LEGAL AFFAIRS

The Origins and Evolution of "Financial Core" Union Membership and its Significance in the Entertainment Industry

by Lionel S. Sobel

Last summer, during the Writers Guild of America strike, an issue arose that looked, at least briefly, as though it might become of enormous significance. The issue did not deal with the merits or the reasons for the strike itself. It dealt instead with Guild solidarity--and whether that solidarity might be crumbling. In legal terms, several of the industry's most successful writers were reportedly on the verge of going on "financial core status." In everyday language, this meant they were

about to resign from the Guild, while continuing to pay at least a portion of their Writers Guild dues.

Of course, in the midst of the strike, the newsworthy thing about writers going on financial core status was not that they would continue to pay dues. Rather, it was that by resigning, the writers would be able to go back to work, despite the ongoing strike. It was (and still is) anybody's guess as to whether and how tong the strike would have continued had a significant number of writers resigned. History will record that no writers did resign, and the strike eventually was settled with the WGA's entire membership intact.

"Financial core" news did not disappear from the trades even after the Writers strike was settled. It continued to appear in connection with reports on the internal activities of the Screen Actors Guild, one of whose former board members, Mark McIntire, did go on financial core status with some fanfare, apparently as a result

of a long-standing disagreement over the scope and direction of SAG activities. Then, former SAG president Charlton Heston predicted that if SAG and the Screen Extras Guild proceed with their planned merger (a merger that Mr. Heston opposes), "financial core resignations [from SAG] will swell to a flood."

News accounts of these events often alluded to a Supreme Court decision handed down just last June, thus suggesting that "financial core status" is a new feature on the entertainment industry landscape. A half-day seminar in October, entitled "Financial Core Membership in Hollywood Unions," was prominently promoted in the trades in ads that heralded the Supreme Court's June decision as a "landmark."

The decision in question, Communications Workers of America v. Beck, 108 S.Ct. 2641 (1988), is an important opinion though not a "landmark." It is more like a prominent feature on an already existing landmark.

Moreover, it is not the decision that created "financial core status," nor is it the one that would have allowed screenwriters to resign from the Writers Guild during the WGA strike, had they decided to do so.

Union security

To appreciate the significance of "financial core status," it is necessary to begin with the National Labor Relations Act itself and a concept known as "union security." The NLRA permits an employer and a union to agree that union membership shall be a condition of employment (though employees who are not union members when first hired must be given 30 days to join). (Section 8(a)(3)) Collective bargaining agreement provisions that require union membership are referred to as "union security clauses."

In 1947, in the Taft-Hartley Act, Congress amended the NLRA to prohibit employers from firing employees for not belonging to a union, unless non-membership is due to the employees' failure to pay union dues and initiation fees. Thus, the Taft-Hartley Act permits employers to fire employees for not being union members, if they fail to pay their union dues and initiation fees; but employers cannot fire employees for not being union members if they pay but simply are not members.

Taft-Hartley appeared to create a contradiction within the NRA itself, in those cases where employers had agreed to union security clauses. In such cases, was union membership a requirement of employment, as the union security clause provided? Or was membership not a requirement so long as employees paid dues and initiation fees, as Taft-Hartley provided? The Supreme Court answered this question in 1954 in Radio Officers v. Union v. NLRB, 347 U.S. 17 (1954).

In that case, the Court concluded that the purpose of the Taft-Hartley Act was to prevent union security clauses from being used for any purpose other than to compel payment of union dues and fees. Congress had allowed union security clauses, the Supreme Court explained, because unions have valid concerns about "free riders"--employees who would benefit from union representation but who would be unwilling to contribute to the financial support of the union--and union security clauses are the only way to prevent free riders. On the other hand, Taft-Hartley took away from unions the power to require employers to fire employees who are not union members, so long as those employees pay dues and fees. (347 U.S. at 41) The Court did not attach a descriptive phrase to such employees in the Radio Officers' Union case.

Origins of "financial core"

The "financial core" phrase appears to have been used by the Supreme Court for the first time in 1963. In NLRB v. General Motors, 373 U.S. 734 (1963), the Court explained that "the burdens of membership upon which employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues. It is permissible to condition employment upon membership, , but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues. 'Membership' as a condition of employment is whittled down to its financial core." (373 U.S. at 742)

It therefore was clear, at least as early as 1963, that actual union membership cannot be required, even in industries where unions have negotiated union security clauses in their collective bargaining agreements. All that can be required is that employees pay union dues and fees, even if they choose not to be members--or, in

the words of the Court's decision in the General Motors case, even if they choose "financial core" status.

Union discipline

Since "financial core" union members must pay dues and fees, the significance of union members going on financial core status in the midst of a strike is not financial. Rather, the significance of financial core membership during a strike relates to the ability of financial core members to work despite the strike. To understand why this is so, it is necessary to appreciate how unions impose discipline on their members--how, in other words, unions enforce a decision to strike and not to work.

When a union votes to go on strike, that decision is enforced through union rules (or resolutions) imposing fines on members that violate the strike by working

anyway. When such fines are imposed, they usually are steep--as much as a day's pay for each day worked during the strike. Few if any fined members pay the fines voluntarily. Thus, in order to enforce the fines, it is necessary for unions to sue those who have been fined. Such suits are based on the theory that union members who work in violation of strike rules have breached their union membership contract, one provision of which requires the payment of fines for breaches of that sort.

One such suit reached the Supreme Court in 1967. The issue was whether the union's lawsuit violated its members' rights under federal labor law "to refrain" from engaging in union activity. (NLRA section 7) The question was a close one, but in NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967), the Court concluded that a union does not violate the law by suing to collect fines from those who "enjoyed full union membership" at the time they violated union rules by returning to work

during a strike. (388 U.S. at 196) In such cases, the Court concluded, the fines are properly within the union's control of its own internal affairs.

Discipline after resignation

Suppose, however, that a union member resigns from the union after a strike begins, but before returning to work and thus before being fined. If a "union security" clause exists in the collective bargaining agreement, the member's resignation would not relieve the member from the obligation to pay dues. The resignation would, however, put the member on "financial core" status, which is not the "full union membership" referred to in the Allis-Chalmers case.

In NLRB v. Textile Workers Union, 409 U.S. 213 (1972), the Supreme Court held that a union does violate federal labor law if it sues to collect strike-related fines

imposed on former members who had resigned and gone on financial core status, even if those members resigned after the union had voted to go on strike (and indeed, even if the members who resigned had themselves voted for the strike before resigning). The Court explained that once a member resigns, "the union has no more control over the former member than it has over the man in the street." (409 U.S. at 217)

The Textile Workers Union case involved one important fact, the significance of which the Court did not explain (even though the Court mentioned it in the first paragraph of its decision). Neither the collective bargaining agreement nor the union's constitution or bylaws said anything about the circumstances under which a member could resign. Whether a union could "curtail" a member's "freedom to resign" was a question the Court expressly chose not to decide, in that case.

The question left unanswered in Textile Workers Union was a very difficult question. It involved the interpretation of ambiguous statutory language, uncertain legislative history, and conflicting aims of federal policy. But it was a question that had to be answered sometime. And it was, in 1985, in Pattern Makers' League v. NLRB, 473 U.S. 95 (1985).

The Pattern Makers' union had a provision in its constitution that prohibited members from resigning during a strike. Nevertheless, several of the union's members did resign during a strike and returned to work. The union fined them for doing so and then sued to collect the fines. By a closely divided vote, the Supreme Court held that it is illegal for a union to sue to collect strike-related fines from former members who resigned before returning to work, even if the union's rules prohibit resignations during a strike. The Court explained its ruling, in part, by saying that federal labor law "protects the

employment rights of the dissatisfied member, as well as those of the worker who never assumed full union membership. By allowing employees to resign from a union at any time, [the]awl protects the employee whose views come to diverge from those of his union." (473 U.S. at 106)

Thus, during the Writers Guild strike, it was the Court's 1985 decision in the Pattern Makers' case that was significant, because Pattern Makers' is the decision that would have given screenwriters the legal right to resign from the Guild during the strike--as well the right to return to work without fear of being fined--even if the WGA has a rule prohibiting resignations during a strike.

Amount of financial core dues

The "financial core" status of members of the Screen Actors Guild became a newsworthy issue for a reason

unrelated to strikes. SAG was not on (or contemplating) a strike at the time. And SAG members were not resigning to avoid disciplinary fines. Insofar as SAG is concerned, the "financial core" issue has involved an entirely separate question concerning the amount of dues that must be paid by those who have resigned--who have, in other words, gone on financial core status.

The early cases interpreting the Taft-Hartley Act--the Radio Officers' Union case in 1954, and the General Motors case in 1963--focused on whether employees could resign from (or refuse to join) a union, even if there was a union security clause in the collective bargaining agreement, so long as they continued to pay dues and fees. Those cases did not consider whether a "financial core member" had to pay the same dues as a full union member, or whether instead financial core members could be required to pay only some lesser amount.

This was precisely the issue the Supreme Court addressed last June in CWA v. Beck. The case arose when several employees who had chosen not to become CWA members objected to that union's use of their dues and fees for purposes other than collective bargaining, contract administration, and grievance adjustment. They objected, in particular, to the union's use of their money for such purposes as organizing the employees of other companies, lobbying for labor legislation, and participating in social, charitable and political events. These "financial core" employees argued that the union's use of their money for such activities violated labor and common law and the First Amendment.

The CWA case was not the first time such an argument had been made to the Supreme Court. It also was made back in 1961 in Machinists v. Street, 367 U.S. 740 (1961). In that case, the Supreme Court held that the law does not permit unions to spend on political causes

the compulsory dues and fees of non-members who object. The Street case, however, involved the interpretation only of the Railway Labor Act and the obligations of the transportation industry unions that are subject to its provisions. Street did not involve the National Labor Relations Act or the unions in industries (other than transportation) that are subject to its provisions. (The entertainment industry and its guilds are among those subject to the National Labor Relations Act rather than the Railway Labor Act.)

The legislative histories of the Railway Labor Act and the National Labor Relations Act are sufficiently different that for more than a quarter century, it was never perfectly clear whether the Court's reasoning in Street also applied to unions outside the transportation industry (and thus subject to the NLRA rather than the RLA). Finally, in CWA, the Court held that Street is controlling even outside the transportation industry. As a result, it is

now clear that unions of all kinds may use mandatory dues and fees of "financial core members"--who technically are non-members-- only to perform "the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues." (108 S.Ct. at 2657)

SAG dues

The Screen Actors Guild--like most if not all unions--collects and uses dues for purposes in addition to representing its members in dealings with employers on labor-management issues. SAG does, for example, spend some money on lobbying in Washington in connection with legislation of importance to the entertainment industry.

Thus, SAG members who resign and go on financial core status have a legal right to pay less dues than full

members. Financial core members are entitled to a reduction in their dues by an amount that corresponds to the portion of their dues that would be spent for purposes other than labor-management representation. The calculation of the exact amount of such a reduction is not, however, a matter of simple arithmetic. It involves matters of judgment, about which disputes are possible.

It has been reported that unions outside the entertainment industry generally have given financial core members a 10% to 15% dues discount (compared to the dues paid by, full members). SAG may offer such a discount as well, to financial core members who request it. If a greater discount is demanded than SAG is willing to allow, an audit or even an arbitration may become necessary to determine exactly how much SAG spends for purposes other than labor- management relations.

Whatever the amount of the discount, it is clear that financial core members will have to pay the balance. And

this is true even for those members who might object that requiring them to do so violates their First Amendment free speech rights. This much was made clear almost 15 years ago in cases filed against the American Federation of Television and Radio Artists, one of them by no less a personage than William F. Buckley, Jr.

First Amendment objections to union membership

The American Federation of Television and Radio Artists has negotiated for and obtained union security clauses in (at least some of) the collective bargaining agreements it has entered into with television and radio broadcasters. As a result, employees covered by AFTRA contracts must be (or become) AFTRA members--either full members, or financial core members--and must pay AFTRA dues and fees.

At first glance, there does not appear to be any reason why an employee of an AFTRA broadcaster should be treated by the law any differently than employees in other industries. As will be seen, there is no reason for doing so even after analysis. But a respectible argument once was made that at least some types of employees have a Constitutional right not to become union members--not even financial core members--and have a right not to pay dues or fees at all.

The argument was made by three politically conversative on-air personalities: William F. Buckley, Jr., host of the television program "Firing Line", M. Stanton Evans, a participant on the CBS radio series "Spectrum"; and Fulton Lewis, III, a radio commentator for the Mutual Broadcasting System. All three argued that their right to broadcast political commentary on issues of public concern could not be conditioned on their joining or even paying dues to AFTRA. They argued, in other words,

that they had a First Amendment right to be broadcasters without becoming regular or financial core union members.

All three lost their cases. The courts of course acknowledged that Buckley, Evans and Lewis had a First Amendment right to speak their views, and that AFTRA could not control (and it had not attempted to) the content of their broadcasts. But the courts also held that the mere payment of AFTRA dues and fees as a condition of their employment as broadcasters simply did not violate their free speech rights. The burden, if there was one, of having to pay dues was outweighed by the benefits to national labor policy of having all of those who benefit from collective bargaining pay their share of its costs. Buckley v. AFTRA, 496 F.2d 305 (2d Cir. 1974); Lewis v. AFTRA, 357 N.Y.S.2d 419 (Ct.App. 1974).

Buckley, Evans and Lewis petitioned the United States Supreme Court to hear their cases, and former Chief

Justice Warren Burger and the late Justice William 0. Douglas voted to do so. Justices Burger and Douglas apparently were the only ones who did, however, because the petition was denied. Buckley v. AFTRA , 419 U.S. 1093, reh.den. 420 U.S. 956 (1974) (Douglas and Burger dissenting). Thus, the cases ended with AFTRA the victor.

Summary and conclusion

For the entertainment industry, the implications of all this are these. First, guilds and unions may seek union security clauses in their collective bargaining agreements. If employers agree to such clauses, all employees covered by those agreements must become union members; and this is so, even with respect to employees whose jobs involve First Amendment protected speech,

such as writers, actors, directors and news broadcasters, as well as political commentators.

However, the sort of union membership required by union security clauses is not full membership. Financial core membership--which is not true membership at all--is adequate, and simply requires payment of union dues and initiation fees. Moreover, if the union spends some of its money (as most if not all unions do) on activities other than representing its members in dealings with employers on labor-management issues, financial core members may demand, and must be given, a dues reduction so that their money is not used for those other purposes over their objections.

Members who are full members may be disciplined, by fines and in other ways, for violating union rules--for example, by working during a strike. And unions may sue to collect disciplinary fines imposed on full members. On the other hand, members may resign from a union at

any time, even during a strike and even if union rules purport to prohibit resignations during a strike. And if a member does resign and then violates a union rule--for example, by working during a strike--the union may not sue to collect fines imposed for that violation.

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[ELR 10:7:3]

RECENT CASES

Dismissal of NBC employee's claim that "The Cosby Show" was based on his idea is affirmed on appeal

A Federal Court of Appeals has upheld a District Court decision (ELR 9:10:4) granting summary judgment to

the National Broadcasting Company in an action in which Hwesu S. Murray claimed that the television series "The Cosby Show" was based on an idea that Murray submitted to NBC. The court agreed that the lack of novelty and originality in the idea of a television series portraying a middle- class black family meant that the idea was not property under New York law, and precluded Murray, an NBC employee, from maintaining various causes of action arising from the network's allegedly unauthorized use of his proposal for such a series.

Federal Court of Appeals Judge Pratt, in dissent, expressed the view that the issue of the novelty of Murray's idea presented a factual question subject to further discovery. Judge Pratt pointed out that NBC described the television series, in a development contract with the Carsey-Werner Company, as "unique, intellectual property." Other aspects of the development contract

provided additional evidence, for Judge Pratt, that it was Murray's underlying idea, not the developed elements of the series as a whole, which NBC "desired to protect as unique and novel property." Given that "novelty, by its very definition, is highly subjective," and that there was no evidence indicating that NBC knew about the program idea until Murray submitted his proposal, Judge Pratt would have remanded the case for further consideration.

Murray v. National Broadcasting Company, Inc., 844 F.2d 988 (2d Cir. 1988) [ELR 10:7:8]

Damages in copyright infringement action involving the song "Feelings" must be reduced by amount earned by foreign performances, but court refuses to apportion damages based on popularity of singer or use of noninfringing lyrics

Composer Louis Gaste's copyright infringement action against Morris Kaiserman, known as Morris Albert, involving the song "Feelings" resulted in a jury verdict awarding damages to Gaste of about $500,000 (ELR 9:3:19; 9:8:15).

A Federal District Court in New York has considered several issues raised by the parties with respect to damages. Judge William C. Conner first granted a motion by Albert and Fermata International Melodies, Inc. to reduce from the judgment entered on the verdict the amount (to be determined by the parties) awarded for foreign performances. Judge Conner found that Gaste

presented no evidence at trial indicating that the foreign performances resulted from the reproduction of recordings originally made in the United States or any other recorded versions. It was Gaste's burden to show that the foreign performances resulted in a violation of the United States copyright, but the composer did not present evidence to support that contention.

The court did not agree that Albert was entitled to a reduction in damages based on that portion of the song's profits which were attributable to the lyrics of "Feelings." Albert's own expert was unable to recite the lyrics to "Feelings," noted Judge Conner, except for the very first word - Feelings. The only common element of Albert's work and Gaste's composition, "Pour Toi," was the music.

Albert's reliance on Abkco Music, Inc. v. Harrisongs Music, Ltd., 508 F.Supp. 798; aff'd., 772 F.2d 988 (2d Cir. 1983; ELR 5:8:10) was misplaced, stated the court.

In Abkco, the court concluded that three-fourths of the success of the song "My Sweet Lord," composed by George Harrison, was due to the unconscious infringement of the music of the song "He's So Fine," and that one-fourth of the success of the song was due to other factors, such as the words of the Harrison work and the stature of George Harrison in the field of music. Morris Albert, however, was a relatively unknown artist, whose name was not recognized by even a single juror during voir dire, observed the court, in declining to apportion the profits of "Feelings."

The court concluded by noting that Fermata did not produce any evidence to substantiate alleged expenses incurred by the company relating to "Feelings" which would warrant a reduction of the jury's damage award.

Gaste v. Kaiserman, 683 F.Supp. 63 (S.D.N.Y. 1988) [ELR 10:7:8]

Paul Hornung's $1.1 million judgment against NCAA is reversed, because evidence did not support jury's verdict that NCAA improperly refused to approve Hornung as announcer for college football games

After retiring from professional football, Paul Hornung began a career as a sports broadcaster. In 1980 and 198 1, Hornung hosted a series of weekly talk shows about college football for WTBS in Atlanta.

When WTBS obtained the right to telecast a "supplementary series" of college football games, the company agreed that the NCAA would have the right to approve or disapprove any announcer or color analyst used on the broadcasts. WTBS proposed to hire Hornung as the color analyst for the supplementary series, but the

NCAA's Television Committee voted to disapprove Hornung, and one other person who had been proposed, as announcers for the series.

The NCAA, in response to a request from WTBS, confirmed the disapproval of Hornung in a letter stating, in part, that "The Committee believes he is closely identified with professional football, that he had at least one undesirable public situation while a professional player, that the image which he projects or is projected for him does not personify college football."

Hornung sued the NCAA for intentional interference with a prospective contractual relation, and obtained a jury verdict, upon which judgment was entered, for consequential and punitive damages of about $1.1 million. An appellate court affirmed the judgment, but the Supreme Court of Kentucky has found that the trial court erred in failing to sustain the NCAA's motion for a directed verdict.

Judge Lambert noted that it was undisputed that during Hornung's professional football career, the player was suspended for gambling activity and that in a Miller Lite Beer commercial, Hornung was portrayed as a playboy. The NCAA legitimately considered these matters, stated the court. In all, Hornung failed to prove that the NCAA "improperly" interfered with his prospective contract with WTBS.

Even if the court had concluded that improper interference was present, the NCAA was entitled to assert the "good faith" exercise of its contractual right of announcer approval.

The jury verdict did not have a sufficient evidentiary basis, concluded the court, in ordering the entry of judgment for the NCAA.

National Collegiate Athletic Association v. Hornung, 754 S.W.2d 855 (Ky. 1988) [ELR 10:7:9]

Actor and stage manager for original production of "Key Exchange" may sue for payments that became due under Actors' Equity code when movie version of the play was cast

Actor Mark Blum and stage manager Bill McComb may proceed with an action against the WPA Theater to recover conversion payments of about $2,118 and $3,072, respectively, in connection with the sale of the motion picture rights in the play "Key Exchange," a New York trial court has ruled.

Blum and McComb were associated with the original WPA Theater production of the Kevin Wade play; the film version was released in 1984.

The WPA Theater moved to dismiss the action as time barred, arguing that any cause of action accrued in October 1981 when the motion picture rights were sold.

Actors' Equity Association, which instituted the action on behalf of Blum and McComb, contended that the cause of action for increased payment accrued in 1984 when the film was cast; Blum and McComb were not employed in the film.

The Funded Non-Profit Theatre Code covering the production provides that in the event a play covered by the Code is produced in another medium, "each participating member of the Code production shall receive a bona fide offer to perform his/her identical function in another medium or receive (the increased payment sought herein)." Thus, according to Equity, any claim for increased payment made before a film or other version is cast would be premature. Indeed, in the instant case, Equity withdrew its claim on behalf of two cast members

who played their original roles in the film version. The court agreed that the applicable law supported Equity's position.

Dewhurst v. Renick, New York Law Journal, p.24, col.1 (N.Y.Cnty., Oct. 21, 1988) [ELR 10:7:9]

Trial required to decide dispute between record distributor and CBS concerning contract for Simon and Garfunkel records

Tee Vee Records entered several contracts with CBS to purchase records and tapes for distribution through television promotion and direct mail. To secure its obligations to CBS, Tee Vee posted letters of credit in the aggregate amount of $150,000 with CBS as the beneficiary. One letter of credit for $75,000, issued by

Chemical Bank, apparently secured Tee Vee's obligation under a contract for records by Simon and Garfunkel.

In late 1980, Tee Vee defaulted on two contracts; CBS subsequently applied the proceeds of $150,000 on two letters of credit as a setoff against Tee Vee's debt. The amount of the debt was in dispute, but CBS estimated that Tee Vee owed the company between $400,000 and $500,000.

Tee Vee alleged that CBS wrongfully collected the proceeds of two letters of credit of $75,000 each. According to Tee Vee, CBS did not grant the company the option which was set forth in the Simon and Garfunkel contract. CBS argued that it was entitled to collect on the two letters of credit in order to set off Tee Vee's outstanding obligations.

A New York trial court has refused to grant summary judgment to CBS on Tee Vee's wrongful collection claims, although the court did dismiss Tee Vee's claim

for punitive damages. The court stated that it was unclear from the record whether CBS gave Tee Vee the requisite notice of its right to exercise an option for additional records by Simon and Garfunkel, and whether the letter of credit in issue secured Tee Vee's general obligations to CBS or was limited to the Simon and Garfunkel contract. The fact that CBS may have been entitled to certain sums from Tee Vee did not give CBS an absolute right to seize funds from any particular source," stated Judge Altman. However, Tee Vee did not allege the kind of malicious or wanton conduct needed to support an award of punitive damages.

Tee Vee also claimed that CBS breached its warranty that the company had all rights necessary to manufacture and sell the records. Apparently, Paul Simon's attorneys notified CBS that the singer objected to the use of his music under the contract with Tee Vee. Tee Vee alleged that Simon's objection and CBS' attempt to prevent

competition with its own release of Simon and Garfunkel's albums purportedly caused CBS to refuse to deliver records to Tee Vee. CBS claimed that Tee Vee failed to order records, and that CBS therefore was not obligated to deliver any records. The court declined to grant summary judgment in view of the parties' conflicting claims, adding that the question of whether certain advance payments might be recouped also was a question of fact.

In conclusion, Judge Altman found that Tee Vee was barred from recovering any lost profits for late delivery or nondelivery by the express terms of the contract; was not entitled to an accounting; and did not state a cause of action for defamation.

Chemical Bank obtained summary judgment on Tee Vee's claims alleging that the bank wrongfully drafted, and honored CBS' draft on, the letter of credit posted with the bank.

Tee Vee Records, Inc. v. Chemical Bank, New York Law Journal, p. 18, col. 1 (N.Y.Cnty., Sept. 16, 1988) [ELR 10:7:9]

Creator of nostalgia rock-and-roll radio series is entitled to proceed with New York Civil Rights Law and Lanham Act claims against Westwood One, but breach of contract claim is dismissed

In June 1986, Dan Formento, the president of Radio Today, designed a radio series called "Flashback"; each program combined popular music from the years 1965 through 1975 with other material such as excerpts from news stories, film soundtracks and narration, and featured "birthday salutes" to rock and roll musicians, and a review of events in rock and roll history.

In October 1986, Radio Today agreed to produce and deliver to NBC Radio 52 installments of "Flashback" for broadcast from from January 1, 1987 through December 31, 1987. NBC obtained the right to broadcast each of the programs in the series once during the term of the contract over each station licensed by NBC Radio. The contract granted to NBC all rights to "Flashback" that were "reasonably" required for the purpose of exercising the broacast rights. After the term of the contract, all right, title and interest in the programs was to revert back to Radio Today.

The "Flashback" programs were broadcast weekly by about 150 radio stations nationwide, reaching an estimated 15 million listeners.

In August 1987, NBC sold its radio networks, including NBC Radio, to Westwood One. Westwood One decided not to continue to purchase the "Flashback" programs from Radio Today for 1988. And in

November 1987, Westwood One began producing and broadcasting "Backtrack," a replacement program in substantially the same format as "Flashback."

Radio Today's lawsuit against Westwood One alleged causes of action for breach of contract, passing off under section 43(a) of the Lanham Act, false advertising, the violation of sections 50151 of the New York Civil Rights Law and unfair competition.

Federal District Court Judge Mukasey first rejected Radio Today's claim that Westwood One breached a contract to pay not only for particular "Flashback" programs, but also for the "Flashback" format; the contract protected only the programs themselves, stated the court.

The court, however, refused to dismiss Radio Today's claims of passing off under the Lanham Act and common law unfair competition, finding that the company sufficiently alleged facts showing a likelihood of

confusion or deception of purchasers as to the source of "Backtrack." Radio Today also was entitled to proceed with its claim of false advertising under the Lanham Act, ruled the court, based on the company's allegations regarding the mislabelling of a disc containing the first "Backtrack" program.

Westwood One's motion to dismiss Formento's claim under sections 50/51 of the New York Civil Rights Law also was denied. The alleged misuse of Formento's name for the purpose of commercial exploitation was not exempt from the statute as a report on a matter of public interest, nor was the alleged commercial purpose sought to be achieved by Westwood One through the mislabelling too remote or speculative to be actionable. And the use of Formento's name, was not, as a matter of law, merely incidental, concluded the court.

Radio Today, lnc. v. Westwood One, Inc., 684 F.Supp. 68 (S.D.N.Y. 1988) [ELR 10:7:10]

Trial court sets aside $3 million jury verdict in action against Cherry Lane Music claiming breach of "due professional skill and competence" provision of distribution contract, but court lets stand $300,000 damage award on Proteus Books' other claims

One of the provisions in a 1983 distribution contract signed by Proteus Books and Cherry Lane Music required Cherry Lane to "perform the services described herein with due professional skill and competence." In 1985, Proteus, a now-defunct British music and book publisher, sued Cherry Lane for breach of contract.

A Federal District Court jury in New York returned a special verdict finding that Cherry Lane had breached

the cited provision; the jury awarded Proteus damages of about $2.8 million. The jury also awarded Proteus about $300,000 in consequential damages for Cherry Lane's breach of an oral agreement to pay Proteus by way of bills of exchange; $120,000 in damages for breach of a 1985 contract amendment concerning the monthly guaranteed sales of Proteus' books; and $177,000 in damages for converting Proteus' property by making the company's books part of Cherry Lane's inventory.

Judge Robert L. Carter has granted Cherry Lane's motion for judgment notwithstanding the verdict on the breach of contract claim. Judge Carter first stated that the jury "clearly disregarded" the court's instructions concerning how the jury was to determine whether Cherry Lane had breached its obligation to provide services with due professional skill and competence. The provision originated with Proteus and there was

testimony that the parties had not discussed or defined the phrase. In its instructions, the court had pointed out that the phrase was ambiguous and was to be construed in the light most favorable to Cherry Lane.

As there were various reasons why Proteus' books were not selling well, a "fair-minded jury," stated Judge Carter, could not have followed the court's instructions and, on the basis of the evidence, reached the conclusion that Cherry Lane was liable for over $2.8 million in damages for violating the due professional skill and competence provision. Judge Carter also cited Proteus' 1985 extension of the contract term as a measure of the company's approval of Cherry Lane's performance, or "at least as an indication of its consent to forgive prior breaches."

Even if the phrase "due professional skill and competence," had been given an ascertainable meaning, the jury was not entitled to award damages based on

speculation or imagination. The jury apparently assessed the profits Proteus would have made if Cherry Lane had performed pursuant to the challenged contract provision. But Proteus presented no evidence that it had any background of profit-making in the publishing field, or that any of its works would have reached the projected level of profitability.

The jury award of about $300,000 in consequential damages also was set aside. Even assuming that Cherry Lane wrongfully stopped payment on two bills of exchange totalling about $20,000, Proteus was entitled, at best, solely to interest on the $20,000 amount.

Judge Carter, although characterizing the remaining jury awards as "dubious," denied Cherry Lane's motion for judgment notwithstanding the verdict with respect to the award of $120,000 in damages for breach of the monthly guarantee and the award of $177,000 for conversion.

Proteus Books Limited v. Cherry Lane Music Co., Inc., 688 F.Supp. 877 (S.D.N.Y.1988) [ELR 10:7:11]

Advertising agency must pay for television air time scheduled for bankrupt client

In late 1979 and early 1980, the advertising agency Scott, Lancaster, Mills & Atha, Inc. ordered air time from Midwest Television, Inc. and other independent television stations on behalf of the agency's client, National Service Corporation. National Service subsequently declared bankruptcy. When the stations sought payment from the agency after airing the scheduled commercials, the agency denied liability.

A Los Angeles trial court ruled in favor of the television stations, and a California appellate court has affirmed the trial court's decision.

The agency was deemed to have admitted that television stations customarily hold advertising agencies liable for payment for air time purchased on behalf of clients unless the stations are given prior notice of the agency's nonliability. After running television spots, the stations customarily bill the agencies; the agencies then collect payment from their client advertisers and, after deducting a standard commission of fifteen percent of the total bill, forward payment to the stations. If an advertising agency gives prior notice of nonliability, a station might check the client advertiser's credit, require the advertiser to submit a letter of responsibility, and mail the bill for air time to the advertiser "in care of" the agency.

Five of the independent television stations involved in the instant action had incorporated the American

Association of Advertising Agencies' nonliability clause in the "spot confirmations" sent to the agency to confirm the scheduling of television spots for National Service. Two other stations mentioned in their "television contracts" that the agency was solely liable for payment, unless it became insolvent, at which time its client advertiser also would be liable. Station KTLA stated that the agency was jointly and severally liable for payment in the event of its client advertiser's default. Four stations did not produce evidence of the liability clause included in their spot confirmations.

It was further noted that the agency's contract with National Service stated, in part, that "we are held responsible for payment of purchases made in your behalf, as your agent... it is essential that we collect from you in time to pay media and suppliers promptly."

On appeal, the agency argued that when a contracting party knows the identity of the other party's principal,

the contract is presumed to bind only the principal and not the agent. The court disagreed, stating that "the mere fact that a contracting party knew the identity of the other party's principal does not necessarily establish, as a matter of law, that the agent was not a party to the contract." In this case, industry custom and the stations' adherence to the custom were established at trial by means of the agency's deemed admissions. The admissions, together with the agency's actual and constructive knowledge of the custom, rebutted any presumption of nonliability. The agency never informed the stations that it was acting solely as the agent of a disclosed principal, and therefore was liable to the stations for the payment of air time on behalf of its client.

Midwest Television, Inc. v. Scott, Lancaster, Mills & Atha, Inc., Case No. B022198 (Ca.Ct.App., Oct. 25, 1988) [ELR 10:7:12]

NCAA and Southwest Athletic Conference are not governmental bodies subject to Texas Open Records Act, so media is not entitled to disclosure of information about football recruiting scandal at SMU

The National Collegiate Athletic Association and the Southwest Athletic Conference were not governmental bodies subject to the Texas Open Records Act, a Federal Court of Appeals in Texas has ruled. The court reversed a Federal District Court opinion finding that the NCAA and the Conference received public funds and thus were governmental bodies within the meaning of the Act.

The instant action arose when Carole Kneeland, a reporter for the Dallas Morning News, and other media parties sought disclosure, under the Act, of information

obtained by the NCAA and the Conference in connection with the investigation of a football recruiting scandal at Southern Methodist University in Dallas, Texas. The matter eventually was removed to federal court because of claims raised under 42 U.S.C.A. section 1983. (A report on a related state court proceeding appeared at ELR 9:9:19).

Federal Court of Appeals Judge Politz first examined the organization and funding of the NCAA and the Conference. On appeal, the NCAA argued that it was the exclusive owner of various championship events, and that its enforcement division, the holder of the investigative records at issue, did not receive any public funds. Judge Politz agreed with the District Court's findings that revenues from telecast assessments, as well as revenues derived from championship events, were used to fund all NCAA divisions, including enforcement, and

that the gate receipts and television revenues paid to the NCAA and the Conference were public funds.

However, the Court of Appeals disagreed with the District Court's conclusion that the public funds amounted to the requisite support, under Texas law, to warrant characterizing the NCAA and the Conference as governmental bodies. The relevant statute defines a governmental body as including "the part, section or portion of every organization, corporation, commission, committee, institution, or agency which is supported in whole or in part by public funds ... (emphasis added by the court).

As described by Judge Politz, the services provided by the NCAA to member institutions, including conventions, publications, statistics and rules, were "known, specific, and measurable services" in exchange for the funds paid by the institutions. The court was satisfied "beyond peradventure" that the dues of members were not unrestricted grants for the general support of the

NCAA, and that the same conclusion would apply to the television fee assessments, which the NCAA uses to support a scholarship program for college athletes.

Similarly, the various unreimbursed costs and services incurred by hosting members in championship events also did not constitute general support of the NCAA with public funds. Even assuming that incurring the expenses constituted the expenditure of public funds, the court viewed such expenditures as consideration for specific, measurable services, including a mechanism for formulating rules and procedures to enforce policies and standards regarding student athletes. In all, stated the court, member institutions received sufficiently identifiable and measurable quantities of services for any public fund expenditures inherent in hosting championship events.

The Conference also provided specific and "gaugeable" services to its member institutions, and therefore

was not subject to characterization as a governmental body, ruled the court.

Kneeland v. National Collegiate Athletic Association, 850 F.2d 224 (5th Cir. 1988) [ELR 10:7:12]

Montana high schools were not required to change basketball and volleyball seasons as requested by female students in action alleging unequal opportunities in athletic programs

A lawsuit brought in 1982 by several female public high school students in the state of Montana against the Montana High School Association and various school districts challenged, as unlawfully discriminatory, a wide range of practices in the state's high school athletic programs. The complaint alleged the violation of the

students' rights guaranteed by the Equal Protection clause of the Fourteenth Amendment of the United States Constitution, by Title IX of the Education Amendments Act of 1972, and by the Constitution and laws of the state of Montana.

A Federal District Court encouraged the parties to settle the matter, and many changes were made in the school programs. However, in 1986, the court was asked to determine whether or not the high schools were required to change the seasons in which the female students played varsity volleyball and basketball so that those seasons would coincide with the conventional seasons in the rest of the country.

The District Court refused to grant injunctive relief which would have required a season change beginning with the 1986- 1987 year; it was found that such a change would not result in significant improvements in opportunities for female participation in athletics, and

was not directly related to remaining serious problems of inequality.

A Federal Court of Appeals has affirmed the District Court's ruling, finding the decision appropriate in the "unique context" of the parties' settlement agreement, an agreement that authorized the District Court to examine the season shift question in the light of all of the conditions existing in Montana high schools with respect to athletics, and to make the essentially factual determination as to whether an immediate season change would materially further the settlement agreement's objective of achieving equal opportunities for male and female student athletes.

Judge Mary M. Schroeder reviewed the factual allegations of the students and the settlement terms agreed to by the parties on statewide minimum requirements for Montana school districts.

With respect to the scheduling of basketball and volleyball, the court noted that in Montana, girls' basketball was played in the fall rather than in the winter as at most colleges and other states' high schools. Volleyball was played in the winter season as opposed to the normal fall season. Changing the seasons would mean that the female students could compete with out-of- state athletic teams, participate in tournaments and camps aligned with the conventional seasons, and receive attention from college recruiters. The schools argued that the scheduling plan maximized student participation in sports, permitted the same coaches to coach both girls and boys basketball in smaller Montana schools and relieved a burden on school facilities which might occur if both girls and boys basketball were played in the same season. A report on the seasons issue stated that if the change were adopted, the disparity between boys and girls athletic opportunities eventually would be reduced,

but concluded that the "most significant cause of Montana high school girls' restricted athletic opportunities" was the "sexually biased attitudes of some of the coaches, athletic directors, administrators and others. "

Judge Schroeder found that the District Court did not abuse its discretion in admitting the evidence showing the effects of the proposed seasons change and the efforts of the schools to achieve equality. However, the issue of whether the season change violated equal protection was not properly before the District Court and Judge Schroeder declined to express an opinion on the appropriate resolution of the issue, concluding that the possibility of a court-ordered season change in the future "should act as a continuing incentive to the schools to improve athletic opportunities for high school girls in Montana."

Judge Robert R. Beezer, although concurring in the court's opinion, noted that the District Court denied the

permanent injunction sought by the female students, not only for the 1986-87 season, but for all subsequent seasons. If the students again request a permanent injunction, and the District Court grants one, the instant Court of Appeals' decision would be meaningless, in Judge Beezer's view. Relief might be available to the students under the Federal Rules of Civil Procedure, stated Judge Beezer, but by affirming the District Court's denial of a permanent injunction, the Court of Appeals "necessarily foreclosed further judicial oversight of the sequence of Montana high school girls' basketball and volleyball seasons." (In a footnote comment, Judge Schroeder declared that nothing in the court's opinion should be viewed as foreclosing the District Court from considering the seasons issue in the future.)

Ridgeway v. Montana High School Association, Case No. 86-3901 (9th Cir., Oct. 4, 1988) [ELR 10:7:13]

Hallmark Cards was enjoined from distributing greeting cards which allegedly infringed the trade dress of a competitor's cards, and then settled case by discontinuing disputed line

A Federal Court of Appeals has upheld a District Court decision (ELR 8:11:12) on behalf of Hartford House, Ltd. in an action alleging that Hallmark Cards, Inc. violated section 43(a) of the Lanham Act and engaged in unfair competition and copyright infringement in distributing the "Personal Touch" line of non- occasion greeting cards.

Hartford House, doing business as Blue Mountain Arts, was the distributor of the "Airebrush Feelings" and "WaterColor Feelings" lines of cards. The cards, as described by Federal Court of Appeals Judge McKay,

contained messages concerning "love, personal relationships, and other similar subjects, superimposed on watercolor or airbrush artwork that generally has a landscape motif or nature theme." The "Personal Touch" cards also conveyed emotional messages about personal relationships.

After reviewing the District Court's findings, Judge McKay affirmed the issuance of a preliminary injunction restraining Hallmark, pending a trial on the merits, from manufacturing or distributing eighty-three "Personal Touch" cards. The District Court had found that Blue Mountain's trade dress was a combination of some or all of ten specified features, which produced an overall uniform look and distinctive appearance to the "AireBrush Feelings" and "WaterColor Feelings" lines of cards. The trade dress of the Blue Mountain cards was nonfunctional and had acquired a secondary meaning, according to the District Court, and it further was found that there

would be a likelihood of confusion among card purchasers as to the source of Blue Mountain's cards and the Hallmark "Personal Touch" cards'

On appeal, Hallmark challenged the District Court's determination that Blue Mountain's trade dress was non-functional. But Judge McKary agreed that Hallmark had the capacity to avoid the potential for confusion and to compete effectively without having to "slavishly copy or imitate the distinctive combination of features comprising Blue Mountain's trade dress." The court rejected Hallmark's claim that Blue Mountain was granted exclusive rights in an artistic style or in a concept, idea, or theme of expression - it was Blue Mountain's "specific artistic expression, in combination with other features to produce an overall Blue Mountain look" that was protected.

Furthermore, it was unnecessary for the District Court to perform a feature-by-feature functionality analysis.

The preliminary injunction barred Hallmark from copying or imitating the overall appearance or look of the two Blue Mountain greeting card lines, but Hallmark, again, was free to utilize the individual features comprising the protected trade dress to produce its own expressive non-occasion cards.

The court concluded by finding that Blue Mountain had established a substantial likelihood that it would eventually prevail on the merits of its trade dress infringement claim under section 43(a) of the Lanham Act, and by affirming the District Court's grant of a preliminary injunction.

The United States Supreme Court declined, without comment, to hear Hallmark's appeal of the Court of Appeals' ruling.

Thereafter, according to news reports, Hallmark agreed to stop publishing its Personal Touch line of cards and to assist Blue Mountain in obtaining "equal and free"

access to Hallmark card stores. Hallmark also will pay an undisclosed amount to Blue Mountain and will discontinue the use of the Personal Touch name.

Hartford House, Ltd. v. Hallmark Cards, Inc., 846 F.2d 1268 (10th Cir. 1988) [ELR 10:7:14]

Dispute over limited partnership investment in film "The Romantic Englishwoman" results in dismissal of securities claims as time-barred but court agrees to hear civil RICO cause of action

In 1983, the Internal Revenue Service disallowed the depreciation deductions taken by Arlington Properties from 1975 to 1979 in connection with a limited partnership investment in a film entitled "The Romantic Englishwoman." A partnership called Biscayne Associates

had paid $180,000 to acquire an interest of approximately twenty percent in Arlington. The partners in Biscayne, Ralph J. Zola, Paul A. Zola, and Irving Zola, took federal income tax deductions for their shares of Biscayne's partnership losses on the Arlington investment.

The Internal Revenue Service challenged the $3.15 million cost evaluation of the film, set the actual value at $60,000, and disallowed the depreciation expense taken by Arlington and passed on to the limited partners.

In 1986, the Zola parties sued Larry Gordon and Edward Wagner, the marketers of the Arlington investment, seeking to recover damages for violations of the federal securities laws, civil RICO, and state common law.

Gordon argued that the statutes of limitations governing the claims under the federal securities laws had lapsed. Federal District Court Judge Conboy agreed that

any fiduciary duty owed to the limited partnership by general partner Gordon did not warrant extending the three year absolute limitations period under the Securities Act of 1933. The latest time that the Zolas' claims arose would have been in 1975, and the claims thus were time-barred.

The Securities Exchange Act of 1934 does not contain a statute of limitations. In considering whether the Zolas' claims were time- barred, Judge Conboy reviewed the fiduciary obligations undertaken by Gordon, and the conduct of the investors.

For the court, the "decisive relevant event" was the investors' receipt of an Internal Revenue Service report in June 1984 that placed a value on "The Romantic Englishwoman" of $60,000, a figure that represented only 4.4 percent of the value Arlington assigned to the film. Although the Zolas argued that the receipt of this information did not create a duty of inquiry on their part, the

court concluded otherwise. Judge Conboy noted that in 1984, the Internal Revenue Service notified Ralph Zola that Gordon and Wagner had been convicted on federal charges involving fraud in connection with the marketing of film tax shelter investments, including the Arlington limited partnership. The investors presented no evidence indicating that they made any inquiry of Gordon as to the calculations used to determine the film's cost, or as to the names of the valuation experts upon whom Gordon claimed to rely. After receiving the June 1984 report, stated the court, it was not reasonable for the investors to continue to rely on representations made by Gordon in a September 1975 letter that he had experts who would support his calculations as to the value of the film.

In all, "the curious and amazing silence on the part of Gordon" with respect to the downward revision of the film's worth by the Internal Revenue Service "cried out

loudly for explicit inquiry," and indeed, investigation, by the Zola parties. Given the absence of evidence demonstrating a genuine issue of fact as to whether the investors exercised due diligence, the court concluded that knowledge of the fraud would be imputed to the investors on receipt of a copy of the Internal Revenue Service report - any period of equitable tolling ended at that time. The causes of action under section 10(b), according to Judge Conboy's calculations, lapsed on June 13, 1986. Since the complaint was filed on June 18, 1986, it thus was untimely and was barred.

The investors' RICO claim was timely and sufficiently pleaded, stated the court. The alleged predicate acts were the sale of the limited partnership interests (securities fraud) and the sending of a letter concerning the sale (mail fraud). However, the investors did not set forth any facts from which the court could reasonably infer that Wagner engaged in the requisite predicate acts for

RICO liability, either as a primary violator or as an aider and abettor.

The investors' state law claim for fraud was time-barred, continued the court. And although a cause of action for conversion was within the applicable three year statute of limitations, the court allowed Gordon an opportunity to replead the status of Arlington. A claim for breach of fiduciary duty was not time-barred against any of the Zola parties, concluded Judge Conboy. [Dec. 1988] [ELR 10:7:15]

Briefly Noted:

Antitrust/Street Vendors.

A Federal District Court in Missouri has dismissed an antitrust action brought by vendors who, prior to the

spring of 1984, sold their event-related merchandise in an area outside Busch Stadium in St. Louis. The vendors claimed that the operator of the stadium and the stadium's licensed concessionaire, from 1983 to about April 1984, sought, by various means, to restrain the trade of the street vendors. Judge Hungate found that the vendors did not sufficiently allege that the conduct of the stadium parties substantially affected interstate commerce for purposes of a claim under the Sherman Act; there were no allegations showing the magnitude of either the vendors' purchases of out-of-state goods or the vendors' sales to out-of-state customers. The court also dismissed without prejudice the pendent claim of tortious interference with the vendors' business relationships and expectancies.

Huelsman v. Civic Center Corporation, 690 F.Supp. 825 (E.D.Mo. 1988) [ELR 10:7:16]

Copyright Infringement/Music.

A Federal District Court has ordered Pier III Cafe in Milford, Connecticut to pay a total of $8,000 in damages to the owners of eight copyrighted musical compositions, as well as attorneys fees and costs of about $2,100, for having performed the musical works without a license. The court also granted a permanent injunction prohibiting the nightclub from publicly performing the compositions in issue.

Golden Torch Music Corp. v. Pier III Cafe, Inc., 684 F.Supp. 772 (D.Conn. 1988) [ELR 10:7:16]

Cable Television.

City Communications, an unsuccessful bidder for the contract to install cable television in the city of Detroit, after having its antitrust claims against the city rejected (ELR 9:4:17), sought summary judgment on a First Amendment claim. A Federal District Court has denied the motion and dismissed the First Amendment claim without prejudice on the ground that City Communications lacked standing, or, in the alternative, that the First Amendment issue was not ripe for adjudication. In order to present the court with a complete record, City Communications would have to provide an application for a second franchise, accompanied by a feasibility study; an application and feasibility study filed with the cable commission, city council and mayor; and a denial of the application. Judge Gilmore declared that the court was "not in the business of granting franchises," and that a

determination as to whether any First Amendment rights were violated by the city's action would have to await a complete factual record.

City Communications, Inc. v. City of Detroit, 685 F.Supp. 160 (E.D.Mich. 1988) [ELR 10:7:16]

Previously Reported:

The following cases, which were reported in previous issues of the Entertainment Law Reporter, have been published: Angelika Films, Inc. v. Urban Entertainment Associates, Inc., 530 N.Y.S.2d 979 (10:3:15); Apple Records, Inc. v. Capitol Records, Inc., 529 N.Y.S.2d 279 (10:2:9); Challenge Publications, Inc. v. Commissioner Internal Revenue Service, 845 F.2d 1541 (10:1:15); Lamothe v. Atlantic Recording Corporation,

847 F.2d 1403 (10:2:8); McCollum v. CBS, Inc., 249 Cal.Rptr. 187 (10:3:8); Midler v. Ford Motor Company, 849 F.2d 460 (10:2:7); Redwood Theatres, Inc,. v. Festival Enterprises, Inc., 248 Cal.Rptr. 189 (9:12:12).

The opinion in Harkins Amusement Enterprises, Inc. v. General Cinema Corporation, 843 F.2d 1198 (ELR 9:12:11) as amended April 19 and July 19, 1988, has been published at 850 F.2d 477.
[ELR 10:7:16]

NEW LEGISLATION AND REGULATIONS

National Film Preservation Act will require labeling of certain colorized or otherwise altered movies

President Reagan has signed the National Film Preservation Act of 1988. The AC authorizes the Librarian of

Congress to establish a National Film Registry for the purpose of registering films that are "culturally, historically, or aesthetically significant." The Librarian, in consultation with the newly-authorized National Film Preservation Board, will recommend up to 25 films each year for inclusion in the Film Registry. A film will not be eligible for registration until ten years after its first theatrical release.

The Act prohibits the knowing distribution or exhibition to the public of a materially altered version of a film included in the Film Registry unless the version carries a label. The label for a materially altered version of a film, other than a colorized version, must state, in conspicuous and legible type on a panel card immediately preceding the beginning of the film: "This is a materially altered version of the film originally marketed and distributed to the public. It has been altered without the participation of the principal director, screenwriter, and

other creators of the original film." The latter sentence also must be included in the label for a colorized version of a film, but the first sentence of such label must state: "This is a colorized version of a film originally marketed and distributed to the public in black and white."

The label requirements also apply, with specified exceptions, to films intended for home use through either retail purchase or rental. Specifications are set forth for the content and placement of the labels on film packages, i.e., the original box, carton or container of any kind in which a videotape or disc is offered for sale or rental.

In establishing a National Film Preservation Board, the Librarian will select thirteen members chosen from candidate lists submitted by the following organizations: The Academy of Motion Picture Arts and Sciences; the Directors Guild of America; the Writers Guild of America; the National Society of Film Critics; the Society for

Cinema Studies; the American Film Institute; the Department of Theatre, Film and Television, College of Fine Arts at the University of California, Los Angeles; the Department of Cinema Studies in the Graduate School of Arts and Science at New York University; the University Film and Video Association; the Motion Picture Association of America; the National Association of Broadcasters; the Association of Motion Picture and Television Producers; and the Screen Actors Guild of America. The legislation sets forth the manner of appointment and operation of the Board.

Films nominated for inclusion in the Film Registry will be reviewed by the Board in consultation with the Librarian and in accordance with criteria to be established by the Librarian.

It should be noted that the Act defines the term "material alteration" as "to colorize or to make other fundamental post-production changes in a version of a film for

marketing purposes but does not include changes made in accordance with customary practices and standards and reasonable requirements of preparing a work for distribution or broadcast." Excluded from the definition of "material alteration" are practices such as the insertion of commercials and public service announcements for television broadcast.

The Librarian also has been authorized to attempt to obtain, by gift from the owner, an archival quality copy of an original version of each film included in the Film Registry in order to establish a special collection of such films.

Sanctions for violations of the Act include the prospective application of a label or removal of a seal. Federal District Courts may impose fines of up to $10,000 and order appropriate injunctive relief for willful violations of the Act.

The Act, which will be effective for three years, shall not apply to any copy of a film materially altered prior to the effective date of the Act if the copy is owned by an individual for his/her personal use, is in the inventory of the manufacturer or packager of a videocassette or already distributed to retail or wholesale distributors of videocassettes.

Interior Department Appropriations Bill (HR 4867), (Sept. 27, 1988) [ELR 10:7:17]

Copyright Office will require deposit of black-and-white print along with colorized version of a Him in order to register copyright in colorized work

In August 1988, the Copyright Office of the Library of Congress adopted a final regulation requiring parties

seeking a copyright in the colorized version of a film to deposit with the Office a black and white print of the work along with a copy of the computer colorized version.

The Copyright Office announced in June 1987 (ELR 9:3:21) that it would register certain colorized versions of black and white films, and proposed a regulation at that time concerning the deposit of a black and white print of the colorized work.

In commenting on the final regulation, the Register of Copyrights found that the Copyright Office possessed the authority for requiring a black and white print in addition to the colorized copy. It was emphasized that the deposit requirement "will facilitate the examination necessary to determine that the colorized version for which registration is sought is more than a trivial variation" so as to warrant registration of the colorized version as a work of original authorship. Furthermore, the Library of

Congress will obtain materials which will benefit the general public.

The Register noted that the Copyright Office does not plan to conduct patent or trademark-like examinations of the submitted works, and will review each (emphasis in original) colorized version on its own merits in relation to the material each added to the original black and white film.

If a registrant does not own an archival quality black and white print or demonstrates that it would be prohibitively expensive to prepare a new archival quality print where none is otherwise available, the Copyright Office may grant special relief to deposit the best available, near-archival quality print. Special relief to deposit a black and white videotape will be granted only where a celluloid print is demonstrably unavailable. In all instances, parties are requested to make a good faith effort

to deposit the best available film print " that is clear, undamaged, undeteriorated, and free of splices."

Copyright Registration for Colorized Versions of Black and White Motion Pictures, Library of Congress, Copyright Office (37 CFR Part 202, Aug. 9, 1988) [ELR 10:7:18]

National Football League Players Association amends its player agent regulations

The National Football League Players Association was the first player union to adopt regulations governing the activities of sports agents. It did so in 1983 (ELR 5:10:3). The National Basketball Players Association followed suit in 1986 (ELR 8:2:3). And the Major

League Baseball Players Association did so as well, earlier this year (ELR 10:6:18).

The NFLPA's regulations remained unchanged for five years. Now, however, the NFLPA has amended its agent regulations in several respects, some of them quite significant.

One of the most important changes concerns agents for NFL rookies. Under the original plan, agents who only represented rookies were not covered by the regulations. This was because the NFLPA gave a cautious and conservative reading to its legal authority over rookies who had not yet signed their first NFL contract. As the first of the player associations to regulate agents, such caution may have been wise. But subsequent legal developments now make it clearer than it was in 1983 that the NFLPA does have authority to regulate rookies' agents. The NFLPA plan now does so. It does by stating that agents must be certified by the Players Association in

order to represent an "NFL Player," and by specifically defining "NFL Player" to "include players who are about to enter their rookie season in the NFL."

Becoming an NFLPA certified agent is now more expensive than it used to be. Originally, the NFLPA did not charge agents an application fee or annual fees. Now, there is a $100 application fee, plus an annual fee of at least $400; in addition to the $400, agents also must pay a "cumulative fee" based on the number of negotiations they conduct during the previous year ($100 for 1 to 10 negotiations; $200 for 11 to 25; and $300 for more than 25).

The NFLPA's regulations always have prohibited" agents from "failing to disclose" to players the names of NFL management personnel agents represented. Now, however, that requirement has been made even clearer. The new amendments require agents to attach lists of their management clients to their player representation

agreements, and to send copies of those lists to the NFLPA as well. Moreover, if agents obtain new management clients after signing a player client, existing player clients and the NFLPA must be notified in writing when that occurs.

The NFLPA also has changed its regulations concerning the maximum fees that agents may charge their player clients. Previously, agents were permitted to charge a percentage of the amount by which a player's salary exceeded the collectively bargained for minimum (10% of the difference for the first contract year, 5% for the second, and 2% for the third) or $1,000, whichever was greater; and if a player's salary did not exceed the minimum., the agent could charge $125 per hour for negotiations, but not more than $1,000. Now, by virtue of the amendments, agents may charge no more than 5% of the amount by which a player's salary exceeds the minimum for all three of the first three years of a multi-year

contract (and nothing for the fourth or subsequent years). If a player's salary does not exceed the minimum, agents may charge $125 per hour for negotiations, but not more than $2,000.

Agents also must now notify the NFLPA in writing when they begin negotiations with an NFL club on behalf of a player.

The effective date of these amendments was October 1, 1988. The NFLPA is located at 2021 L St., N.W., Washington, D.C. 20036; phone 202/463-2200. [ELR 10:7:18]

IN THE NEWS

Jury rejects copyright infringement claim against musician John Fogerty

John Fogerty did not copy the melody of his 1970 song "Run Through the Jungle," in writing the hit song "Old Man Down the Road," according to a Federal District Court jury in San Francisco. Fantasy Records, the copyright owner on most of the songs Fogerty wrote for Creedence Clearwater Revival from 1967 to 1972, claimed that Fogerty infringed the earlier work in writing the lead single on the musician's highly successful 1985 solo album "Centerfield." [ELR 10:7:20]

Walt Disney Co. may use MGM/UA Communications name for Florida studio facility, rules Los Angeles trial court

A Los Angeles trial court has ruled that Walt Disney Co. may use the MGM/UA Communications name on Disney's Florida studio facility in accordance with a

1985 contract between the parties. MGM/UA sought to prohibit the use of its corporate name, claiming that the contract was breached when Disney added hotels to the Florida complex. [ELR 10:7:20]

Record company president is sentenced to ten years in jail and fined $200,000 for extortion in connection with purchase of cutouts

As reported at ELR 10:2:16, Morris Levy, the president of Roulette Records, was convicted on charges of conspiring to commit extortion in connection with a 1984 transaction involving the purchase of almost 5 million "cutout" records from MCA Records. A Federal District Court in New Jersey has sentenced Levy to ten years in jail and imposed a $200,000 fine. The court sentenced Levy's associate, Dominick Canterino, to 12

years in jail, and fined Canterino $50,000. Levy and Canterino, who remain free on $3 million bail, plan to appeal the sentences.

According to a news report, the conviction of Howard Fisher (Roulette's controller) was overturned. [ELR 10:7:20]

Antitrust action brought by record promoter Joe Isgro is dismissed

A Federal District Court in Los Angeles has dismissed a $25 million antitrust lawsuit in which independent promoter Joe Isgro alleged that most of the major record companies and the Recording Industry Association of America engaged in a conspiracy to restrain the business of independent record promoters in order to decrease promotion expenses.

Isgro previously settled his claims, for undisclosed amounts, against Capitol Records (ELR 9:2:21), against the Motown, Polygram and Chrysalis record companies (ELR 9:7:19) and against RCA Records, Arista Records, and A&M Records. Judge Consuelo B. Marshall granted the motion for dismissal sought by MCA Records and several Warner Communications record labels; Judge Marshall stated that a ruling, in June, denying a similar motion made by the parties was incorrect. [ELR 10:7:20]

Contract dispute between Los Angeles Raiders and Los Angeles Coliseum Commission may not be resolved by summary judgment

A Los Angeles trial court has denied a motion for summary judgment brought by the Los Angeles Coliseum

Commission in a $50 million breach of contract action against the Los Angeles Raiders football team. The Commission claimed that the Raiders breached their contract with the Coliseum by entering into an agreement to eventually play in Irwindale. Judge Dzintra Janavs ruled that questions of fact existed as to whether there was a breach of contract and whether the Raiders had entered an enforceable agreement for the team to play in Irwindale.

In an earlier ruling, the court had dismissed part of a breach of contract action brought by the Raiders in response to the Commission's lawsuit. The Raiders bad alleged that the Commission fraudulently informed the team that the Coliseum would be renovated. Judge Janavs found that state law prohibited private parties from suing public agencies, such as the Coliseum Commission, for fraud. [ELR 10:7:20]

DEPARTMENTS

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[ELR 10:7:22]