, 525, 2 L.Ed.2d 1460, 78 S.Ct. 1332 (1958).

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[ELR 9:7:3]

RECENT CASES

Producer of the film "Cross Country" is awarded over \$2.1 million damages in action against United Artists Corporation for breach of distribution contract

In February 1982, Filmline (Cross-Country) Productions, Inc., Yellowbill Finance Limited and United Artists Corporation entered a contract for the production, financing, and distribution, respectively, of a feature film entitled "Cross Country" Under the contract, United Artists was entitled to request revisions in Filmline's draft screenplays; a revised screenplay was conditionally approved several weeks prior to the scheduled May 11th start date for principal photography.

Filmline's May 7th final screenplay, however, did not incorporate certain conceptual changes which had been requested by a United Artists executive and which Filmline had agreed it would make. Nevertheless, United Artists did not exercise its right to terminate the contract, provided that the company first gave Filmline written notice that it was in breach and thirty days to cure the breach, and provided Filmline did not in fact cure the breach. The filming began as scheduled on May 11th, with the parties apparently agreeing to "work out" any additional requests for revisions.

On June 24, 1982, with only two days of filming left to be completed, United Artists sent a telex notifying Filmline that it was in breach and that United Artists intended to terminate the contract because the film was not being produced "in strict conformity with the approved screenplay and storyboard" Filmline proceeded to complete principal photography on June 26th, and

subsequently sued United Artists for damages arising from the company's failure to purchase and distribute the film.

Federal District Court Judge Sprizzo first found that United Artists' justification for termination was a "pre-text," and that the company terminated the contract because it did not want to comply with its contractual obligation to pay \$2.5 million upon delivery of the film. It was noted that United Artists continued to work with Filmline for six weeks notwithstanding its purported dissatisfaction with the May 7th screenplay; having elected to go with the contract, United Artists could not later, after six weeks of filming, terminate the contract based upon the alleged prior breach, stated Judge Sprizzo.

Also rejected was United Artists' claim that Filmline's failure to make the requested changes in the screenplay during good faith efforts to meet repeated requests for such changes. In all, United Artists had no contractual

right to terminate the contract on June 24th, declared the court.

Judge Sprizzo next found that the negative cost of the film exceeded \$2.5 million and that Filmline incurred direct damages in this amount as a result of United Artists' wrongful termination of the contract.

The court rejected Filmline's request for consequential damages of \$113,420 - this amount included a finance penalty incurred by Yellowbill after it defaulted on a loan and certain soundtrack production costs.

Filmline fulfilled its duty to mitigate damages, stated Judge Sprizzo-the company completed the production of the film and distribution rights were assigned to New World Pictures. Total net mitigation income was found to be \$289,210.

Judge Sprizzo then found that if United Artists had requested Filmline to reshoot scenes to conform to the May 7th screenplay, it would have cost Filmline

\$20,901 to conform the eleven scenes at issue. Thus, reducing Filmline's damages by the stated amount would put the company in the exact position it would have been in if United Artists had not terminated the contract.

Filmline was entitled to damages in the amount of \$2,189,889 plus pre-judgment interest on that amount from January 26, 1983, concluded the court.

Filmline (Cross-Country) Productions, Inc. v. United Artists Corporation, 662 F.Supp. 798 (S.D.N.Y. 1987) [ELR 9:7:11]

"TV's Bloopers and Practical Jokes" was within "all other" show rather than variety program category of Directors Guild of America collective bargaining agreement, rules arbitrator in proceeding to determine minimum compensation due program segment directors

The producers of "TV's Bloopers and Practical Jokes" were not required to comply with the minimum compensation and other employment conditions set forth in the variety program category of the DGA-Producers Freelance Live and Tape Television Agreement, according to Arbitrator Murray L. Schwartz, but rather, were governed, for the period from 1983 through December 1985, by the terms set forth in the category of programs known as "all other"

The Directors Guild of America argued that TV's Bloopers and Practical Jokes was a variety show

pursuant to the dictionary definition of "a show made up of unrelated acts, such as songs, dances, and comic skits." Generally, each Bloopers program consisted of two practical jokes segments, three bloopers segments, one greatest commercials segment, one man-on-the-street segment and other sports and movie montage elements. The Guild claimed that neither the absence of dancing and musical performances, nor the primary focus on excerpts and outtakes from previously recorded programs served to remove the program from the variety category.

The producers of the program, C&C Joint Ventures, a joint venture between dick clark productions, inc. and Freedom Productions, a subsidiary of Carson Productions Company, noted that in the past, the Guild has treated similar programs as "all other." The arbitrator agreed with the producers' position.

One of the factors relied upon by Arbitrator Schwartz was Arbitrator Dixon Dern's opinion in a Directors Guild proceeding involving two Alan Landsburg Productions programs - "Life's Most Embarrassing Moments" and "The World's Funniest Commercial Goofs." In that opinion, it was noted that during the negotiations for the 1984 collective bargaining agreement, no agreement was reached to include blooper programs within the variety programs category. Arbitrator Schwartz reached the same conclusion, observing that the Guild had engaged in other unsuccessful efforts to put bloopers type shows such as "TV's Censored Bloopers" into the variety category.

Even apart from the past experience of the parties in dealing with blooper programs, a variety categorization was found unwarranted due to the "unitary theme" of TV's Bloopers and Practical Jokes-comedy. "Variety must refer to different types of entertainment, not to

different versions of the same type," declared Arbitrator Schwartz, in order for the category to retain any of its original meaning. Thus, "for a monothematic program, consisting only of songs, or dancing, or comedy to fall into the 'variety' category would require a set of highly unusual circumstances" those circumstances were not present in the instant matter.

Furthermore, the differences in the collective bargaining agreement with respect to directors minimums apparently was intended to correspond to the demands made upon the directors for different programs. Variety show directors receive the second highest minimum (the highest minimum being dramatic programs) since traditional variety shows require a director to expend substantial skills, time and effort in rehearsals and in obtaining production values.

With respect to TV's Bloopers and Practical Jokes, the directorial contributions "were not of the same

magnitude as those of a director of a more traditional variety program," found Arbitrator Schwartz. The primary contributions of the overall director consisted of certain "wraparound" segments conducted by Ed McMahon and Dick Clark, and of selecting and editing various segments. And many of the segments, although requiring some set-ups, relied upon the unrehearsed reactions of interviewees; again, the directors of these segments were not called upon to contribute efforts on the same order of magnitude as those of directors of traditional variety shows.

Arbitrator Schwartz proceeded to consider the question of whether the personal services agreements of two segment directors provided that they were to be paid initial compensation on a variety program basis; the arbitrator declined to consider, as argued by the Guild, whether the agreements also provided that the directors were to be paid residuals on a variety program basis.

After reviewing the negotiations covering the personal services agreements of segment director/producer David Lowe, Arbitrator Schwartz found that there was no understanding with respect to the first season of the show that Lowe would be paid residuals on the basis of a variety program categorization. However, during the second and third seasons, C&C described the Bloopers program in a deal memo as a variety show and paid Lowe residuals on a variety schedule. C&C's claim of mutual mistake with respect to the program category, requiring reformation of the contracts to provide for compensation based upon the correct program category, was rejected.

Segment director Stephen H. Schwartz, on the basis of the evidence presented, also was entitled to compensation based on prime time variety rates, concluded Arbitrator Schwartz.

In the Matter of Arbitration between Directors Guild of America, Inc. and C & C Joint Venture, Relating to "TV's Bloopers and Practical Jokes," Case Nos. 01768 and 2005 (Before the Directors Guild of America-Producers Arbitration Tribunal, Oct. 2, 1987) [ELR 9:7:11]

Copyright Royalty Tribunal determines allocation of 1984 cable system royalties, finding in part, that syndication was entitled to claim royalty fees in connection with NBC's "Little House on the Prairie" and that copyright owners of music videos may raise royalty claims directly before the Tribunal

The Copyright Royalty Tribunal has issued a final determination in its 1984 cable royalty proceeding.

One of the disputes raised by the parties seeking royalty fees paid by cable systems for secondary transmissions during 1984 involved "Little House on the Prairie," a television series produced by NBC and aired by the network from 1974 to 1983. In 1979 and 1982, NBC entered contracts granting Worldvision Enterprises the domestic off-network television distribution right to the Little House programs in return for an unrevealed (but substantial) per-episode sale price.

Beginning in 1983, both Worldvision and NBC filed claims for cable royalties for Little House; NBC did not pursue its claim in 1983, and Worldvision received royalties for the program through the Motion Picture Association of America's pre-arranged settlement with program suppliers. In the 1984 proceeding, NBC invoked a controversy against Worldvision, claiming entitlement to royalties as the creator and copyright owner of the series. NBC also argued that it did not convey to

Worldvision either the public performance right on cable television or the right to cable copyright royalties.

Worldvision contended that there could be no cable retransmission giving rise to compulsory license royalty payments without a primary transmission via a television broadcast station. (The company also claimed that the Federal Communications Commission's syndication rule divested NBC of any right to cable retransmission royalties; this argument was not reached by the Tribunal.)

The Tribunal has ordered the distribution to Worldvision of the 1984 cable copyright royalties for "Little House on the Prairie" on the ground that Congress intended section III of the Copyright Act to protect syndicators of television programs. Indeed, the Tribunal declared, the exclusive syndicator of off-network programming, "among all those parties in the chain of production and distribution," will be the party to whom the

Tribunal will consistently in the future distribute section III royalties in order to secure "an orderly marketplace."

The Tribunal stated that its ruling will not prevent syndicators from entering contracts with production and distribution entities for the remission of cable copyright royalties. However, in the instant dispute Worldvision apparently reimbursed NBC entirely for NBC's interest in off-network syndication.

NBC's argument that the broadcaster did not convey to Worldvision the relevant copyright for the purpose of receiving cable copyright royalties was rejected. It was found that the cable retransmissions of the programs "occurred directly from the actions of Worldvision in licensing television stations" Although Worldvision did not register any copyright in Little House, registration was not a prerequisite for collecting cable copyright royalties, and the failure to register was not evidence that a copyright was not conveyed. In all, Worldvision was the

proper party to claim royalties for Little House, concluded the Tribunal, declining to consider any disputes as to the meaning of contract terms or the intent of the parties, particularly as to whether the contract imposed any obligation on Worldvision to remit royalties to NBC or whether, indeed, the terms used in the contracts conveyed to Worldvision the relevant copyright.

Also considered by the Tribunal was a joint claim filed by Warner Communications, Inc., Elektra/ Asylum/ Nonesuch Records, Atlantic Recording Corporation, Warner Bros. Records, Inc. and Geffen Records. The Warner parties claimed that music videos produced by record companies are "audiovisual" works; that the record companies own the copyright in the non-music audiovisual portions of music videos; and that Warner, as the copyright/owner, was entitled to appear directly before the Tribunal to claim royalties for the retransmission of music videos by cable systems. In 1984, Warner

sought royalties from seven music video shows, including "Night Tracks," "Top 40 Videos" and "New York Hot Tracks" - the shows almost exclusively consisted of music videos licensed by record companies on a nonexclusive basis to the producers/distributors of the shows.

In agreeing that Warner was entitled to direct access to the Tribunal to advance its royalties claims, the Tribunal found that music videos, unlike cartoon characters "are complete program units in and of themselves." The Tribunal thus will continue to hold to its ruling in the 1978 cable royalty distribution proceeding denying royalty fees to the owners of such cartoon characters as Bugs Bunny, Miss Piggy, Big Bird, and Superman on the ground that such characters were individual, albeit copyrighted components of programs.

In the instant proceeding, two factors distinguished Warner's position from the situation in NBC-Worldvision. First, Warner retained the full copyright in

its music videos, giving only a nonexclusive license to those who distribute and use the videos. And two copyrighted properties were involved in the music video controversy - Warner's music videos and the various shows produced by syndicators and local television stations.

The Tribunal stated that when Warner supplies its videos directly to a production company commissioned by a local television station, it would be appropriate to consider directly the royalty claims of both the syndicator in the music video and the local station in the music video show. Warner also supplied its videos to program producers who in turn contracted with syndicators to distribute the programs; in several instances, the syndicators did not file royalty claims for the music video programs. The Tribunal noted that denying Warner the right to appear directly before the Tribunal would, in such circumstances, effectively deny the

company's claim for the use of its music videos in those shows.

Thus, the Tribunal held that where a music video is shown in its entirety, i.e., that is a complete program, and the copyright is retained entirely by the music video producer, the owner's claim is considered part of the Program Suppliers category, and may come directly to the Tribunal. Segments of music videos used on news and entertainment programs may not constitute a part of the claim of any music video copyright owner. The Tribunal emphasized that it did not determine whether the copyright ownership in the nonmusical audiovisual portions of a music video has a quantifiable value or is de minimis.

The third controversy before the Tribunal involved the claims of Multimedia Entertainment, Inc., the National Association of Broadcasters and the Motion Picture Association of America. The MPAA represented 86

producers and/or syndicators of syndicated movies, television series and specials; the claimants sought cable royalties attributable to 5,796 different productions which were retransmitted by cable systems in 1984. The NAB represented 59 television broadcast stations seeking cable royalties attributable to 121 programs. The Tribunal allocated royalties under Phase 11 for individual claimants to the MPAA, the NAB and Multimedia as follows: 98.475%, 0.825% and 0.7%, respectively.

Under its Phase I settlement, the Tribunal allocated 1984 basic cable copyright royalty fees, after subtracting a stipulated award to National Public Radio of 0.18 % of the entire fund, to the following claimants: Program Suppliers, 67.10; Joint Sports, 16.35; Public Broadcasting Service, 5.20; Commercial Television, 5.00; Music, 4.50; Devotional Claimants, 1. 10; Canadian Claimants, 0.75; Commercial Radio, 0.

Copyright Royalty Tribunal's Notice of Final Determination in 1984 Cable Royalty Proceeding, 52 Fed.Reg. 8408 (March 11, 1987) [ELR 9:7:12]

Licensee of four music groups, including The Grateful Dead and The Beastie Boys, obtains preliminary injunction barring merchandiser's allegedly unauthorized distribution of posters featuring photographs of the groups

Winterland Concessions has obtained a preliminary injunction preventing NEA Enterprises from distributing allegedly unauthorized posters and other merchandise featuring the music groups The Grateful Dead, Dokken, The Smiths and The Beastie Boys.

NEA claimed that it was entitled to sell posters made from photographs purchased by the company from the

owners of the copyrights in the photographs. Winterland, the exclusive licensee of the music groups with respect to posters displaying the photographic images, names, trademarks and service marks of the performers, argued that NEA did not have the right to commercially exploit such images; rather, according to Winterland, the groups retained the right to determine the manner of any commercial use.

In granting the preliminary injunction, Federal District Court Judge Thelton E. Henderson rejected NEA's arguments that Winterland delayed in filing its lawsuit, and found that Winterland would be irreparably injured by the continued sale of the posters during the pendency of the company's action against NEA for violating the Lanham Act and for unfair competition, and violating the performers' right of publicity. Since harm to an individual's interest in the commercial value of his/her likeness and/or to privacy interests may be difficult to

compensate by a damage award, injunctive relief was available stated the court, citing *BiRite Enterprises, Inc. v. Button Master*, 555 F.Supp.1188 (1983; ELR 6:4:6; 5:3:12).

Furthermore, Winterland established the likelihood of success on the merits, given the crucial rule, as set forth in *Bi-Rite Enterprises, Inc. v. Bruce Miner Co.*, 447 F.Supp. 440 (1985; ELR 7:11:10) "that possession of the copyright of a photograph does not give the possessor the right to exploit the commercial value of the image." In the absence of authorization by the music groups, NEA was not entitled to wholesale the posters.

Judge Henderson concluded by rejecting NEA's contention that Winterland failed to join indispensable parties, i.e., the individual members of two of the music groups. But the musicians had assigned their publicity rights to licensees, which in turn gave Winterland its exclusive poster rights; as an exclusive licensee,

Winterland had the right to protect its licensors' rights of publicity.

Although the matter focused on unauthorized posters, the preliminary injunction pending trial also restrained NEA from manufacturing, advertising, distributing, selling or otherwise commercially exploiting other merchandise bearing "the names, likenesses, symbols, logos, photographic images, trademarks, service marks or other indicia" of the four music groups."

Winterland Concessions Co. v. NEA Enterprises, Inc.,
Case No. 87-2405 (N.D.Ca., Sept. 14, 1987) [ELR
9:7:14]

Tax Court finds that former basketball player Bill Russell's wholly owned corporation was subject to personal holding company tax of \$25,000 for fiscal year ending in January 1978

Former professional basketball player Bill Russell has been outscored by the Internal Revenue Service in an action involving a personal holding company tax of about \$25,000.

Beginning in 1973, Russell was employed by Kenyatta Corporation to provide a variety of personal services, including hosting radio talk shows, making personal appearances, lecturing on college campuses, sportscasting, writing newspaper columns, coaching and managing a professional basketball team, and performing various advertising and promotional endeavors. From 1973 through 1978, Russell was the president of Kenyatta.

Russell was hired as coach and general manager of the Seattle SuperSonics in 1973; the basketball team was a wholly owned subsidiary of First Northwest Industries of America. Russell signed a contract with First Northwest covering his services as coach and general manager of the basketball team. A contract between First Northwest and Kenyatta covered Russell's publicity and public relations services; under this contract, Kenyatta agreed to accept \$250,000 payable in 60 equal monthly installments beginning July 1, 1973. During the 1978 fiscal year, Kenyatta received income in the amount of about \$21,000 under the public relations contract.

In 1977, Kenyatta entered a contract with ABC Sports pursuant to which Russell would provide his services as a commentator, host, analyst, and interviewer in connection with television sports and news programs. During 1978, ABC Sports paid Kenyatta a total of about \$53,000.

in another 1977 contract, Kenyatta agreed that Russell would provide material for a weekly column in the Seattle Times in return for a fee of \$250 per column; Kenyatta received \$4,750 during 1978 as consideration for the columns. A fee of \$15,000 received by Kenyatta in 1977 for Russell's services in connection with a series of television commercials for a local dairy company also was included in Kenyatta's taxable income.

Tax Court Judge Featherston first found that the stock ownership test of section 542(a)(2) of the Internal Revenue Code was satisfied because, in part, Kenyatta's 1978 tax return designated Russell as the holder of 100 percent of Kenyatta's voting stock.

Judge Featherston then reviewed each of the contracts described above and noted that the contracts designated Russell by name as the individual who was to perform the contracted-for services, thereby meeting the designation test under section 543(a)(7). Kenyatta argued that

under the First Northwest contract, substitutions occasionally were made for Russell. But it was not clear, stated the court, that the substitutions were made with respect to appearances covered by Kenyatta's contract. Furthermore, the public relations contract did not preclude such substitutions.

The income from ABC Sports and from the Seattle Times also was personal holding company income ruled the court, rejecting Kenyatta's claim, with respect to the advertising agency income, that Russell's talent was not unique and that Kenyatta could have substituted the services of other individuals. Rather, concluded Judge Featherston, the evidence clearly demonstrated that Russell's talents were unique. Since Kenyatta derived a total of about \$93,700 from personal service contracts, and this amount of personal holding company income exceeded 60 percent of Kenyatta's adjusted ordinary gross income, Kenyatta was ruled a personal holding company

subject for the relevant fiscal year, to the tax imposed by section 541 of the Internal Revenue Code.

Kenyatta Corporation v. Commissioner, 86 T.C. No. 12 (1986) [ELR 9:7:14]

Investors in "First Blood" limited partnership were entitled to proceed with securities and common law fraud claims

A Federal District Court in New York has ruled that the investors in a limited partnership known as First Blood Associates may proceed with a securities fraud and common law fraud action against the general partners of First Blood and against various parties associated with Anabasis Investments and its successor, Carolco Pictures.

Stanley B. Block, the owner of a partial unit of a limited partnership interest in First Blood, alleged, on behalf of himself and other investors, that the partnership's placement memorandum contained a false and misleading description of the agreements whereby Anabasis purportedly transferred rights in the film "First Blood" to the partnership. According to Block, the partnership, notwithstanding statements in the placement memorandum did not own the film "in any meaningful sense of the term."

Judge Sweet found that although Block did not attribute individual misrepresentations in the placement memorandum to specific parties, the complaint adequately set forth the challenged statements and gave the First Blood parties sufficient notice of the nature of the claims. Block also was entitled to conduct limited initial discovery on the activities of Mario P. Kassar and Andrew G. Vajna, the cochairmen of the board of Carolco,

in order to establish prima facie evidence to support the exercise of the court's jurisdiction, ruled Judge Sweet.

Block v. First Blood Associates, 663 F.Supp. 50 (S.D.N.Y. 1987) [ELR 9:7:15]

Royalties earned by "Son of Sam" killer are ordered disbursed to victims

In accordance with a New York trial court's order, the victims of David Berkowitz's "Son of Sam" shooting attacks will divide about \$118,000 in book royalties and interview fees paid to Berkowitz.

Berkowitz, who killed six young people and wounded seven others during a year-long crime spree, pleaded guilty in 1978 to charges of murder and attempted murder and was sentenced to 25 years to life. The

conservator for Berkowitz, Doris Johnsen, claimed that she was exempt from the 1979 "Son of Sam" law (now Executive Law section 632-a) which was passed to prevent a convicted felon from profiting from book, movie or television deals. However, in response to the state's Crime Victims Board the legislature amended the law; the Board then sued Johnsen for \$20 million.

The balance of funds in Berkowitz's account will be distributed according to the percentages previously agreed upon by the families of the deceased victims and by the individuals wounded in the attacks. The court disallowed all requests for attorneys' fees in order "to maximize the recovery of the victims of the Conservatee's criminal acts in light of the extremely limited funds available to them." And the Crime Victim Board waived any liens on the awards.

Matter of Johnsen, New York Law Journal, p. 15, col. 3
(Kings Cnty., Sept. 2, 1987) [ELR 9:7:15]

Importers of Cabbage Patch Kids dolls are held liable for trademark and/or copyright infringement in two separate federal court proceedings

A Federal Court of Appeals in New York has upheld a District Court decision (ELR 9:2:14) finding that Granada Electronics infringed Original Appalachian Artwork's trademarked Cabbage Patch Kids dolls by importing dolls bearing Original Appalachian's trademark, but manufactured abroad under a restrictive license. The imported dolls were materially different from the Cabbage Patch Kids dolls sold in the United States, observed the court - differences such as the foreign language adoption papers and birth certificates created

confusion over the source of the product and resulted in a loss of good will by Original Appalachian and its licensee, Coleco Industries; an injunction barring further importing of the dolls therefore was affirmed.

In a concurring opinion, Judge Cardamone, while agreeing with the majority that there was confusion over the source of the dolls, would have focused on the issue of whether Granada's importation of dolls with Spanish "papers" may have confused the public as to whether Original Appalachian "sponsored" the importation of what consumers may have perceived to be inferior dolls. According to Judge Cardamone, confusion as to sponsorship, which has been deemed confusion as to source of origin, was sufficient to constitute a violation of the Lanham Act. Sponsorship includes quality control, and the territorial sales restrictions imposed by Original Appalachian could be viewed as a means of quality control, stated Judge Cardamone, who also declined to adopt, in

the international context, the view that trademark rights are exhausted once the trademarked goods have been placed into the market. Although the Spanish dolls were not physically altered during their importation, the sale of the dolls in the United States upset "the settled expectations of U.S. consumers" about what they would receive when they purchased a Cabbage Patch doll. Thus, stated Judge Cardamon, "the very act of importing different goods may be viewed, in an abstract sense, as an alteration of the doll." Once again, it was the violation of Original Appalachian's right to control the quality of its product, i.e., its sponsorship, that should have been deemed, in Judge Cardamone's view, confusion as to source.

In a separate proceeding, J. F. Reichert, Inc. has been held liable for copyright infringement in connection with the unauthorized importation of Cabbage Patch Kids dolls. At trial, Reichert agreed to the entry of a

permanent injunction prohibiting the company from importing dolls distributed by European licensees of Original Appalachian Artworks. A Federal District Court in Pennsylvania found that Reichert's conduct did not constitute willful infringement and awarded Original Appalachian statutory damages of \$250 per infringement for a total of \$1,000, as well as attorney's fees and costs. The permanent injunction agreed to by the parties also prohibited Reichert from violating Original Appalachian's rights under the Lanham Act; no additional damages for trademark infringement were warranted, concluded the court.

Original Appalachian Artworks, Inc. v. Granada Electronics, Inc. 816 F.2d 68 (2d Cir. 1987); Original Appalachian Artworks, Inc. v. J.F. Reichert, Inc., 658 F.Supp. 458 (E.D.Pa. 1987) [ELR 9:7:15]

Sebastian International was entitled to preliminary injunction in copyright infringement claim against unauthorized distributor of imported beauty products, rules Federal District Court in New Jersey

In early 1986, Sebastian International, Inc. entered an oral contract with Consumer Contacts (PFY) Ltd., doing business as 3-D Marketing Services, whereby 3-D agreed to distribute Sebastian's products to professional hair care salons located only in South Africa and its territories, and not to distribute the products in any other country or territory. However, when four shipping containers of Sebastian products arrived in South Africa in January 1987, 3-D did not open the containers. Rather, the company shipped the containers back to the United States and apparently resold the beauty products to various retailers.

Sebastian obtained a temporary order restraining the 3-D parties from disposing of the beauty products. Subsequently, a Federal District Court in New Jersey ruled that the unauthorized distribution of two of the products in the United States would constitute copyright infringement.

Judge Maryanne Trump Barry first noted that the label copy for the two Sebastian products was "more than simply a list of ingredients, directions, or a catchy phrase," the text therefore was protected by the Copyright Act.

Judge Barry then reviewed the "interplay" of various sections of the Copyright Act, pointing out that section 602, the "importation right," grants the copyright owner a distribution right as defined in section 106, but that the first sale doctrine of section 109(a) seems to allow the very acts prohibited by the importation right. After carefully considering *CBS, Inc. v. Scorpio Music*

Distributors, Inc., 569 F.Supp. 47 (1983; ELR 5:11:7), aff'd mem., 738 F.2d 424 (1984), *Hearst Corp. v. Stark*, 639 F.Supp. 970 (1986; ELR 9:7:17), and *T.B. Harms Co. v. JEM Records, Inc.*, 655 F.Supp. 1575 (1987; ELR 9:2:8), Judge Barry pointed out that on their face, section 602(a) and section 109(a) do not conflict. Section 602(a) prohibits the importation of copyrighted works acquired outside the United States. Section 109(a), stated the court (quoting *United States v. Ather-ton*, 561 F.2d 747) "provides that where a copyright owner parts with title to a particular copy of his copyrighted work, he divests himself of his exclusive right to vend that particular copy." In Judge Barry's view, *Scorpio* and its "progeny" wrongly assumed that importation was a form of vending - importation may involve vending, but nothing in the legislative history indicated that the word "importation," as used in section 602, meant a

bringing in of parallel imports combined with a sale or transfer of title.

Importation is an act of copying, observed the court, because it increases the number of copies of a work available in the United States. Thus, importing works acquired outside the United States interferes with the fundamental rights of a United States copyright owner to control the number of copies available of a work in this country, "no less than the mass copying of his work which might occur at the local copy shop." Judge Barry agreed with Nimmer on Copyright that the distribution right is a form of the reproduction right. And "it would make no sense if a copyright owner could prevent unauthorized reproduction but not unauthorized distribution," or if a copyright owner could prevent the making of unauthorized copies or phonorecords by mechanical photocopying or recording but not prevent the saturation of the market with unauthorized parallel imports - the

importation right "does no more than ensure the copyright owner that control." For Judge Barry, section 602 "erects an impenetrable shield forever safeguarding the copyright owner's ability to control the maximum number of copies or phonorecords of his work available in this country" - this "expansive" shield thus served to protect Sebastian's rights.

In a significant summary, Judge Barry announced that the Copyright Act of 1976 created two types of distribution rights: "one involving the act of vending, which is limited by the first sale doctrine, and the one involving the act of importation, which is not." Sebastian's right to control the importation of the beauty products at issue was not extinguished when those goods were first sold regardless of where Sebastian's products were first sold or first manufactured. Section 602(a) created a copyright remedy when traditionally only a breach of contract action was available, and a discussion of complex

contractual issues concerning the passage of title was found contrary to the clear purpose of the section.

The court rejected arguments related to the lack of an irreparable injury to Sebastian, and enjoined the sale of Sebastian's WET and Shpritz Forte products by the 3-D parties pending the resolution of the case.

In conclusion, Judge Barry noted with surprise that American businesses have been slow to recognize the power granted them under the Copyright Act of 1976 to control the importation of gray market copyrighted works, and indicated approval of Sebastian's successful effort under section 602(a) to prevent the entry into this country of products seldom associated with copyright protection."

Sebastian International, Inc. v. Consumer Contacts (PTY) Ltd., Case No. 87-1995 (D.N.J., June 30, 1987) [ELR 9:7:16]

Importer of books lawfully produced in United Kingdom infringed rights of United States copyright owners, rules Federal District Court in California

Hearst v. Stark (cited by the court in Sebastian, ELR 9:7:16) involved the allegedly unauthorized importation and sale of copies of eighteen books. Pursuant to agreements with the authors of the books, Hearst Corporation and various other publishers became the exclusive United States owners of the copyrights in the books. The publishers granted rights to United Kingdom publishers to issue the books in the United Kingdom. The books then were sold by the United Kingdom publishers to a wholesaler in the United Kingdom, who, in turn, sold the books to (California-based) J. Ben Stark. Stark

imported the books into the United States and proceeded to sell the books to United States customers.

Federal District Court Judge Legge noted that section 602(a) of the Copyright Act provides that the "Importation into the United States, without the authority of the owner of copyright ... of copies of a work that have been acquired outside the United States is an infringement of the exclusive right to distribute copies ... under section 106 actionable under section 501." The court stated that the language of the statute applied to the facts of the instant case, i.e., that the section applied to books as well as to other forms of artistic expression, and that it was an infringement of United States copyrights when books that were acquired outside the United States, however lawfully, were imported into the United States.

Stark argued that section 602 should not be applied to books which were out of print or otherwise unavailable in the United States. It was not clear from the record

whether the eighteen titles were or were not available in the United States other than through Stark's imports, and the court considered the case as dealing both with titles that were and were not available in the United States editions, although stating that the claimed distinction was not material.

Judge Legge next observed that it was "questionable" whether section 109 had any application to liability under section 602. It was noted that section 602 was a separate statute which was passed after section 109. And although section 602 referred to section 106, it appeared to create rights and liabilities in addition to those in section 106, with the purpose of precluding the importation of copyrighted works lawfully produced elsewhere.

If any event, stated the court, any modification of section 602 by section 109 did not apply to Stark's activities, because Stark was importing large quantities of

titles for the purpose of multiple resales in the United States. Thus, "even if section 109 did permit booksellers to sell a particular copy of a copyrighted work, that section would not authorize the wholesale importation and redistribution of multiple copyrighted works in conflict with section 602."

The court also rejected the argument that section 602 violated the First Amendment. By prohibiting the unauthorized importation of works, section 602 "preserved" the copyright owners' right to control their copyrighted works. Stark's unauthorized importations would have an "undermining" effect on the copyright owners' control over the public dissemination of the copyrighted works, stated the court, for section 602, rather than violating the First Amendment, furthered the objectives of the Amendment by assuring a fair financial return and by protecting copyright owners from the diluting effect resulting from unauthorized importation.

Judge Legge granted the publishers' motion for summary judgment with respect to the issue of copyright infringement, and found that the publishers were entitled to the requested injunctive relief to prevent further infringement, and to actual damages for those infringements; the court declined to find that Stark's infringement was willful or in bad faith.

Hearst Corporation v. J. Ben Stark, 639 F.Supp. 970 (N.D.Ca. 1986) [ELR 9:7:17]

Seventeen Magazine was not liable for damages resulting from young subscriber's use of tampon after reading magazine's advertisement for the product

In late 1984, Lisa Marie Walters, a minor, read an advertisement in Seventeen magazine for Playtex tampons.

After using one of the tampons, the young woman became ill and was hospitalized for toxic shock. Walters subsequently sued Seventeen and its parent company, alleging negligence, product liability, breach of warranty, conspiracy, and fraudulent advertising.

An Orange County trial court's decision to sustain the magazine's demurrer and to dismiss Walters' complaint has been upheld by a California appellate court.

The appellate court first noted that only one reported California decision has ever held a publisher liable for a product advertised in its magazine. In *Hanberry v. Hearst Corp.* 276 Cal.App.2d 680 (1969), the claim concerned a pair of shoes advertised in Hearst's magazine *Good Housekeeping* as bearing "Good Housekeeping's Consumer Guaranty Seal." Hanberry alleged that the soles of the shoes were defectively manufactured, causing her to slip, fall, and incur serious injuries. Hanberry was entitled to bring an action against the

publisher, stated the court, but only for negligent misrepresentation; alternate theories of warranty and product liability were rejected.

But the Hanberry decision was inapposite in the Walters proceeding, according to Judge Wallin, Seventeen did not in any way sponsor or endorse products advertised in the magazine, and "there was no representation of quality, no promotional effort, and no attempt to induce the public to buy Playtex tampons beyond merely printing the advertisement." Walters' argument that the ads were printed misleadingly close to editorial material concerning health topics was not supported in the record and was "meaningless by itself," found the court. Also rejected was the claim that the tampon advertisements resembled feature articles, for "even a small child could easily distinguish them from regular copy."

Judge Wallin found that Walters had presented no cause of action supported by traditional theories, and he

declined to create a new tort of negligently failing to investigate the safety of an advertised product. The court cited the "dire possibility" that the result of such a tort eventually might be a dramatic decrease in the total number of publications in circulation, and determined that the trial court's ruling also should be sustained on the basis of the link between commercial speech and the First Amendment.

Walters v. Seventeen Magazine, Case No. G004430
(Ca.Ct.App., Sept. 30, 1997) [ELR 9:7:17]

Broadcast Music, Inc. obtains damage award of \$15,000 and attorneys fees in copyright infringement proceeding against operator of unregistered juke boxes

A Federal District Court in San Antonio has awarded damages of \$15,000 to Broadcast Music, Inc. in a copyright infringement proceedings against Triple L Vending, an operator of unregistered juke boxes. Chief Judge William S. Sessions, in granting summary judgment to BMI, noted that the juke box registration fees paid to the United States Copyright Office are turned over to the major performing rights societies, which, in turn, distribute the funds (after deducting an administration fee) to the artists they represent. Triple L would have been required to pay fees amounting to about \$6,300 for the period from 1978-1985. The company's claim that it was unaware of the registration procedure was found "neither credible nor reasonable." Thus, a damage award of \$3,000 for each of the five alleged infringements, although totalling about three times the lost registration fees, was within the statutory limits and "just," stated Judge Sessions, particularly with respect to serving to

deter Triple L and other "similarly situated" juke box owners from failing to register.

The court also granted BMI's request for a permanent injunction barring the further infringement of copyrighted musical works. And in Supplemental Findings of Fact and Conclusions of Law, Judge Sessions awarded BMI attorneys fees of \$13,093, as well as reasonable costs.

Broadcast Music, Inc. v. Triple L. Vending, Inc., Case No. SA-86-CA-754 (W.D.Tex., Aug. 13, 1987; Aug. 29, 1987) [ELR 9:7:18]

Television news manager was entitled to proceed with breach of contract and negligent misrepresentation claims against Westinghouse Broadcasting parties arising from employment negotiations, but Federal District Court in Pennsylvania grants summary judgment to broadcaster on fraudulent misrepresentation and punitive damages claims

A Federal District Court in Pennsylvania has denied, in part, Westinghouse Broadcasting and Cable's motion for summary judgment in an action brought by television news manager Arthur Browne. Browne claimed that he entered an oral contract to work for WKYW, the Westinghouse television station in Philadelphia. Otis Maxfield, a WKYW official, conducted the employment negotiations with Browne.

Judge Louis H. Pollak stated that although a close question was presented as to whether Browne was

aware that his hiring was subject to approval by the president of Westinghouse's television station group, a jury might reasonably find that Maxfield had the apparent authority to make a final hiring decision and that there was an oral contract between Westinghouse and Browne.

However, stated Judge Pollak, a jury would not be permitted to conclude that the alleged contract was not terminable at will. Browne testified that he had not negotiated for a specific term of employment or for employment terminable only for cause. And the evidence was insufficient "to overcome the strong presumption under Pennsylvania law that employment contracts are terminable at will."

Notwithstanding terminability at will, Judge Pollak determined that a jury might find that the purported contract was breached by the failure of the Westinghouse parties to provide Browne with certain severance pay

for which he apparently had bargained. In all, there was a genuine issue of material fact as to Browne's breach of contract claim, and summary judgment was denied on that claim.

Browne also raised the alternative claim of misrepresentation based upon Maxfield's assent when Browne requested permission to tell his then-employer of the likely KYW job offer. Judge Pollak agreed that the assenting statement was properly characterized as a misrepresentation but, after a thorough analysis, concluded that Browne did not establish his fraudulent misrepresentation claim. It was further found that punitive damages were inappropriate in this case, and that the Westinghouse parties were entitled to summary judgment with respect to the fraudulent misrepresentation claim, the punitive damages claim, and a claim for loss of consortium, but not with respect to Browne's causes

of action for negligent misrepresentation and breach of contract.

Browne v. Maxfield, 663 F.Supp. 1193 (E.D.Pa. 1987)
[ELR 9:7:18]

IN THE NEWS

Motown, Polygram and Chrysalis Records settle antitrust action filed by promoter Joe Isgro

Independent promoter Joe Isgro has resolved all outstanding claims against Motown, Chrysalis and Polygram Records for undisclosed sums. Isgro previously reached a settlement with Capitol Records in his \$25 million antitrust action against the Recording Industry Association of America and eight major record labels.

Isgro alleged a conspiracy to drive independent promoters out of business in order to decrease record promotion costs.

Polygram will pay an undisclosed amount to Isgro and has dropped a \$1 million counterclaim against the promoter. The parties also stated that Polygram did not consent to a purported proposal by the RIAA to investigate independent record promotion. [Dec. 1987] [ELR 9:7:19]

Federal District Court reduces jury's \$22.8 million damage award to Wayne Newton in libel action against NBC, finding that singer was entitled to damages of \$5.3 million

A Federal District Court judge has reduced to \$5.3 million a jury award granting \$22.8 million to Wayne Newton in his libel action against NBC (ELR 8:8:20).

Judge Myron Crocker found that Newton had shown by clear and convincing evidence that he was defamed by NBC news stories, broadcast in 1980 and 1981, linking the singer to organized crime figures. However, the evidence did not support Newton's allegations that the broadcasts hurt his reputation or reduced his earnings, stated the court. [Dec. 1987] [ELR 9:7:19]

Jeffrey MacDonald will receive \$325,000 payment to settle \$15 million action against "Fatal Vision" author Joe McGinniss

Joe McGinniss, the author of the book "Fatal Vision," has agreed that a settlement payment of \$325,000 will

be made to convicted killer Jeffrey MacDonald. McGinniss did not admit liability in connection with MacDonald's claim that the author did not, as purportedly agreed, portray MacDonald as being innocent of the 1970 slaying of his wife and two daughters. MacDonald's action resulted in a mistrial in the summer of 1987 when a Federal District Court jury reported a deadlock in its deliberations (ELR 9:5:20). The settlement ends MacDonald's action in federal court, a counterclaim by McGinniss and an action filed by MacDonald in a Long Beach trial court. [Dec. 1987] [ELR 9:7:19]

California Lieutenant Governor Leo McCarthy obtains dismissal of \$7 million libel action brought by former Lieutenant Governor Mike Curb

A Los Angeles trial court judge has dismissed former Lt. Governor Mike Curb's \$7 million libel and slander action against Lt. Governor Leo McCarthy. Superior Court Judge Thomas Murphy stated that Curb did not establish that McCarthy acted with malice in making certain comments during the 1986 election campaign; the comments concerned Curb's participation in producing certain purported "exploitation" films during the 1960s. Judge Murphy did not discuss whether McCarthy's statements about Curb were true or false. Rather, the court found that the remarks at issue did not accuse Curb of criminal conduct, and were protected political speech about a public figure. [Dec. 1987] [ELR 9:7:19]

Collective bargaining agreement governed claims of former KMET-FM disc jockeys against radio station owner, rules Federal District Court in dismissing action

Former KMET-FM disc jockeys David Perry and Jack Snyder must bring their grievances against the radio station's owner before the American Federation of Television and Radio Artists under the applicable collective bargaining agreement, a Federal District Court in Los Angeles has ruled. Judge David Kenyon therefore dismissed the actions brought by the performers against Metropolitan Broadcasting arising from the station's firing of all on-air personnel due to a format change; Perry and Snyder contended that the station's general manager and program director did not reveal their purported knowledge of the imminent format change when

conducting employment contract negotiations with the performers. [Dec. 1987] [ELR 9:7:19]

Football coach Earle Bruce will receive \$471,000 to settle dispute with Ohio State University over firing

Former Ohio State University football coach Earle Bruce has agreed to accept \$471,000 to settle a \$7.4 million lawsuit against the university and its president, Edward Jennings, arising from Bruce's firing by Jennings and the school's trustees. According to news reports, if Bruce accepts another job before July 1, 1989, he will have to pay back part of the settlement. [Dec. 1987] [ELR 9:7:19]

Theater owner was not liable in connection with murder committed by young man after viewing the film "The Warrior" rules Massachusetts trial court

A Massachusetts trial court has ruled that Saxon Theatre Corp., a subsidiary of USA Cinemas and Paramount Pictures, was not liable for damages claimed by the parent of a young man who was murdered by another youth who had just seen the film "The Warriors" in a Saxon theater. According to news reports, the court found that Saxon, in the absence of any special agreement, did not have a duty of care to a member of the general public to guard against the independent acts of third parties. [Dec. 1987] [ELR 9:7:20]

WASHINGTON MONITOR

Federal Communications Commission affirms new "indecent" standard, but will allow broadcasters to air more explicit programming between midnight and 6 A.M.

Radio and television stations will not face action by the Federal Communications Commission if programming classified as indecent is broadcast between midnight and 6 A.M., the FCC has announced.

The time limit was established in response to requests for clarification of an April, 1987 FCC decision (ELR 8:12:19). In the April proceeding, the Commission notified broadcasters that it planned to impose the following definition of indecency: "material that depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast

medium, sexual or excretory activities or organs." And the FCC abandoned its previous 10 P.M. standard, stating that it might take action against broadcasters even with respect to indecent material aired after 10 P.M. Obscene programming cannot be aired at any time.

Although setting the midnight to 6 A.M. "safe harbor," the Commission refused to provide a list of words or pictures that would be considered indecent. However, the "contemporary community standards" which the FCC expects to apply apparently will be broad national standards rather than local standards.

The Commission reaffirmed its issuance of warnings to Pacifica Foundation station KPFK-FM in Los Angeles, Infinity Broadcasting station WYSP-FM in Philadelphia, and The Regents of the University of California station KCSB-FM in Santa Barbara for broadcasting indecent programs. However, no further action will be taken against the stations because, according to the

Commission, each had reasonably assumed that their broadcasts were permissible under previous guidelines. [Dec. 1987] [ELR 9:7:20]

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