LEGAL AFFAIRS

U.S. Enters New Era in International Copyright Relations: Joins Berne; Seeks GATT Intellectual Property Code; Settles MPEAA's Trade Complaint vs. South Korea

by Lionel S. Sobel

This year will be recorded in copyright history as the beginning of a new era in the international copyright relations of the United States. Three events all have occurred in recent months, each one of which would have been independently significant had it happened alone.

First, at long last, the United States will join the 102-year old Berne Union and become a party to its Convention for the Protection of Literary and Artistic

Works. Second, the U.S. has formally suggested that the General Agreement on Tariffs and Trade be supplemented to include an intellectual property code. And third, the U.S. pursued and was quickly able to settle a trade complaint filed against South Korea by the Motion Picture Export Association of America.

These events demonstrate that the United States intends to play a major role in the future development of international copyright policy -- a role that it has not played (at least not successfully) until now, in part because U.S. copyright law has never before been sufficiently progressive to be a model for other countries of the world.

Berne Convention

The Berne Convention is universally considered to be the premier international copyright treaty. Until now, however, the U.S. was unable to become a party to it, because the Berne Union may be joined only by those countries whose domestic laws provide a specified minimum level of copyright protection. Ironically, although the U.S. is the world's leading producer and exporter of copyrighted works, this country's law has never before met Berne's minimum standards in several respects.

As a result, in the 1950s, the U.S. was instrumental in the adoption of the Universal Copyright Convention. Though the UCC attracted many parties, including the U.S., the UCC's minimum requirements are quite lax compared to Berne's, and thus, the copyright laws of many UCC members do not provide as much protection for foreign copyrights as American copyright owners came to expect and demand.

In October, Congress finally enacted, and President Reagan signed, the Berne Convention Implementation Act of 1988 which amends the U.S. Copyright Act of

1976 in ways required by Berne. The Senate also gave its advice and consent to U.S. accession to the Berne Convention.

Some of the amendments made by the Berne Implementation Act to U.S. copyright law are quite minor (and are more in the nature of clarifications than revisions). Other changes are of concern to particular industries only. But some produce significant changes in longstanding features of American copyright law.

Architectural plans

For example, the Copyright Act's definition of protected "pictorial, graphic and sculptural works" (found in section 101) has been amended to specify that "architectural works" are such works. This amendment satisfies a Berne requirement that copyright protection be provided for architectural works.

Congress considers this amendment to be a mere clarification, because architectural plans have been protected by copyright under the law as it long has existed. The legislative history of the Berne Implementation Act also makes it clear that buildings themselves are not to receive copyright protection, even as sculptural works, because of the American principle that works of utility are not protected by copyright.

Jukebox licenses

Another amendment is of primary interest only to the jukebox industry and to music publishers and songwriters. This amendment deals with the compulsory jukebox license (found in section 116 of the Copyright Act). As a general rule, the right to perform music publicly is one of the rights granted exclusively to the owners of copyrights to musical works. As a practical matter, this simply requires those who wish to perform music publicly to obtain a license to do so, usually through ASCAP, BMI or SESAC.

However, the Copyright Act does contain certain limitations on and exemptions from this exclusive right. And the compulsory jukebox license is one such limitation. Until now, the Act has granted a statutory license to publicly perform recorded music by means of jukeboxes, in exchange for royalties set by the Copyright Royalty Tribunal. Since the jukebox license is built into the Copyright Act, and since royalties have been set by the Tribunal rather than through negotiation, the jukebox license is a limitation on rights that otherwise would be enjoyed by copyright owners.

Such a limitation, however, is not permitted by the Berne Convention. Thus in order to join Berne, it became necessary to do something about it. One possibility, of course, was simply to eliminate the compulsory jukebox license -- a course of action that was opposed by the Amusement and Music Operators of America (the jukebox trade association). As a result of a compromise between jukebox operators (represented by AMOA) on the one hand and music copyright owners (represented by BMI, ASCAP and SESAC) on the other, Congress has modified the compulsory jukebox license in a manner that Congress believes will satisfy Berne's requirements.

A new section has been added to the Copyright Act (section 116A) which provides for industry-wide negotiation of jukebox license fees, and voluntary fee arbitration if necessary. If negotiation or arbitration produce agreed-upon license fees, those fees will take precedence over the compulsory license fee set by the Copyright Royalty Tribunal. Only if negotiation and arbitration fail, will the Tribunal impose a compulsory license fee. The Berne Implementation Act also establishes new standards (in section 801) to be used by the Tribunal in setting compulsory jukebox fees, if it should have to do so.

Recordation of assignments

An amendment of interest to all copyright owners is one that eliminates an existing requirement (found in section 205(d)) that copyright transfers be recorded in the Copyright Office before infringement lawsuits may be filed by transferees. This requirement has been eliminated, because Berne generally prohibits mandatory formalities; and recordation of transfers was considered to be one type of prohibited formality.

The Copyright Office will still record transfers, and recordation still will be important, because in the event conflicting transfers are made, the question of which transferee has priority will still depend, as it long has, on whether and when the first transferee recorded its transfer. Recordation of transfers to obtain priority -- though a formality -- is not the type of formality that is prohibited by Berne.

Copyright notice no longer required

The most dramatic of the changes made by the Berne Implementation Act is the elimination of the requirement that published works bear a copyright notice. The notice requirement had to be eliminated, because notices that are a condition of copyright protection are a type of formality prohibited by Berne.

Prior to 1978 (the effective date of the current Copyright Act), omitting notice from copies of published works resulted in the automatic and incurable loss of copyright protection. This harsh result was softened significantly by the Copyright Act of 1976, which -- while still requiring notice -- permits omissions to be cured under certain specified circumstances (set forth in section 405). Nonetheless, since notice was still a requirement for copyright protection, and since copyright could be lost if the circumstances for curing the omission were not or could not be met, the notice requirement was a formality prohibited by Berne.

Though once the Berne Implementation Act becomes effective, copyright notices will no longer be required, notices will still be permitted. Moreover, those who continue to affix notices will enjoy one advantage over those who do not. If proper notice is affixed, and an infringement suit later becomes necessary, the defendant will not be able to successfully assert the defense that it was an innocent infringer in order to mitigate actual or statutory damages (as innocent infringers otherwise may under section 504(c)(2)).

Registration

The Copyright Act has long required registration of copyright claims with the Copyright Office before infringement suits could be filed. Since this requirement might be a type of formality that is prohibited by Berne, Congress decided that something had to be done about registration. Of course, mandatory registration could have been eliminated altogether. But the Copyright Office was opposed to doing so, at least in part because the collection of the Library of Congress comes from copies of works that are deposited with the Copyright Office at the time their copyrights are registered.

Instead of eliminating the registration requirement entirely, the Berne Implementation Act eliminates it only for works whose countries of origin are Berne members other than the United States itself. This is a permissible approach to the registration issue, because Berne's requirements must be satisfied only with respect to the protection of works from foreign (Berne-member) countries -- not with respect to domestic works.

In this respect, U.S. works are treated a little less favorably than foreign ones, because only U.S. works must have their copyrights registered before infringement suits may be filed. To offset somewhat this effect of the Berne Implementation Act, Congress improved the status of registered U.S. works (over their status under the current Copyright Act). Congress did so by doubling the statutory damages that may be awarded to the owner of a copyright that is registered before an infringement occurs. Until now, copyright owners could be awarded (under section 504(c)) statutory damages (in lieu of actual damages and profits) ranging from $100 for an innocent infringement, to $250 to $10,000 for an ordinary infringement, to $50,000 for a willful infringement. As a result of the Berne Implementation Act, statutory damages -- available to owners of copyrights that are registered before being infringed -- will range from $200 for innocent infringements, to $500 to $20,000 for ordinary infringements, to $100,000 for willful infringements.

Effective date

The amendments made to the Copyright Act by the Berne Implementation Act will take effect on the same date that' the United States' accession to the Berne Convention becomes effective. This will occur sometime in the first quarter of 1989. (The Berne Convention provides that its effective date for a new member is 90 days after the country notifies, in writing, the World Intellectual Property Organization in Geneva, Switzerland, that it has acceded to the Convention. The U.S. Senate ratified the Convention on October 20, 1988, but the exact date on which the necessary document was received by WIPO from the U.S. State Department is still unknown.)

Causes of action that arise before the effective date of the Berne Implementation Act are to be decided under the Copyright Act as it read when the, cause of action arose.

Moreover, foreign (Berne-member) works that already are in the public domain on the effective date of the Berne Implementation Act will not thereafter be protected in the U.S. In other words, works will not be retrieved from the U.S. public domain simply because the U.S. has joined Berne, even though some foreign (Berne-member) works may still enjoy copyright protection in their own or other foreign countries.

Moral rights

The Berne Implementation Act contains one provision that is significant for it does not do. The provision specifies that the Act does "not expand or reduce any right of an author" to claim what are commonly known as "moral rights" -- the right to claim authorship and the right to object to distortions of the work that would prejudice the author's reputation. The moral rights issue was the most controversial of all of the issues Congress had to consider in connection with Berne.

The reason Congress had to consider moral rights is that the Berne Convention (in Article 6bis) requires that authors be granted moral rights (in addition to other rights of an economic nature). Thus, in order to join Berne, Congress had to determine whether American law (in the Copyright Act or elsewhere) already provides the sort of moral rights required by Berne. If not, moral rights had to be added.

By coincidence, the issue of movie "colorization" came to the fore at the same time Congress was considering Berne. And opponents of colorization, including for example the Directors Guild of America, correctly realized that their position would be improved if an express moral rights provision were added to the Copyright Act. The Berne Implementation Act was the perfect vehicle for doing so, and at least one of the early Berne bills in fact contained a proposed moral rights provision.

However, a moral rights provision was opposed by the Motion Picture Association of America, and even more vigorously by a coalition of magazine publishers. They argued that American law already contains sufficient protection for moral rights to satisfy Berne's requirements. They cited, for example, the exclusive derivative work right in the Copyright Act (section 106(2)); principles of trademark law that prevent undisclosed mutilation of works (relied on with success by "Monty

Python" in Gilliam v. ABC, 538 F.2d 14 (2d 1976)); and certain principles of state law involving defamation, privacy, and unfair competition.

In the end, Congress concluded that current U.S. law does meet Berne standards, and that the question of whether to add express moral rights provisions to U.S. law should be considered later, separately from Berne.

Self-execution

Congress also had to decide how the Berne Convention is to relate to domestic copyright law. Some other countries, for example, have provided that the Berne Convention is itself a part of their domestic copyright laws, either by incorporating the text of Berne into their own laws, or by providing that the Berne Convention is "self-executing" within their borders. In those countries, parties may rely directly on the language of the Berne

Convention itself, as well as on the language of domestic statutes.

This approach was of course also available to the United States. Taking it, however, would have made the moral rights provision of Berne directly applicable in U.S. courts, and (theoretically at least) would have given precedential weight to foreign judicial decisions interpreting Berne. Congress was unwilling to have either of these consequences result from the U.S. joining Berne. And thus, the Berne Implementation Act clearly indicates that the Berne Convention is not to be self-executing in the U.S.

There is case authority supporting the notion that a treaty is not self-executing if Congress declares it is not -- despite Article VI of the Constitution which provides that the "Constitution...and all Treaties ... shall be the supreme Law of the Land." Nonetheless, since the authority is at the Circuit Court of Appeals level, the "self-executing" issue may be addressed someday by the Supreme Court; and if existing authority is held to be in error, the Berne Convention could become part of U.S. copyright law, lock-stock-and-barrel.

Benefits of Berne membership

The benefits to American copyright owners of U.S. membership in Berne are unlikely to be immediate or dramatic. The U.S. now will have, for the first time, copyright relations with two dozen countries that are not members of the UCC and with which the U.S. does not have bilateral treaties. These countries are not major markets for Americar. works. A few of them, however, may be home for major piracy operations that export their products to other countries where it is sold in direct competition with American-made or licensed products; and if so, Berne membership theoretically will help

American copyright owners to put a stop to piracy in those countries.

The real benefits from Berne membership are likely to arise in the foreign trade arena, where Berne membership enables the U.S. to assert, in trade negotiations, that other countries ought to adhere to Berne-equivalent copyright standards -- a position that other countries previously could and did reject on the grounds that the U.S. itself was not a Berne member.

GATT Negotiations

In addition to the Berne Implementation Act, Congress recently passed, and President Reagan signed, an entirely separate bill that also has copyright significance (ELR 10:4:11). That bill became the "Omnibus Trade and Competitiveness Act of 1988," and nestled within its 1100 pages is one provision (section 1101(b)(10)) that declares what U.S. policy is to be in connection with this country's participation in ongoing multinational trade negotiations concerning the General Agreement on Tariffs and Trade (commonly referred to as the GATT).

The GATT dates back to 1947 when the U.S. and 21 other countries met in Geneva to develop a framework for reducing then-existing trade barriers. Almost 100 countries are now parties to GATT, and periodically, negotiating "rounds" are conducted for the purpose of further reducing tariffs and non-tariff trade restrictions. In December, GATT members will meet in Montreal to plan an agenda for the next two years of negotiations.

The new Omnibus Trade Act declares that a U.S. objective in GATT negotiations is to seek the enactment by foreign countries of laws which recognize and adequately protect copyrights (and other forms of intellectual property). Moreover, the U.S. seeks to establish a

GATT-imposed obligation that members adopt intellectual property laws containing principles based on "the standards in existing international agreements that provide adequate protection." Insofar as copyright is concerned, the international agreement referred to almost certainly is the Berne Convention, and not the UCC -- thus demonstrating how critical it was that the U.S. join Berne itself.

In October of 1987 -- in apparent anticipation of this year's legislation -- the U.S. Trade Representative submitted to GATT a proposal for an intellectual property code that would become part of the GATT. (The U.S. Trade Representative, a Cabinet-level official, is the government's designated foreign trade negotiator. During the Reagan administration, the position has been held by Clayton Yeutter.) The U.S. proposal has been the subject of discussions within GATT for a full year. Now, following the passage of the Omnibus Trade and

Berne Implementation Acts, the Trade Representative has submitted to GATT a more detailed proposal for such a code, in the hopes that intellectual property will be put on the negotiating agenda when GATT meets next month in Montreal.

Copyright protection principles

The U.S. has proposed that the GATT be supplemented to require parties to provide copyright protection to foreigners in accordance with seven principles.

First, the proposal would require parties to grant copyright owners the exclusive right to copy, translate (or otherwise adapt), distribute (by sale or rental), import, and publicly communicate (except sound recordings) their works.

Second, the proposal calls for parties to extend copyright protection to all forms of original expression. All of the types of works mentioned in the U.S. Copyright Act are specifically enumerated in the proposal, as are computer programs of all kinds, "works created with the use of computers," and "works in forms yet to be developed."

Third, the proposal specifies that copyright protection should exist automatically, as soon a work is created, and that no formalities should be required in order to enjoy or exercise rights. Economic rights also are to be separately exploitable and transferable.

Fourth, limitations and exemptions to economic rights are not to exceed those permitted by the Berne Convention, and in any event, are not to impair the value of copyrighted works.

Fifth, the proposal suggests that compulsory licenses not be adopted if legitimate local needs can be satisfied by voluntary negotiations with copyright owners. Where necessary, compulsory licenses are to conform to those permitted by the Berne Convention; they are to be accompanied by laws that assure copyright owners the opportunity to be heard and prompt payment; and products produced pursuant to compulsory licenses are not to be exported.

Sixth, the proposal would require copyright protection for a term of not less than the life of the author plus 50 years (or 50 years from publication where the work is made-for-hire, anonymous or pseudonymous).

Seventh, countries that have not previously afforded "effective copyright protection" to foreign works are to be required to provide protection for preexisting works that are still protected in their country of origin.

The proposal also contains a detailed statement of the sorts of intellectual property enforcement procedures and remedies that should exist in the laws of GATT parties. The suggested procedures and remedies are similar to those found in U.S. law.

Perhaps the most interesting point in the proposal is its suggestion that a unique GATT mechanism for settlement of trade disputes involving goods between governments be applied in intellectual property cases involving infringements as well. Indeed, it is this suggestion that highlights one of the most important benefits that could be achieved by incorporating copyright into foreign trade law.

Benefits of incorporating copyright into trade law

The notion of making copyright protection a GATT subject has not been greeted with acclaim throughout the world. The European Community and Japan appear to support the idea. But other countries, especially developing countries, do not. They have argued that GATT concerns trade in goods only, and should not be expanded into the intellectual property area. Copyright, they say, is the proper domain of the World Intellectual Property Organization (the organization that administers Berne and other intellectual property conventions).

The U.S. acknowledges that WIPO has special expertise in the copyright area. But, good as Berne is, it has one major weakness. The only remedies it provides are those available to copyright owners in infringement suits brought against alleged infringers in the country where the infringements occurred. Berne does not, in other words, have a procedure for a copyright owner's country to deal directly with an infringer's country in order to compel the infringer's country to take action against the infringer. Not surprisingly, American copyright owners have found that foreign judges tend to resolve the slightest doubts in favor of their own countrymen, and against U.S. copyright owners, even when (by U.S. standards) the judges' own countrymen are mere copyright pirates.

While theoretically at least, Berne itself could be amended to provide a country-to-country dispute resolution procedure, the question of remedies would remain a difficult if not impossible one. What remedy, after all, could be awarded against a country that failed to abide by its copyright obligations? Such a country could be ejected from Berne, thus denying its authors copyright protection in other countries such as the U.S. But that remedy is of little practical benefit in a world where the production of copyrighted works occurs primarily in certain countries while piracy occurs in primarily in others. The piracy havens of the world export few if any copyrighted works; and thus depriving their authors of copyright protection in other countries does them no harm.

On the other hand, the U.S. does import manufactured goods from countries that do not provide adequate copyright protection for U.S. works. And the ability to sell such goods to the U.S., restricted as little as possible by tariffs and quotas, is important to those countries. If GATT contained an intellectual property code, it is likely that most countries of the world would comply with it, if the penalty for non-adherence were the loss of GATT trade concessions with respect to the export of their goods. Bluntly put, if trade sanctions could be applied by the U.S. (without violating its own GATT obligations) to countries that have not adequately protected U.S. copyrights, the degree of protection afforded to U.S. copyrights by those countries is likely to increase dramatically.

The trade sanction strategy for improving protection for U.S. copyrights abroad is so attractive, that Congress has not waited for the outcome of GATT negotiations to put the strategy in place.

MPEAA Complaint vs. South Korea

One provision of the new Omnibus Trade and Competitiveness Act authorizes the United States Trade Representative to take certain actions against those countries whose laws do not provide "adequate and effective protection of intellectual property rights" or which deny "fair and equitable" market access to U.S. businesses (sections 1301-1303). The actions authorized include suspending trade benefits otherwise available to offending countries, and imposing import restrictions on goods from such countries.

While the Trade Representative may initiate investigations on its own, the Omnibus Trade Act also provides a procedure by which "interested persons" may petition the Trade Representative to initiate an investigation.

The first such petition was filed against South Korea last September -- almost before the ink was dry on President Reagan's signature on the Act -- by the Motion

Picture Export Association of America. The MPEAA (the international arm of the Motion Picture Association of America) represents Buena Vista (Disney), Columbia, MGM/UA, Orion, Paramount, Twentieth Century Fox, Universal and Warner Bros. In its petition, the MPEAA alleged that: South Korea does not protect American copyrights in movie videos; that Korea imposes de facto quotas on the import of foreign films; and that Korea had prohibited MPEAA members from successfully establishing and operating distribution offices in that country.

The dispute between American and Korean film distributors is a long-standing one. For some time, it has been Korea's practice to require American film distributors to enter into flat-fee sub-distribution agreements with Korean distributors. Apparently flat-fees were admittedly designed to let Korean distributors retain the majority of the profits from American movie exhibition.

The practice was justified on the grounds that it was necessary for Korea to subsidize the production of Korean films using profits from the showing of American films, and that the control of American film exhibition was necessary to retain Korea's unique culture.

Two years ago, the MPEAA filed a petition with the U.S. Trade Representative, similar to the one it filed in September. Following negotiations, the Koreans agreed to modify their practices and to permit American film companies to distribute movies themselves in Korea, without using subdistributors. In response to that 1986 agreement, United International Pictures (a joint-venture of Universal, Paramount and MGM/UA) opened an office in Seoul and directly distributed its first film, "Fatal Attraction," earlier this year. Even before the movie opened, however, Korean exhibitors were threatened with boycotts and violence, allegedly by Korean distributors. (Indeed, when the movie did open, it was greeted with violent demonstrations which the Korean government did little if anything to control. Korean newspapers refused to print ads for the movie, and Korean labs refused to make and subtitle prints.)

The MPEAA's September petition complained of the threatened boycotts, as well as de facto quotas stemming from inadequate film import procedures and print limits. The petition also complained of high Korean tariffs and taxes, and of the Korean government's failure to prevent piracy of American videos, despite its earlier agreement to do so. The MPEAA estimates that 70 percent of the videos in Korea are pirated copies of American movies.

The U.S. Trade Representative again negotiated with the Koreans, and again -- according to the MPEAA itself -- reached a settlement "resolving the differences between Korea and the U.S. film industry." Korea has assured American film distributors that it will eliminate its limitation on the number of prints in circulation, that it will insure that its import procedures will not act as a bottleneck to restrict imports, and that it will take prompt and effective action to stop demonstrations and boycotts by Koreans aimed at preventing American companies from distributing American films in Korea. (Settlement of the video piracy issue was not addressed in the news release distributed by the MPEAA or by the Trade Representative.)

Whether this year's settlement works any better than the 1986 agreement did remains to be seen. Only days after the settlement was announced in Washington, D.C., two South Korean movie trade associations filed petitions of their own in Seoul, with Korea's Economic Planning Board. The petitions ask the Korean Board to prevent United International Pictures from distributing movies in Korea, on the alleged grounds that UIP is a monopoly and engages in unfair trade practices.

Clearly, the final chapter in the story of Hollywood's role in the Korean movie marketplace has yet to be written. Even when it is, however, that story will only be one part of the much larger story of America's new role in the international protection of copyrights.

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[ELR 10:6:3]

RECENT CASES

Court of Appeals amends its opinion in case involving Paramount Pictures' use of copyrighted song in videocassettes of "Medium Cool," but continues to hold that use was an infringement

The Federal Court of Appeals decision in Cohen v. Paramount Pictures Corp., (845 F.2d 851) (ELR 9:12:3) has been amended. The court, describing Cohen's copyright infringement action against Paramount Pictures in connection with the allegedly unauthorized use of the song "Merry-Go-Round," had referred to the use of the song in a videocassette reproduction of the film "Medium Cool;" the amended opinion refers instead to the use of the work in a "reproduction of the film in videocassettes distributed for home display."

The Court of Appeals also apparently expanded the basis of the District Court's decision so as to include in its review "the application of contract law" as well as an analysis of the contract language.

And, in describing the terms of the 1969 syndication license granted to H&J Pictures by copyright owner Herbert Cohen for the use of the song in the film

"Medium Cool," the court noted that the license granted H&J the authority (subject to the terms, conditions, and limitations set forth in the license) "to make copies of such recordings and to perform said musical composition everywhere;" the quoted language did not appear in the original opinion of the Court of Appeals. The Court of Appeals then stated that the license extended to the exhibition of the motion picture to audiences in motion picture theatres "and other places of public entertainment where motion pictures are customarily exhibited..."

The section of the original opinion discussing the limitation on the licensee's right to use the song was amended. Paramount argued, in part, that the distribution of videocassettes through sale and rental to the general public for in- home use was equivalent to "exhibition by means of television." The court again did not agree with Paramount, stating, in the amended opinion, that although Paramount had "the limited right to authorize broadcasters and cable television companies to broadcast the movie over the airwaves or to transmit it by cable, microwave, or some such means from a central location, (t)he words of that paragraph must be tortured to expand the limited right granted by, that section to an entirely different means of making that film available to the general public - the distribution of individual videocassettes to the general public for private 'performances' in their homes."

Judge Hug continued by pointing out that "the general tenor of the section contemplates some sort of broadcasting or centralized distribution, not distribution by sale or rental of individual copies to the general public." And while videocassettes may be "exhibited" (as distinguished from the use of the word "displayed" in the original opinion), by using a television monitor, it did not follow, according to the court, that for copyright purposes, playing videocassettes constitutes "exhibition by television."

Returning to the path of the original opinion, the court described the differences between exhibition of a film on television and via videocassette, and discussed the significance of the fact that videocassette recorders for home use were not known or invented in 1969. The license reserved to Cohen "all rights and uses in and to said musical composition, except those herein granted to the licensee..." As in the original opinion, Judge Hug stated that this language operated to preclude uses not then known to, or contemplated by the parties. The amended opinion added the following sentences: "Thus, by its terms, the contract did not convey the right to reproduce and distribute videocassettes. That right, having not been granted to the licensee, was among those that were reserved."

The court's holding remained the same - the license did not give Paramount the right to use the composition "Merry-Go-Round" in connection with videocassette production and distribution of the film "Medium Cool." The District Court's award of summary judgment in favor of Paramount was reversed.

The court rejected an argument in the petition for rehearing claiming that videocassette exhibition did not constitute a public performance and thus was not subject to the limitations of the license.

Cohen v. Paramount Pictures Corp., No. CV-85- 1164 (July 22, 1988) [ELR 10:6:10]

Personal manager's breach of contract action and fraud claims against members of The Monkees music group are dismissed, but trial is ordered on quantum meruit claim

A New York trial court has dismissed two causes of action in a lawsuit brought by David Fishof against David Jones, Michael Dolenz, and Peter Tork (three-quarters of the music group known as "The Monkees"). Fishof alleged that in late 1986, after he had organized and produced a reunion tour of the three performers, they agreed to give Fishof a two year, fifteen percent gross management contract; in return, Fishof agreed to give up ten percent of his anticipated share of the net revenues from the second part of a world tour. Fishof eventually released about $155,000 to the performers, but claimed, in part, that the performers failed to pay him commission fees amounting to about $274,000.

Judge Stecher refused to grant The Monkees motion to dismiss the claim on the ground that Fishof was acting as an unlicensed agent, finding that issues of fact were present as to whether Fishof was involved in seeking employment for the performers.

In response to The Monkees' contention that the statute of frauds required the dismissal of Fishof's causes of action for breach of contract, Fishof asserted part performance of the contract, and the existence of certain writings memorializing the contract. Judge Stecher described the writings as "self-serving, disconnected papers," and stated that the several unsigned drafts for a personal management contract indicated only that the parties did not intend to be bound without a signed contract. Furthermore, the alleged part performance did not unequivocally refer to the two year contract alleged by Fishof. The cause of action for breach of contract was dismissed accordingly, as was Fishof's cause of action alleging that The Monkees fraudulently induced Fishof to release a share of his 1986 revenues - the claim relied on a contract void under the statute of frauds.

Fishof apparently will be allowed to proceed on his claim in quantum meruit alleging that the fifteen percent gross management fee was reasonable and customary in the music business.

Judge Stecher concluded by declining to rule on Fishof's motion seeking an attachment pending the report of a referee, and by continuing a previously entered temporary restraining order pending the resolution of the application for an attachment.

Fishof v. Jones, New York Law Journal [Nov. 1988] [ELR 10:6:11]

Investors' suit against Dino De Laurentiis Corporation alleging breach of contract and fraud during negotiations for acquisition of Embassy Pictures is dismissed

A New York appellate court has dismissed an action brought by a group of investors who sought, unsuccessfully, to acquire Embassy Pictures, a subsidiary of the Coca-Cola Company.

During the course of negotiations with Coca- Cola, the group at one point proposed the formation of a joint venture with another bidder, the Dino De Laurentiis Corporation. The investment group and De Laurentiis executed a confidentiality agreement requiring each party to refrain from using confidential information obtained from the other, during any unilateral negotiations with Coca-Cola. However, the parties did not realize the joint venture, and De Laurentiis, on its own, eventually purchased Embassy Pictures.

The investment group failed to obtain a preliminary injunction barring the purchase. In the amended complaint in issue, the group sought, in part, $35 million in damages for the alleged breach of the confidentiality agreement.

The appellate court found that the vague and conclusory allegations of the complaint were insufficient to sustain a cause of action for breach of contract; the investment group did not identify any confidential information provided to De Laurentiis other than its proposal to Coca-Cola and the financial due diligence with respect to Embassy. The court observed that such information was not confidential or secret since Coca-Cola already possessed the information before the group disclosed it to DeLaurentiis. And the investors did not demonstrate how De Laurentiis' alleged breach of the confidentiality agreement caused any injury to the group - the complaint contained only "boilerplate" allegations of damage, stated the court.

The second cause of action alleged fraud based on De Laurentiis' purported misrepresentation to the investment group that it would not use confidential information obtained from the investors to negotiate with Coca-Cola. The court found the cause of action insufficient since it merely restated the breach of contract claim in terms of fraud and misrepresentation.

The appellate court concluded by finding that the trial court also should have dismissed a cause of action alleging that De Laurentiis misrepresented that it would not directly negotiate a separate unilateral deal with Coca-Cola, and that the investors relied to their detriment on this representation and refrained from further dealings of their own with Coca- Cola. The essential element of injury could not be inferred by the conclusory allegations of the investment group's complaint and such allegations therefore were insufficient to establish a claim in fraud.

Gordon v. Dino De Laurentiis Corporation, 529 N.Y.S.2d 777 (N.Y.App. 1988) [ELR 10:6:11]

Producers of film featuring Traci Lords in sexually explicit activity may raise mistake-of-age defense in criminal prosecution under child pornography statute

In 1984, James Marvin Souter, Jr. hired 16 year old Traci Lords to appear in the film "Those Young Girls." The film, which was produced by Ronald Renee Kantor and Rupert Sebastian McNee, depicted Lords engaging in sexually explicit conduct.

The government charged Kantor, McNee and Souter with violating section 2251(a) of the Protection of Children Against Sexual Exploitation Act of 1977; the statute prohibits the production of material depicting a minor engaged in sexually explicit conduct. The Kantor parties sought to introduce evidence that Lords misled the adult film industry into believing that she was an adult.

A Federal District Court ruled that neither the statute, nor due process, nor the First Amendment required the government to prove that the Kantor parties knew that Lords was a minor. However, the court also found that strict liability was not warranted and that evidence of a reasonable mistake of fact defense would be allowed (ELR 9:10:11; 9:12:18).

Federal Court of Appeals Judge Alex Kozinski, stating that the District Court's order raised a new and important issue of first impression, began by observing that knowledge of a minor's age was not necessary for conviction under section 2251(a). The statute provides that "Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in ... any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (d), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce..."

It was not argued that "Those Young Girls" was obscene; the film was entitled to First Amendment protection except for its depiction of a minor. Judge Kozinski pointed out that the age of the subject thus seemed to define the boundary between speech that was constitutionally protected and speech that was not, and declared that a party may not be subject to strict liability for misjudging "the precise location of that boundary."

The Kantor parties proposed to present photographic and testimonial evidence that Lords appeared physically mature when she made the film; that her demeanor, sophistication and apparent sexual experience did not seem representative of a 16 year old; and that Lords used photographic identification and other official documents, as well as release forms and statements from her agent and others to misrepresent her age. The proposed evidence also included the photographs of Lords used in two men's magazines which, according to industry custom, reliably investigated the age of their models; Lords' prior and subsequent appearances in other X-rated films; and the fact that despite Lords' renown, no one suggested that she was a minor until two years after the release of the film in issue.

The prospect of facing up to ten years in prison and a $100,000 fine for each count would be a "sobering thought" for producers wishing to cast young adults in sexually explicit films and other materials. In all, imposing criminal sanctions on the basis of strict liability, particularly when a party has formed a reasonable good faith belief that he/she is engaged in protected First Amendment activities, would "choke off protected speech," stated the court. Judge Kozinski emphasized that "Speech shielded by the amendment's protective wing must remain inviolate regardless of its inherent worth. The distaste we may feel as individuals toward the content or message of protected expression cannot... detain us from discharging our duty as guardians of the Constitution."

The court concluded by finding that allowing a narrow mistake of age defense would enable the statute to avoid constitutional infirmity and would not hamper the statute's "vital effort" to protect minors from sexual abuse. Judge Kozinski cautioned that a party might avoid conviction only by showing, by clear and convincing evidence, that he/she did not know, and could not reasonably have teamed, that the actor or actress was under 18 years of age.

The District Court's order was vacated accordingly and the court was instructed to conduct further proceedings consistent with the opinion of the Federal Court of Appeals.

In dissent, Judge Robert R. Beezer suggested that the court should have weighed the government's interest in protecting children from sexual exploitation against the possibility of inhibiting expression protected by the First Amendment. In Judge Beezer's view, the balance was "sharply" in favor of upholding section 2251(a) as written. The statute was intended to protect children who try to pass as adults to appear in pornography, particularly by not allowing a minor's "guile" to create a reasonable mistake excuse. For Judge Beezer, "pornographers must take whatever steps are necessary to establish the age of the subjects they depict - or they must employ different subjects."

Furthermore, in this case, the expression purportedly threatened was mainly pornography depicting adults; section 2251(a) did not pose a substantial threat of chilling such expression, stated Judge Beezer, and the First Amendment thus did not require a reasonable mistake defense.

United States of America v. United States District Court, Case No. 88-7053 (9th Cir., Sept. 29, 1988) [ELR 10:6:14]

Conviction of adult film producer on charges of pandering is reversed by California Supreme Court; applying pandering statute when producer paid actresses to appear in nonobscene films was unconstitutional

The California Supreme Court has reversed the conviction of adult film producer Harold Freeman on charges of violating Penal Code section 266i in connection with paying actors to perform in a nonobscene film which portrayed sexually explicit acts. The court ruled that the pandering statute was not intended to apply to Freeman's conduct.

As described at ELR 8:10:16, Freeman, in September 1983, produced and directed the film "Caught from Behind, Pan II." The performers in the film engaged in various sexually explicit acts. Subsequently, Freeman was charged with five counts of pandering (apparently based solely on the conduct of the female performers). After a jury trial, the producer was found guilty on all five counts. Freeman was placed on five years probation and ordered, as conditions of probation, to serve 90 days in the county jail and pay restitution of $10,000 as well as a $100 restitution fine.

It was clear to the court that because the film was not determined to be obscene, the prosecution of Freeman under the pandering statute was "a somewhat transparent attempt at an 'end run' around the First Amendment and the state obscenity laws." Judge Marcus Kaufman pointed out that in order to constitute prostitution, the money or other consideration involved in a procurement transaction must be paid for the purpose of sexual arousal or gratification (emphasis by the court). In the instant case, the payment of action fees to the actors was the only payment involved. Freeman thus did not engage in either the requisite conduct nor did he have the requisite mens rea or purpose to establish procurement for purposes of prostitution, stated Judge Kaufman.

Even if Freeman's conduct was found to be within the definition of "prostitution," the application of the pandering statute to the' hiring of actors to perform in a nonobscene film would impinge unconstitutionally upon First Amendment values, ruled the court. If section 266i were applied as suggested by the prosecution, it would include "films of unquestioned artistic and social merit, as well as films made for medical or educational purposes." Prosecuting a film producer for making a nonobscene film would not assist efforts to combat prostitution. Furthermore, the acts of alleged prostitution in this case were not crimes independent of and apart from the payment for the right to photograph the performance of the actors in a nonobscene film.

According to news reports, the court's decision has resulted in the dismissal, by the San Diego County District Attorney, of pandering charges against Ronald Jeremy Hyatt, a producer for Video Exclusions of Hollywood.

People v. Freeman, Case No. S000070 (Cal., Aug. 25, 1988) [ELR 10:6:15]

Jury verdict resulting in treble damages of $225,000 in antitrust action brought by Connecticut film exhibitor are reinstated by Court of Appeals

A Federal Court of Appeals has reinstated a jury verdict resulting in treble damages of $225,000 to William Auwood and Neal S. Ossen, as trustees in bankruptcy for Liberty Theatre Corporation, in an antitrust action against the Harry Brandt Booking Office, Groton

Cinema, Inc., and United Artists Communications. A Federal District Court in Connecticut had reduced the jury's damage award to $3.00.

Liberty operated a movie theater in Uncasville, Connecticut from 1976 until 1981 when the theater declared bankruptcy. In 1979, Liberty and Auwood sued several theater chains and film distributors, alleging that the parties had agreed to allocate the rights to license first- run films among the exhibitor parties to the agreement.

The jury found that Brandt, Groton, and UA Communications had engaged in a conspiracy, combination, or agreement which was intended to and did constitute an unreasonable restraint of trade, and thereby adversely affected Liberty's opportunities to obtain a fair allocation of first-run films.

In response to specific interrogatories, the jury found that as of June 1977, it would have been futile for Liberty to attempt to obtain first-run films in open bidding.

The jury then determined that Liberty was entitled to compensation for actual losses sustained, as proximately caused by the Brandt parties, in the following amounts: $3,000 for the years 1976-1977; $67,000 for the years 1978-1981; and $5,000 for the years 1982-1985; the amounts were designated "nominal" by the jury.

In response to a motion by UA Communications and Groton Cinema for judgment notwithstanding the verdict with respect to liability, or, alternatively, the entry of judgment in the amount of $3, representing $1 in nominal damages, trebled, the District Court agreed to limit Liberty's recovery of damages to $3. The court concluded that the jury could not have intended its award as compensatory damages; that, as a matter of law, $75,000 was not a nominal sum; and that the nominal damage award should be limited to $1.

Federal Court of Appeals Judge Kearse found that the evidence was sufficient to permit the jury to infer that there existed a conspiracy to allocate first-run films; that Brandt, Groton and UA Communications were parties to the conspiracy; and that the operation of the conspiracy caused injury to Liberty. The District Court properly denied the motion of the Brandt parties for judgment notwithstanding the verdict, stated Judge Kearse.

A new trial on the issues of damages was not warranted, stated Judge Kearse, and although the District Court's charge on nominal damages was "undoubtedly incomplete and confusing," the damages specified by the jury should have been allowed to stand. In the view of the District Court, the jury had expressly found that Liberty failed to prove damages; but no such express question had been posed to the jury. Given the lack of clarity in the District Court's instructions, the jury most likely determined that in the absence of anticompetitive conduct by the Brandt parties, Liberty might have avoided most of the claimed losses, but that the exhibitor did not adequately show that it would have made a profit. It was not clear to Judge Kearse that by attaching the term " nominal" to the dollar figures specified, the jury meant to indicate that it found that Liberty had proven no actual quantifiable losses whatever.

The jury may have intended to find that Liberty did not prove all of the $218,610 in losses claimed, but had proven a minimum of $75,000, and/or the jury may have believed that such a fraction of the total claim was what the court meant by minimal or nominal.

After the $75,000 award is trebled, the Brandt parties may be credited with an amount to be determined by the District Court based on the payments made to Liberty in settlement of its claims against other alleged coconspirators.

Auwood v. Harry Brandt Booking Office, Inc., 850 F.2d 884 (2d Cir. 1988) [ELR 10:6:15]

Texas Supreme Court grants summary judgment to radio station in listener's suit seeking $25,000 promotional payment

After lengthy proceedings (see ELR 10:1:13, 8:7:20), the Texas Supreme Court, in a per curiam opinion has granted summary judgment to radio station KSCS in an action brought by listener Steve Jennings.

The court agreed with a trial court ruling that Jennings' affidavit in opposition to KSCS' motion for summary judgment did not disclose the basis upon which Jennings had personal knowledge of the facts asserted. Jennings claimed that the records played by KSCS on the air were sent to the station, without charge, by or on behalf of record companies; that the records constituted valuable consideration; and that in return for such consideration, the station announced the names of the record company's songs and singers. According to Jennings, the announcements interrupted the playing of three songs in a row, and KSCS therefore was obligated to pay him $25,000 in accordance with a promotional scheme "guaranteeing" the playing of three songs in a row without commercial interruption.

Jennings' affidavit did not disclose how he acquired personal knowledge of the business practices of record companies or of KSCS, noted the court. Jennings did not claim to have worked for a radio station or record company, and although he stated that he had done some "promotional work" for a musician, Jennings did not explain how such a relationship gave him personal knowledge of the facts alleged.

The court, accordingly, granted KSCS' application for a writ of error, reversed the judgment of the appellate court and affirmed the judgment of the trial court; a petition for rehearing was denied.

Radio Station KSCS v. Jennings, 750 S.W.2d 760 (Tex. 1988) [ELR 10:6:16]

President of Asian language video cassette distributor is entitled to visa as a temporary worker of "distinguished merit and ability"

When Hong Kong T.V. Video Program, Inc. submitted a visa petition to the Immigration and Naturalization Service to classify See Soo Chuan as a temporary worker of "distinguished merit and ability," the INS denied the petition. Chuan planned to work as the president and chief executive officer of Hong Kong, but the INS stated that a president and chief executive officer was not a member of a profession, that Chuan was not a professional because he did not have a university degree, that the person holding the title in issue was not required to be preeminent, and that Chuan was not preeminent in his field.

In reviewing the INS decision, Federal District Court Judge Schwarzer first noted that Hong Kong T.V. Video Program was the largest Asian language video cassette distributor in the United States. Chuan had twenty years of experience in business, and, as Hong Kong's president, was responsible for corporate financial planning, marketing and promotional strategy videotape anti-piracy technology, and other high level decisions involving technical, legal and financial matters.

Section 101(a)(15)(H)(i) of the Immigration and Nationality Act sets forth a distinguished merit and ability test in order for an alien to obtain an H-1 nonimmigrant visa. Judge Schwarzer observed that the statute did not support the INS' conclusion that, to qualify as a profession, an occupation must require at least a baccalaureate degree. It was further noted that the INS itself has not consistently required a degree as a prerequisite to classifying occupations as professions. Given the complexity of the duties alone, the INS' determination in this case that the position of president and chief executive officer was not a profession simply because it did not require an academic degree was based on an erroneous interpretation of the statute, was in conflict with its own prior interpretation of the statute, and was arbitrary and capricious and unsupported by substantial evidence, as was the determination that Chuan lacked the equivalent of a university degree.

Judge Schwarzer, stating that it was unnecessary to consider whether Chuan would qualify on the basis of preeminence, granted Hong Kong's motion for summary judgment and ordered the INS to issue the visa petition as requested.

Hong Kong T.V.Video Program, Inc. v. Ilchert, 685 F.Supp. 712 (N.D.Ca. 1988) [ELR 10:6:17]

Purchaser of unauthentic nineteenth century painting is entitied to recover purchase price

A New York trial court has ruled that the Robert Miller Gallery was entitled to recover from Shepherd Gallery Associates the $25,000 purchase price, plus interest, for a painting entitled "Woman By the Sea Behind a Basket of Oranges," purportedly painted in about 1884 by the artist Puvis de Chavannes. Robert Miller purchased the painting in early 1985, but subsequently obtained an art historian's opinion that the painting was not authentic; Miller then returned the painting to the Shepherd Gallery.

The court agreed with the art historian's testimony that the technique and coloring of the painting in issue did not reflect the work of Puvis de Chavannes. The Shepherd Gallery had included an express warranty in its invoice to Robert Miller stating the name of the painter of the work. Furthermore, the gallery held itself out as an expert on nineteenth century European painting; the Robert Miller Gallery did not specialize in this area, and purchased the Puvis de Chavannes work relying on the express representation that the painting was genuine. Under the Uniform Commercial Code, the statements on the invoice also were implied warranties that the painting was genuine.

Robert Miller did not show that the market value of a genuine Puvis de Chavannes painting would have been

$60,000 or that the Shepherd Gallery acted negligently or maliciously, concluded the court.

Robert Miller Gallery, Inc. v. Shepherd Gallery Associates, Inc., New York Law Journal, p. 22, col. 6 (N.Y.Cnty., Sept. 23, 1988) [ELR 10:6:17]

NEW LEGISLATION AND REGULATIONS

Major League Baseball Players Association adopts regulations governing player agents

The Major League Baseball Players Association (MLBPA) has adopted a program for the regulation of player agents. In doing so, it joins the National Football League Players Association which adopted an agent regulation plan in 1983 (ELR 5:10:3) and the National

Basketball Players Association which adopted such a plan in 1986 (ELR 8:2:3). (The National Hockey League Players Association has not adopted agent regulations.)

The MLBPA plan is similar in certain respects to those of the NFLPA and NBPA, but it is by no means a carbon copy of them. The baseball plan requires "certification" of agents who represent Major League players, just as the other Player Association plans require certification of agents who represent their members. But the MLBPA will certify only those agents who actually have been retained by a Major League player at the time application for certification is made. In other words, unlike the practice in football and basketball, agents without baseball clients cannot become certified.

The MLBPA bases its authority to regulate player agents on the National Labor Relations Act and on a provision of Major League Baseball's 1985 collective bargaining agreement which permits players to be represented in individual contract negotiations by an agent, " provided" the agent has been "certified to the Clubs" by the MLBPA "as authorized" for that purpose.

To become certified, agents must complete a written application on a lengthy form provided by the MLBPA.

The MLBPA has reserved the right to deny, or later revoke, certification on a number of grounds, including finding that the applicant has misappropriated funds or otherwise breached a fiduciary duty.

Agents who become certified are then required to do a number of things. They must, for example, provide their player-clients with annual statements of itemized fees and expenses. They must attend annual educational seminars conducted by the MLBPA. And they must advise the MLBPA of violations of a player's contract or the collective bargaining agreement committed by a team, league or the Commissioner's office.

Agents also are prohibited from doing a number of things. They are not, for example, allowed to give anything of value to players (or anyone else) to induce players to retain them. They are not permitted to own an interest in any Major League baseball club. Nor are they permitted to represent Major League Baseball,; either of its leagues, any of its teams, or management level employees or officials, without the written consent of the MLBPA.

Contracts between agents and baseball players must be in plain, understandable language -- and if the player's principal language is not English. the player must be provided with a translation of the contract into his own language. Such contracts may not exceed one year in duration. And if an agent-player contract was entered into before the player began playing in the Major Leagues, the contract is not enforceable unless reexecuted by the player after he makes the Majors.

The MLBPA plan does not set the amount of the fee that an agent may charge for salary negotiations. But the plan does provide that (except in the case of professional free agents) an agent may not charge a fee unless the player's salary exceeds the collectively bargained for minimum, nor (in cases where the salary does exceed the minimum) may the fee charged reduce the player's net salary to less than that minimum.

Disputes between agents and players, and disputes concerning certification of agents, must be resolved by arbitration pursuant to procedures set forth in some detail in the MLBPA plan.

The MLBPA agent regulation plan became effective June 17, 1988. (Requests for copies of the regulations and certification-application forms should be directed to the MLBPA's office, marked "Attention: Agent Certification," at 805 Third Avenue, New York, N.Y. 10022.) [Nov. 1988] [ELR 10:6:18]

Player agent regulation statutes enacted in Florida and Mississippi

Two more states -- Florida and Mississippi -- have enacted statutes regulating the activities of player agents. These two now bring the total number of states with such laws on their books to 14. The first state to regulate player agents was California in 1981 (ELR 5:10:3). It was followed by Oklahoma in 1985 (ELR 8:2:3); Texas, Louisiana and Alabama in 1987 (ELR 9:8:7); and Georgia, Indiana, Iowa, Kentucky, Minnesota, Ohio and Tennessee earlier this year (ELR 10:2:5).

Florida

Florida's statute requires registration by all agents who represent (or seek to represent) student athletes who participate in intercollegiate athletics for any college or university in Florida. Registrations, which must be renewed every two years, are to be with, and on forms to be provided by, the state Department of Professional Regulation, which is authorized to charge a fee of not more than $50. Acting as an agent without being registered is a third degree felony.

Student athletes who enter into contracts with agents are required to notify the athletic directors or presidents of their colleges within 72 hours of doing so (or prior to practicing for or participating in any athletic event), if the college is a member of the NCAA, the NAIA or the NJCAA. Student athletes who sign professional sports employment agreements must do likewise. A student athlete's failure to provide such notification is a first degree misdemeanor.

Agents also are required to notify athletic directors or presidents upon signing a student athlete. An agent's failure to do so is a third degree felony.

Athlete-agent contracts must contain a designated legend near the student's signature warning student athletes that they may lose their collegiate eligibility by signing the contract, and informing them they must notify their athletic director or college president that they have done so.

If the required notifications are not given, the athlete-agent contract is void. And the athlete and the agent are made liable for damages the athlete's college may suffer by reason of the athlete's subsequent ineligibility. In addition to such damages, the statute also authorizes the college to recover three times the value of any athletic scholarship the athlete may have received.

Student athletes are given 10 days to rescind an agent contract. Postdating of contracts is prohibited. And agents are prohibited from offering anything of value to college employees for referrals, or to athletes as an inducement.

The statute was enacted as Chapter 88-229 and became effective on October 1, 1988.

Mississippi

Mississippi's statute prohibits unregistered agents from contacting, directly or indirectly, student athletes enrolled in Mississippi colleges that are members of the NCAA or NAIA, as well as Mississippi-resident athletes under 21 years of age. Agents who wish to represent such athletes in contract negotiations with professional sport teams, as well as agents who wish to provide financial services (including services relating to investment decisions), are to register annually with (and on forms provided by) the Mississippi Secretary of

State. The annual fee is $50. (Mississippi lawyers are exempt from the registration and fee requirements, but must otherwise comply with all other provisions of the statute.)

In addition, those agents who provide financial services must post a $100,000 bond. (No such bond is required if the agent merely seeks employment for athletes and negotiates their employment contracts.)

Agents are prohibited from doing a number of things, including offering anything of value to college employees for referrals, and entering into contracts with or giving anything of value to athletes until their collegiate eligibility has expired. Postdated contracts are prohibited.

The statute permits Mississippi colleges to sponsor athlete agent interviews on campus during an athlete's final year of eligibility. If colleges do so, agents may talk to college athletes at that time concerning future representation. The statute is ambiguous about whether registered agents may discuss future representation with athletes, if colleges chose not to sponsor on-campus interviews. One section suggests not; but elsewhere, the statute seems only to prohibit entering into representation agreements, not mere discussion.

Violation of the statute is an offense punishable by a fine of as much as $10,000 or two years in prison or both.

The statute also provides that if an athlete is declared ineligible by the NCAA or NAIA as a result of contacts with an agent that violate NCAA or NAIA rules, the athlete's college may recover its damages from the athlete's loss of eligibility and the cost of the athlete's scholarship.

The statute was enacted as Chapter No. 533 and became effective July 1, 1988, though agents were not required to comply with it until October 1, 1988. [Nov. 1988] [ELR 10:6:18]

Florida amends its Talent Agencies Act; agents and actors question state's jurisdiction and law's constitutionality

Florida's Talent Agencies Act regulates any person or corporation engaged "in the occupation of operating an agency, bureau, office, or other place for the purpose of procuring or attempting to procure engagements..." for artists seeking employment in motion pictures, television shows, theatrical productions, or other specified entertainment activities. The Department of Professional Regulation has the authority to issue licenses, as well as to deny license applications, and to supervise the conduct of licensed agencies.

The Act, in part, requires any person, firm, or corporation engaged in the occupation of a talent agency in the state to procure a license. The California-based Association of Talent Agents and the Screen Actors Guild in Florida have challenged the jurisdiction and constitutionality of the Act, apparently claiming that the state improperly would require out-of- state talent agents, seeking to arrange work in Florida for their clients, to maintain an office in Florida, or to affiliate with a Florida talent agency.

Florida Talent Agencies Act, Fla.Stats. sec. 468.401 et seq., as amended by Senate Bill No. 658, Chapter 87-325 [Nov. 1988] [ELR
10:6:20]

Congress passes, and President signs, Berne Convention Implementation Act

Last month, Congress passed the Berne Convention Implementation Act of 1988, and President Reagan signed it in a ceremony in Beverly Hills. Passage of the Act enables the United States to join the Berne Union and to become a party to its international Convention for the Protection of Literary and Artistic Property. The Act makes several changes to the Copyright Act of 1976, which are described in this issue's "Legal Affairs" article (ELR 10:6:3).[Nov. 1988] [ELR 10:6:20]

Canada amends its Copyright Act

Canada recently amended its 64-year-old Copyright Act. The new legislation grants copyright protection to computer programs, defining them as literary works eligible for full protection for the life of the creator plus 50 years. However, the Act provides that the lawful owners of a program may alter it to suit their personal needs or adapt it, and allows the creation of limited back-up copies.

According to a news report, infringing the copyright on commercial films, records and computer software will be punishable by fines of up to $1 million (Canadian) and jail terms of up to five years. Individuals summarily convicted of distributing or importing for sale pirated copies of copyrighted works will face maximum fines of $25,000 and prison terms of up to six months; the previous maximum penalty was $200 per transaction.

The Act sets forth standards to determine whether an article should be protected by copyright, as a work of industrial design, or in both or neither category.

The two-cents-a-song royalty to songwriters and publishers has been abolished; a new rate will be determined pursuant to negotiation with the recording industry.

Other amendments include a moral rights provision which will protect painters and sculptors from the alteration of their work, and a provision granting copyright protection for choreography without plot or regular action sequences.

The Canadian Parliament still has under consideration measures concerning home copying, retransmission rights, "fair dealing," exemptions to copyright protection, and protection for semiconductor chips. [Nov. 1988] [ELR 10:6:20]

IN THE NEWS

Jury awards actress Valerie Harper more than $1.4 million in damages plus share of series profits in action against Lorimar Television

A Los Angeles trial court jury has awarded actress Valerie Harper $1.4 million in damages plus a share of the profits from the NBC television series "Valerie." Lorimar Television had sued Harper for breach of contract, claiming that the actress chose to leave the series in the fall of 1987. Harper countered with a claim that Lorimar wrongfully fired her.

In addition to the aforementioned damages, the jury awarded Harper 12.5 percent of the adjusted gross profits of the series for the 1987- 1988 season, $220,000 as compensation for the dismissal of Harper's husband as supervising producer of the show, and an additional

$200,000 that Harper would have earned as part of her contract with Lorimar by starring in a television movie for the company.

Earlier in the proceeding, the trial court judge had dismissed Harper's claim that NBC conspired with Lorimar to have her fired, and also dismissed Lorimar's motion seeking punitive damages from Harper. [Nov. 1988] [ELR 10:6:21]

Former football player Charlie Krueger settles lawsuit against San Francisco 49ers

The San Francisco 49ers have agreed to pay former defensive lineman Charlie Krueger more than $1 million to settle Krueger's claim for fraudulent concealment based upon the nondisclosure of material medical information. A California appellate court upheld Krueger's claim and directed the entry of judgment in favor of Krueger; a trial court then awarded the former player $2.36 million (ELR 10:3:19; 9:1:13).

The details of the settlement remain confidential, but it is likely that Krueger will receive about $750,000, after legal fees and expenses, and that the team will agree not to appeal the trial court ruling. [Nov. 1988] [ELR 10:6:21]

Temple University settles discrimination action filed by female student athletes

Temple University has settled an action alleging unlawful gender discrimination in the school's intercollegiate athletic program. A Federal District Court had denied Temple's motion for summary judgment (ELR 10:2:11), finding that the female student athletes had raised issues of material fact with respect to whether the class members encountered discrimination in connection with the university's " allocation of opportunities to compete, expenditures, recruiting, coaching, travel and per them allowances, uniforms, equipment, supplies, training facilities and services, housing and dining facilities, academic tutoring, and publicity."

The settlement agreement, which has received tentative approval from the court, requires Temple to allocate athletic scholarships to women in proportion to the percentage of women participating in the university's sports program. The settlement also adds new teams for female student athletes, and requires equitable treatment in all areas of the sports program, including public relations activities undertaken by the university. [Nov. 1988] [ELR 10:6:21]

DEPARTMENTS

Book Notes:

Copyright Law: A Practitioner's Guide (2d ed.), by Harry G. Henn

Trademark Law: A Practitioner's Guide, by Siegrun D. Kane

Many legal subjects are covered by treatises that are considered standards in their fields. In copyright, the standard is of course Nimmer on Copyright by the late Melville Nimmer and by his son David Nimmer. In trademark law, the standard is Trademarks and Unfair Competition by J. Thomas McCarthy. But sometimes and for some lawyers, standards such as these actually are more book than necessary -- so much more that a shorter, simpler volume would actually be helpful. Nimmer on Copyright, for example, is now four heavy volumes. While it truly is the "Bible" for copyright specialists, and for everyone doing research in connection with copyright litigation, a non-specialist non-litigator could become lost in Nimmer, so lengthy, rich and deep is its analysis.

The Practising Law Institute has published shorter, simpler books in both of these areas. Each is subtitled "A Practitioner's Guide," and that subtitle conveys well the nature and purpose of these volumes.

Copyright Law by Harry G. Henn runs 844 pages: 359 pages of text; and 485 pages of appendices. The book's 33 chapters are well outlined in its table of contents. The text begins by distinguishing copyright law from trademark and patent law, and by explaining the continued relevance of pre-1978 copyright law; and then it guides the book's users through the 1976 Act. In the main, the text consists of a readable narrative statement of the content of the Act itself, selections from the legislative history of the Act, and Copyright Office explanatory material. Appropriate references are made in footnotes to the material being discussed, as well as to some (though not all) judicial opinions on each point, and selected law review commentary. As an introduction to copyright for the non-specialist, the text works well and provides an understanding of copyright basics which may be sufficient for answering many non-problem questions. The appendix contains the 1909 and 1976 Acts, Copyright Office and Copyright Royalty Tribunal regulations, Copyright Office Forms and Circulars, and excerpts from the legislative history of the 1976 Act. A bibliography, table of cases, and index are also included.

Trademark Law by Siegrun D. Kane is uniform in appearance (as well as in title) to Ms. Henn's book, though shorter. Trademark Law runs only 417 pages, in part because it has only 18 pages of appendices. With this book, what you get is mostly what Ms. Kane herself has authored. The writing style is clear and instructive, and the book's orientation is very practical. It will be of particular interest and value to non-specialist business and entertainment lawyers who need an understanding of non-problem trademark basics. The book includes, for example, an explanation of how trademarks should be selected and searched, how they are registered and how registration is maintained, and trademark licensing. Ms. Kane also devotes several chapters to trademark infringement litigation and Trademark Office proceedings, though on these topics, the book should not be considered a primary research resource so much as an overview of the litigation process. Indeed, Ms. Kane implicitly acknowledges that she is writing for the non-specialist when she advises that one way to emphasize to an opponent the importance of a trademark dispute is to "bring outside counsel in at an early stage." The appendices include forms and fee schedules.

Both books -- though recently published -- suffer just a little from having been published prior to the closing weeks of the 100th Congress when (just last month), Congress enacted significant amendments to both the Copyright and Trademark Acts. Though not designed to be supplemented annually, perhaps Mr. Henn and Ms. Kane will write and have PLI publish update pamphlets to their books, for both are valuable tools.

The books are priced at $85 each and are available on approval. To order, or for further information, contact June E. McDonald, Sales Manager, Practising Law Institute, Dept. AG, 810 Seventh Avenue, New York, N.Y. 10019; phone 212/765-5700. [ELR 10:6:22]

In the Law Reviews:

Copyright Infringement of Choreography: The Legal Aspects of Fixation, 13 The Journal of Corporation Law 839 (1988)

Moral Right Protections in the Colorization of Black and White Motion Pictures: A Black and White Issue, 16 Hofstra Law Review 503 (1988)

Broadcast Deregulation: The Reagan Years and Beyond by Richard E. Wiley, Dennis R. Patrick, Laurence A. Tisch and Jonathan D. Blake, 40 Administrative Law Review 345 (1988) (750 N. Lake Shore Drive, Chicago, IL 60611)

Not Just Another Sequel: The Canadian Motion Picture Industry After Tax Reform by Norman Bacal, 36 Canadian Tax Journal 547 (1988)

Artists' Rights: Should Maryland Grant Moral Rights? by Eric C. Schneider, 17 University of Baltimore Law Review (1987)

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