

BUSINESS AFFAIRS

**The Control of Film and Video
Distribution in Canada and Quebec:
The Effects of Existing and Proposed
Legislation on U.S. Distributors**

by Michael I. Prupas

Canada has long suffered an inferiority complex in relation to the United States in the area of popular entertainment. Canada's publishing industry, its magazine industry, its music industry, its radio industry, its television industry and its film industry have all had to struggle with the sometimes overwhelming presence in Canada of products originating in the United States and the dominating popularity of such products among

Canadians. Each one of these industries has in different ways and at different times demanded and received special government measures designed to nurture and protect them against the realities of Canada's geography and the common linguistic and cultural identifications that English Canada shares with the United States.

Of all of these cultural industries the one which has been the least susceptible of Canadian government protection has been the feature film industry. While the Federal government and various provincial governments have poured directly or indirectly millions of dollars into the production of Canadian films over the years, this has had very little impact on the motion picture theatre going habits of Canadians. In the most recent year for which statistics are available fully 97% of the screen time in Canadian theatres was occupied by non-Canadian films.

While Canadian political leaders have long considered bringing in legislation or negotiating agreements with

the U.S.-based major distributors favoring the production and exhibition of Canadian films, they have, until recently, never succeeded in adopting any effective measures to change the situation. There are many reasons why Canadian governments have had such a hard time in coming to grips with this problem. These include: (a) the capital intensive nature of the film production and distribution business and the absence of, until recently, significant pools of Canadian controlled capital in the business; (b) the regular departure of quality Canadian creative talent in the film industry to more lucrative positions in the United States and elsewhere; (c) the absence of Canadian control over Canadian theatres; (d) the almost impossibly small size of the Canadian marketplace and its further sub-division into two distinctive linguistic parts; and (e) the unabashed popular (sex) appeal of American film products and the relatively dry and cerebral character of much Canadian film product.

But perhaps most important of all has been the complete absence, until recent years, of any Canadians with any substantial economic interest in a Canadian controlled film industry who were willing to lobby Canadian governments to take measures to protect and nurture their interests. In recent years, the Federal government as well as the governments of several of the Canadian provinces (especially the province of Quebec) have received increased pressure from Canadian producers and distributors to ensure that they receive a fair share of the dollars flowing into Canadian theatres. Not surprisingly, the leadership in this area has come from the Province of Quebec which passed a new Quebec Cinema Act in 1983 (Bill 109) which contains provisions which should significantly change the way that the film distribution business is carried on in the Province of Quebec.

Prodded by the Quebec government, the Federal government under the leadership of Flora MacDonald

prepared a bill (Bill C-134) which received its first reading in the House of Commons on June 8, 1988 which proposed federal controls over the film distribution business in Canada.

The purpose of this article is to examine in some detail the new film distribution regime that has been established in the province of Quebec, to analyze the distribution regime that was envisaged by Bill C-134, and to provide some thoughts as to future of the film distribution industries in Canada.

Quebec Leads the Way

Bill 109 became law in 1983 after many years of discussion and debate within Quebec, and it covers numerous film industry issues, including such housekeeping issues as the reorganization of the film classification bureaucracy in Quebec, such politically charged issues as

the rules dealing with the language of exhibition of films in Quebec, and some very novel rules dealing with control of the distribution of films in Quebec. It is these latter rules which are the focus of this article.

It should be noted that many of the U.S. majors were vociferously opposed to Bill 109 when it was first adopted but seem to have adjusted their attitudes rather dramatically after their association, the Motion Picture Export Association of America ("MPEAA"), was able to successfully negotiate in December 1986 amendments to Bill 109 applicable only to members of the MPEAA. The provisions of Bill 109 which are relevant to this article are Articles 3, 4, 102 to 110 and 117 to 122.

Bill 109 creates two classes of film distributors in the province of Quebec: those who are entitled to receive a general distributor's license and those who are entitled to receive only a special distributor's licenses. General distributors' licenses permit their holders to sell, lease, lend

or exchange any and all films or videos in the province of Quebec while a holder of a special distributor's license may only sell, lease, lend or exchange a film or video which is identified in that special license, that is to say, he must obtain a new license every time he wants to distribute a film (Article 103).

General Distributors' Licenses

General distributors' licenses are only available to businesses whose "principal establishment" is located in Quebec, principal establishment being defined as the place where the decision-making power of the business is exercised (Article 104). The use of the "principal establishment" test is an original one and is designed to prevent non-Quebec based companies from establishing dummy head offices in Quebec in order to obtain a general distribution license in Quebec while exercising

decision-making powers elsewhere. This rule also has the incidental effect of permitting companies which may be incorporated and have legal head offices in other jurisdictions, but which are in fact run out of the province of Quebec, to obtain such general distributors' licenses. There is at least one well known company which falls into this category.

The restriction of the availability of general distributors' licenses only to companies whose principal establishments are located in the Province of Quebec could become the subject of some interesting constitutional litigation in the future in light of the Canadian Charter of Rights and Freedoms as well as the inter-play between Sections 91(3) (the exclusive Federal Trade and Commerce Power) and Sections 92(13) and 92(16) (the provincial Property and Civil rights and matters of a local nature powers) of the British North America Act. We have yet to see a test case being instituted under Bill

109 although there have been several film distributors based in Toronto who have raised objections to the fact that Section 104 excludes them from the Quebec marketplace while Section 105.1 effectively permits all of the major non-Canadian distributors to continue their usual activities here. The fact that Ontario has no such law excluding Quebec distributors is an indication of the unfairness of the situation in their eyes. One hopes that a practical solution will be found to this problem, otherwise the issue will have to be resolved by the courts.

Special Distributors' Permits

The rules governing the issue of special distributors' permits by the Regie du Cinema are found in Articles 105 and 105.1 of Bill 109. Section 105 was part of the original law passed in 1983 while Section 105.1 was added to give legislative sanction to the agreement

signed in earlier that month between the Quebec government and the Motion Picture Export Association of America (the "MPEAA Agreement"). Originally, Bill 109 had permitted special distributors' licenses to be issued only to two classes of persons: (a) the producer of the film (who is defined in Section 105 as the person who owned or co-owned the copyright of the film in accordance with an agreement that was in place at the commencement of principal photography of the film) ; or (b) the person who owned the worldwide distribution rights of the film and who had held a film distribution license in the province of Quebec on December 17, 1982.

Apart from the general objection of the major studios to being subject to any kind of legal limitation on their distribution activities (particularly when it is imposed upon them by a province which represents a very small distribution market for them) they had substantial problems with the letter of Section 105 in its original form.

In the first place, Section 105 prevented the companies who had financed a motion picture from claiming a special distribution permit unless they actually owned the copyright of the film on the date that principal photography of the film commenced. This restriction alone would exclude many of the films actually financed by the U.S. majors in the 1980's since many of their films had been financed by the use of funds from publicly owned limited partnerships, which limited partnerships in many cases held the copyright to the film.

In addition, the requirement that as distributor the applicant for a special distributor's permit had to hold "worldwide distribution rights" in the film in question was confusing and problematic. From the U.S. majors' point of view there were many problems in conforming with this regulation in that most of the major studios use sub-distributors in various minor territories of the world (including such places as India, the Middle East and

Eastern Europe) and since most of them used different legal entities for their own tax reasons in distributing films outside of the United States and Canada. Furthermore, some of the major studios jointly own a single Paris-based distribution company which is responsible for distributing all of their pictures in the European markets. To put it generally, the rules contained in Section 105 in its original form would not have permitted these companies to distribute in Quebec much of the product which they considered to be their "own" product and all kinds of threats to "boycott" Quebec were rumored to have been made.

MPEAA Agreement

As a result of representations made to the Quebec government by and on behalf of the major studios after the passage of Bill 109, the Liberal government which was

elected in 1985 decided to negotiate a contract with the MPEAA which would on the one hand accomplish the government's political goal of restricting the activities of the major studios in Quebec to the distribution of films which they considered to be their "own" films while at the same time making the technical requirements flexible enough to accommodate the normal practices of the major studios. The result was the MPEAA Agreement which was incorporated into the law as Section 105.1.

Section 105.1, which incorporates by reference the MPEAA Agreement, as well as the regulation issued under Section 105.1 by Order in Council dated August 3, 1988, established the rules which would be followed by all of the U.S. major studios in obtaining special permits for the release of motion pictures in the province of Quebec. The first thing to note, of course, is that Section 105.1 is only available to companies who were members of the MPEAA as of January 1, 1987. This includes all

of the major studios and some of the mini-major studios but not any of the independent distributors in the United States or any Canadian distributors. It should also be noted that the mere act of joining the MPEAA after January 1, 1987 will not permit a company to qualify for the benefits of Section 105.1 as Di Laurentis Entertainment Group learned to its regret.

The regulations to Bill 109 also specified that members of the MPEAA would have to file with the Regie du Cinema copies of their Articles of Incorporation and their business permits in order to become qualified to obtain special distributor's permits. According to representatives of the Regie du Cinema, all of the qualifying members of the MPEAA have provided such documentation to the satisfaction of the Regie du Cinema as of the present time.

In order to obtain a special distributor's permit for any given film under Section 105.1, the qualifying distributor

must provide proof that a film falls into one of three categories: (a) that the distributor paid for 100% of the negative costs of the film, in which case he must provide a certified copy of an extract of a contract demonstrating this fact; (b) that the distributor invested either itself or with another qualifying member of the MPEAA at least 50% of the amount invested in the film (including production and release costs) or \$4.5 million (Canadian) (converted at a rate of .7194 U.S. dollars for each Canadian dollar, which makes the minimum investment U.S. \$3,237,300), in which event proof in the form of an affidavit signed by an officer of the MPEAA member company will suffice; or (c) that the distributor, whether alone or in conjunction with another member of the MPEAA, holds the rights to distribute the film in Canada, the United States, the European Economic Community, Japan, Australia and New Zealand, in which event the proof required is a certified extract of the contract

pursuant to which the distributor or distributors obtained such rights.

It is interesting to note that the category for qualification referred to in (b) above is the category that is being used most often by the U.S. major studios since September 30, 1988 in obtaining their special distributor's permits. The explanation for this is obviously the facility of the proof that is required in those circumstances since the mere deposit of an affidavit from one of the Montreal based officers of the studio in question is sufficient. It is also interesting to note that category (b) permits studios who have simply invested a given dollar amount in the prints and ads costs of the film, for example, to obtain a special distributor's permit for such film in Quebec. As a result, and to put a cynical perspective on it, Section 105.1 of Bill 109 and its regulations effectively permit the established U.S. majors to continue to distribute within Quebec all of the films that they are

distributing in the rest of North America with virtually no exceptions since no major studio these days gets involved in either the production or the distribution of the film without spending the minimum of (US) 3,237,300. In effect, all of the large budget pictures will be left to the American distributors while all of the smaller budget European pictures and American independent pictures will be the exclusive domain of the Quebec distributor. Nothing is being done to threaten the studios' oligopolistic control of the distribution of large budget pictures in Quebec.

Videocassette Distribution in Quebec

Another very important facet of Bill 109's regulatory environment are the sections dealing with the distribution of videocassettes in the Province of Quebec (Sections 117 and 122). These sections came into force on

September 30, 1988 and contained the seeds of a potentially explosive battle between the existing video distributors and the Quebec government, although the possible conflict did not receive much publicity in the press. In effect there is a doubly restrictive regime applicable to the distribution of videocassettes in Quebec, because the rules relating to obtaining general distributors' licenses and special distributors' licenses are applicable to distributors who release their product in the videocassette format, and they are also faced with obtaining a filing certificate pursuant to Section 119 of Bill 109 identifying each videocassette that they sell and making available a copy of such filing certificate to each wholesale or retail dealer that distributors deal with.

As a result, the video distributors who are members of the MPEAA will be required to get both special distributors' licenses and filing certificates for each of the video cassettes that they distribute in Quebec. Since

there are approximately 200 new videocassettes which are released in the Quebec marketplace every month, these rules should have a fairly dramatic impact on the work load that the video distributors face especially since it is an absolute requirement of Section 119 that a copy of the full distribution agreement authorizing the video distributor to distribute the videocassette in question must be filed with the Regie du Cinema in order for the distributor to obtain a filing certificate in respect of such videocassette.

Although the law is already in effect, no one has addressed the logistical problems that the implementation of Section 119 would entail for the video distributors, not to mention the fact that Section 105.1 does not address the current structure of the videocassette distribution industry where joint ventures involving companies that were not members of the MPEAA prior to January 1, 1987 are common.

According to a representative of the Regie du Cinema whom the author spoke to on November 11th, 1988, Bill 109 is not being applied to the video industry at the present time, and virtually all of the video distributors who sell to the Quebec marketplace are at least in technical violation of the provisions of the Act. High level meetings have been convened between representatives of the Quebec government and representatives of the videocassette distribution industry to address these issues and some attempt may be made to negotiate a special agreement relating to video which would ultimately be incorporated into Bill 109.

Implementation Delay

It should be noted that all of the sections of Bill 109 dealing with the distribution of films, as well as all of the related regulations, were brought into effect on

September 30, 1988, nearly five years after the law was passed and nearly two years after it was amended to accommodate the agreement with the MPEAA referred to above. While one cannot pretend to know exactly what were the causes of the delay of implementation, it is clear that the domestic and international political implications of grossly offending the major U.S. studios was a major factor in the first delay. On the one hand, no Quebec government wanted to be faced with the anger of an electorate that had just been deprived of one of their major forms of entertainment because of a Hollywood boycott of the Quebec market place. On the other hand, the Quebec government was very wary about offending the U.S. government which was known to have been heavily lobbied by the U.S. major studios, at a time when it was actively supporting a free trade agreement with the United States.

The dilemma facing the Quebec government was dramatically alleviated with the signing of the MPEAA Agreement. The MPEAA Agreement was touted by the Quebec government to be the very first agreement ever signed by the U.S. major studios anywhere in the world pursuant to which they voluntarily agreed to restrict their distribution activities. In Quebec only films which they either had financed to some substantial degree or in respect of which they held distribution rights in most of the major markets world-wide could henceforward be distributed by the majors.

Yet even after the signing of the MPEAA agreement, the Quebec government waited nearly two years before putting its law into effect. This second delay, while partially explained by the slowness of the Quebec government bureaucracy in drafting regulations, was largely caused by the on-again, off-again noises that were coming from the Conservative government in Ottawa, whose

Communications Minister, Flora MacDonald, seemed very interested in finding a way of imitating Quebec's example on a national scale. During this 21 month period both the Quebec Minister of Cultural Affairs, Lise Bacon, and the major lobby organization which had an interest in the distribution sections of Bill 109, the Association des Distributeurs des Films et Videos du Quebec, focused their attention on pushing Flora MacDonald to see similar legislation through the House of Commons and seemed prepared to wait for the outcome in Ottawa before pushing for the implementation of Quebec rules.

Ottawa Follows Suit

Since 1945, the Federal government had been looking into the reasons behind the dominance of Canadian theatrical distribution by American distributors and the

absence of Canadian films on Canadian screens and had made various largely unsuccessful efforts to change the situation during that time. Among these were the creation of the Canadian Film Development Corporation in 1967, the negotiation with Famous Players Corporation in the early 1970's of a voluntary program pursuant to which Canada's then largest exhibition chain would invest in Canadian films, and the commissioning of various studies and task forces (Applebaum-Hebert, Raymond-Roth) which made recommendations as to how the situation could be corrected. Needless to say, none of these efforts had had the slightest impact on the movie-going habits of Canadians nor on the financial benefits that Canadian owned companies derived from the dollars spent by Canadians on filmed entertainment product.

However, by the spring of 1987, the time was ripe for the Conservative government to act. Soon after its

election in 1984, its then Minister of Communications, Marcel Masse, had established a Film Industry Task Force under the joint chairmanship of Marie-Josée Raymond and Stephen Roth to make specific recommendations on what the government should do. Its initial report was issued in November 1985 and its first recommendation was "That the distribution of films and videos in all medias in Canada be by companies owned and controlled by Canadians." The strident tone of this recommendation became a little bit easier for the Federal government to handle after the Quebec government had successfully negotiated an agreement which, while it did not go nearly as far as the Roth-Raymond recommendation, at least on paper restricted the American majors to the distribution of the types of films which they had always distributed and closed Quebec's doors to any new distribution companies which might be set up in the United States or elsewhere.

Yet, at the same time, the Canadian government was in the process of negotiating a free trade agreement with the United States. It became obvious to close observers of Federal government's actions in the film and television areas during the 1987-1988 political season that while the Federal government was going to have to do something in the film distribution area to appease the potential opinion makers who formed the Canadian film community, they could not do anything that would violate the spirit of the free trade agreement. The result was Bill C- 134.

Proposed Federal Bill C-134

Bill C-134 is a classic example of a statute whose political ambitions far outweigh its practical impact. It sets out its purpose in Section 3 of the Act which is worth remembering: "The purpose of this Act is to regulate the

importation of film products in order to establish Canada as a separate national market for the distribution of film products, to promote the distribution of the film products in Canada by Canadians and to promote the production, distribution and exhibition of Canadian film products."

This statement of purpose is rather curious in that nothing in the Act whatsoever deals with the production, distribution or exhibition of "Canadian film products" and nothing in the Act promotes the distribution of film products in Canada by Canadians although there is a provision which requires film importers to have a "business establishment" in Canada. The Act does, however, go some way towards the establishment of Canada as a separate national market for the distribution of film products. It is the establishment of this separate national market which is the primary goal of Bill C- 134 and it is

a goal which has taken its cue from Quebec's Bill 109 but carried the ball in a different direction.

In trying to ensure that it was on solid constitutional footing in proposing Bill C-134, the Federal government attempted to regulate the distribution of film products in Canada under the guise of controlling the right to import film products into Canada (foreign trade having been long since acknowledged as a jurisdiction in which the Federal government has the right to exercise power, if not exclusive power).

Basic Rules of the Proposal

Subsection 9(3) of Bill C-134 establishes the basic rules. The first requirement which applies to all classes of importers of film products is that the importer have a "business establishment" in Canada. The term "business establishment" is defined in subsection 2(6) as being

places of business in Canada with at least one employee and having some assets (no minimum amount is specified) which are used to carry on the business. There is no requirement that the establishment be manned or owned by Canadian citizens or residents.

However, it should be noted that the Investment Canada Act which had been amended in 1985 provides that investments in cultural industries are subject to review under that statute. It follows that non-Canadians may not be able to establish business establishments in Canada relating to the film distribution business unless they have obtained specific permission to do so by the Investment Review Board established under the Investment Canada Act. While it is doubtful that any of the established major studios would be in a position where they would be considered not to have a business establishment in Canada, it is likely most newly established non-Canadian companies might have difficulty in setting up a business

establishment in Canada with the result that they would not be able to meet the requirements of subsection 9(3) of Bill C-134 (assuming it is to become law).

Under Bill C-134, once a company has passed the hurdle of establishing a "business establishment," that company must meet one of three tests if it is to be allowed to import any given film product in Canada. These tests are: (a) that it has invested at least 50% of the production costs of the film product prior to the making of the first answer print (paragraph 9(3)(c)); or (b) that it or any one affiliate of it (the French version reads "cette personne ou une personne moral qui appartient au meme groupe") has the right to distribute the film product in all media throughout the world other than the original country origin of the film product (paragraph 9(3)(b)); or (c) that the distribution agreement relating to the distribution of the film product in question in Canada was not a condition of any agreement relating to the distribution of

the film outside of Canada or vice versa (paragraph 9(3)(a)).

Once again, just as was the case in respect of the original text of Article 105 of Quebec's Bill 109, it would appear that the language used in subsection 9(3) of Bill C-134 is sufficiently ambiguous and/or inflexible in certain important respects to permit the Bill's opponents to pronounce it as being unworkable.

Anticipated Response of American Majors

One can assume that the major studios will bring to bear on the Federal government the same arguments they brought to bear on the Quebec government when it comes time to try to pass these provisions into law or enforcing the law thereafter. Thus, one can expect to see the major studios seeking to have a minimum dollar investment in a film fixed as a sufficient threshold to

qualify it for importation and distribution, and an agreement that any such investment could take the form of investment in prints and ads as much as it can take the form of an investment in production costs. Similarly, one can assume that pressure will be brought to bear to ensure that "worldwide" distribution rights does not necessarily have to include the right to distribute in every single country of the world other than the country of origin.

It will also be argued that it is unfair to require the distribution rights for the entire world to be held by an entity or any one of its affiliates. In many cases the major studios hold their distribution rights in different legal entities in different parts of the globe. In addition, there are many territories where for economic or political reasons the major studios arrange for their product to be handled by third parties. It will be interesting to see how the Federal government reacts to such arguments and

whether the government will follow the path of least resistance by following the example set by Quebec by recognizing that the major studios should pretty much be permitted to carry on their business in Canada the way they have always carried it on.

The boldest change attempted in Bill C-134 is contained in paragraph 9(3)(a). This sub-paragraph requires in effect, that a film not produced by a major studio and not distributed worldwide by a single entity be available for distribution in Canada only to persons who entered contracts pursuant to which Canada is treated as an independent territory. It is designed to reserve the distribution of all motion pictures produced outside of the U.S. studio system, including all motion pictures produced by independent producers in the United States, exclusively for Canadian distributors since as a practical matter American distributors, even those with separate business establishments in Canada, will invariably try to

purchase both United States and Canadian rights to a film in a single deal to the extent that they get into the market of distributing European and other non-studio produced pictures.

Paragraph 9(3)(a) will also give rise to serious questions of proof since the onus will be on the government to prove that in effect two contracts entered into on the same day involving the same parties, one covering Canada and the other covering the United States, were in fact conditional on each other. The mere fact that a Canadian distributor may have been prepared to pay a higher minimum guarantee for Canadian rights to a given film, would not by any means be sufficient grounds for alleging that the company that obtained the rights in question only because of its willingness to purchase the U.S. rights as well. It could be argued that other factors, such as the experience of the distributor, the ability of the distributor to allow the film in question to ride the coattails

of other higher profile films in the Canadian marketplace, as well as the ability of the distributor in question to coordinate marketing and publicity efforts with its U.S. affiliate, are all legitimate business reasons for working with a Canadian affiliate of a U.S. company, which do not, on their face, violate the provisions of paragraph 9(3)(a).

Canadian Government Accommodation of U.S. Majors

Looked at from this perspective it appears that, once again, the Canadian government, like the Quebec government before it, is carefully attempting to avoid cutting into the distribution by the American majors of films which they consider to be their "own" films while reducing possible intrusions by the American majors into the market for the Canadian distribution of European and other non-studio productions. While this goal

will undoubtedly allow Canadian- based distributors to continue doing what they've always been doing, one wonders whether it will have any effect in increasing the amount of revenues available to Canadian distributors or in having any effect on the movie-going habits of Canadians.

To put it simply, one wonders how the government is doing anything that will have any material impact on the strength of the independent distribution sector in Canada, especially since Bill C-134 would not legally prevent any U.S. distributor who does have a business establishment in Canada from competing with Canadian-owned distributors if they wanted to distribute foreign and American independent films in Canada. Although, it is unlikely that the American majors would jump into that marketplace (since they have learned from past experience that the profits are not large enough in that

marketplace), there is very little in the law that would inhibit their ability to do so.

Of course, there is always the possibility that the film tastes of Canadians will change dramatically at some point in the future but I wouldn't bet my next pay cheque on that possibility happening in the foreseeable future.

The Canadian-U.S. Free Trade Agreement

Some people may be wondering about the potential impact of the recently implemented (January 1, 1989) Free Trade Agreement between the United States and Canada (the "FTA") on Bill C-134 and Bill 109. Paragraphs 2005(1) and (2) of the FTA read as follows: "(1) Cultural Industries are exempt from the provisions of this Agreement, except as specifically provided in Article 401 (Tariff Elimination), paragraph 4 of Article 1607 (divestiture of an indirect acquisition), and Articles 2006

(retransmission rights) and 2007 (repeal of restriction of deductibility of Canadian advertising expenses in American publications and broadcasts). (2) Notwithstanding any other provision of this Agreement, a party may take measures of equivalent commercial effect in response to actions which would have been inconsistent with this Agreement but for paragraph 1. "

Thus, paragraph 1 permits Canada to enact legislation relating to film distribution (a defined "Cultural Industry") without violating the Free Trade Agreement, and paragraph 2 would permit the United States to take measures of "equivalent commercial effect" (a vague and undefined term) to counter Canada's film distribution legislation, should such legislation be considered to be otherwise inconsistent with the FTA. Given my analysis that Bill C-134 is likely to have almost no economic impact on U.S. film distributors it is hard to see how the U.S. could take any significant counter

measures given the "equivalent economic effect" rule.

Conclusion

It has become politically fashionable in recent years for Canadian politicians to try to do something about the lack of control by Canadian distributors over the product that appears on Canadian movie screens. It has been argued that in the absence of such control, it is impossible for Canadian distributors to make the kind of profits that they would need to make in order to become serious financial supporters of Canadian produced film product. Australia has been pointed to as an example of a country whose film distributors (who are often also exhibitors) have had greater control over their local screens and who have invested some monies (albeit relatively small amounts) in Australian films.

Notwithstanding all of these political fashions, Canadian politicians are too smart not to have recognized that it would be political suicide for them to interfere in any kind of material way with the in-flow of filmed entertainment which Canadian voters go to see 97% of the time that they step into a motion picture theater. And clearly those politicians (both at the Federal level and in Quebec) who support free trade with the United States would be hard put to justify closing the door to American businesses which have been established here for many years.

As a result, the political fashion has translated itself into laws both at the Quebec and Federal level which do very little to expand the film products that will be available to Canadian distributors and the number of dollars which will be available from those distributors for investment in Canadian productions. The most that can be said of these laws (assuming that the federal law passes

3rd reading and is brought into force) is that they have addressed an issue which was at one point four years ago a grave concern of the existing Canadian distribution community, the establishment by the U.S. majors of so-called "Classics" divisions, designed to distribute primarily European films to North American audiences. Since the threat of the Classics divisions has long since passed (all of these Classic divisions have now been closed), it is hard to see how the lot of the Canadian distributors will be dramatically improved by these new laws.

What impact will these laws have on the Canadian production community? Not likely very much, since even a high level of guarantee for Canadian rights from a Canadian distributor will contribute only a relatively small percentage of a normal, or even low-budget, film's budget. The Canadian marketplace is just too small. So Canadian producers, other than those who are able to

rely on government help for the vast bulk of their budget, are going to have to rely on coproductions and foreign sales to make their projects fly. Fortunately, there are more and more Canadian producers who are able to obtain such coproduction deals and foreign sales. But they are not likely to ever thank Bill 109 or Bill C-134 for their successes.

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RECENT CASES

Owner of renewal copyright to short story on which "Rear Window" was based may be entitled to participate in profits from re-release of film

"It Had to be Murder," a short story by Cornell Woolrich was first published in February 1942 in "Dime Detective Magazine." The magazine had a "blanket copyright" in the name of its publisher, Popular Publications, Inc., In April 1943, Popular Publications assigned its rights in the story, except the right of magazine publication, to Woolrich.

In 1945, Woolrich assigned the motion picture rights to six of his stories, including "It Had to be Murder," to B.G. DeSylva Productions. Woolrich also agreed to renew the copyrights in the stories and then assign the same motion picture rights to DeSylva for the 28 year

renewal term. MCA, Inc. acquired the motion picture rights in "It Had to be Murder" from DeSylva's successors in interest for \$10,000 and in 1954, Paramount Pictures produced and distributed the classic film "Rear Window," which was based on Woolrich's story.

Woolrich died in 1968, leaving his property to a bank-administered trust for the benefit of Columbia University. In December 1969, the bank renewed the copyright in Woolrich's story. In 1972, the bank assigned the renewal copyright to Sheldon Abend for \$650 plus ten percent of all proceeds from the exploitation of the story.

When the ABC television network broadcast "Rear Window" in 1971, Abend notified MCA, director Alfred Hitchcock and James Stewart, the owners of the "Rear Window" film and the renewal copyright in the film, of Abend's copyright renewal interest. In 1974, Abend sued the MCA parties in a Federal District Court in

New York, alleging copyright infringement. Abend eventually dismissed his complaint in return for \$25,000.

In 1977, a Federal Court of Appeals in New York decided the case of *Rohauer v. Killiam Shows, Inc.*, 551 F.2d 484 (2d Cir.), cert.denied, 431 U.S.949 (1977). On the basis of *Rohauer*, MCA authorized Universal Pictures to re-release "Rear Window" for theatrical and cable television exhibition and through videodisc and videocassette rentals and sales.

Abend once again sued the MCA parties, claiming that the re-release of the film and other activities interfered with Abend's renewal rights and constituted copyright infringement. A Federal District Court in California granted the MCA parties' motion for summary judgment based on *Rohauer* and on a fair use defense. The court rejected MCA's motion for summary judgment based on alleged defects in the story's copyright, and also denied

Abend's motion for summary judgment as to MCA's liability for copyright infringement.

On appeal, Judge Harry Pregerson first found that the fact that Woolrich did not separately register any copyright for "It Had to be Murder" did not mean that the story entered the public domain. In the area of magazine publishing, the publisher's copyright effectively protects the story and gives the author beneficial ownership of a copyright in the story, stated Judge Pregerson, agreeing with the "sound practical sense" of the Second Circuit's position on this issue.

Judge Pregerson next determined that the executor of Woolrich's estate validly renewed the copyright in "It Had to be Murder," finding that section 24 of the Copyright Act of 1909, as amended, gives the author of a contribution to a periodical renewal rights with respect to that contribution, even when the author did not separately copyright the contribution.

In turning to the applicability of the Rohauer decision, the court noted that Rohauer involved the 1926 film "The Son of the Sheik," based on a novel written by Edith Maude Hull. Hull obtained the copyright in the novel in 1925, and assigned the motion picture rights to an individual identified by the court as Moskowitz. Hull also agreed to renew the copyright and assign the motion picture rights during the renewal term to Moskowitz. The owners of the film renewed the derivative copyright on the film in 1954, and in 1961, sold this copyright to Gregstan Enterprises, a corporation headed by Paul Killiam. Gregstan assigned the renewal copyright to Killiam Shows, Inc. in 1968.

However, in 1952, Hull's daughter renewed the underlying copyright on the novel under section 24 of the Copyright Act, and in 1965, assigned the motion picture and television rights to Rohauer. The original film was broadcast on a public television station in New York in

July 1971, using a tape made from a print obtained from Killiam. Rohauer proceeded to sue for copyright infringement.

Federal Court of Appeals Judge Friendly, citing a "new property right" theory and the relative "equities" of the case, found that the television broadcast of the "Son of the Sheik" film did not infringe the renewal copyright in the underlying novel.

Judge Pregerson, after reviewing other relevant cases, and observing that Woolrich died before the renewal period for his copyright arrived, declared that Woolrich's purported assignment of renewal rights was "ineffective and irrelevant;" the most MCA's predecessors could have acquired was an expectancy in the right to use the story underlying the derivative work during the story's renewal period. Judge Pregerson, finding support in "Nimmer on Copyright" and *Mills Music., Inc. v. Snyder*, 469 U.S. 153 (1985; ELR 6:9:8) characterized as "

meaningless" the distinction drawn in Rohauer between cases where the author never agreed to assign renewal rights, and cases where the author's agreement is "plainly unenforceable" against his statutory successors.

The legislative history behind section 24 also supported Abend's position as to the contingency of the renewal right provided by the section, stated the court, as did Congress' concern with providing authors a "second chance" to gain from the benefits of their work. When Woolrich agreed to assign his renewal rights, he could not have foreseen the technological advances which enabled the producers of the film to expand the exploitation of the work, noted Judge Pregerson. Section 24 also was intended to provide protection to the author's family, acting, according to the court in *DeSylva v. Ballentine*, 351 U.S. 570 (1956), as a "compulsory bequest of the copyright to the designated persons." In balancing the equities in favor of the derivative copyright owner,

Rohauer did not discuss either of the concerns underlying section 24, stated Judge Pregerson, and mistakenly looked for support in the Copyright Act of 1976. In all, declared the court, "neither the equities, precedent, nor Congressional intent justify us in changing the balance between owners of renewal copyrights in underlying works and owners of the copyright in derivative works when Congress has refrained from doing so. We therefore hold that [MCA's] continued exploitation of the 'Rear Window' film without Abend's consent violates Abend's renewal copyright in the underlying story 'It Had to be Murder,' unless [MCA] can establish any affirmative defenses."

Judge Pregerson advised the District Court to take the equities of the case into account in reaching an appropriate remedy in the event the MCA parties, who invested substantial money, effort, and talent in creating "Rear Window," fail to establish any equitable defenses. Since

the film resulted from the efforts of many individuals, other than Woolrich, enjoining the further exhibition of the film would cause a "great injustice" for the owners of the film, cautioned the court. An injunction would also deny the MCA parties the legitimate profits derived from the exploitation of the "new matter" comprising the derivative work, and would deny the public the opportunity to view the film.

Professor Nimmer's suggestion of damages or a continuing royalty most likely would provide an acceptable resolution for the parties, stated Judge Pregerson. The District Court would be capable of calculating damages caused to the fair market value of the Woolrich story by the re-release of the film. Any impairment of Abend's ability to produce new derivative works based on the story would be reflected in calculating such a damage award. Abend also would be entitled to an award of actual damages.

The court concluded by finding that the MCA parties' use of Woolrich's story was not a fair use. It was noted that the use was of a commercial nature and involved a fictional short story, a "quintessentially creative product." A substantial portion of the underlying story was used in the film, and there was no question, for the court, that the adaptation rights in the story, particularly United States television rights, were adversely affected by the re-release and distribution of the film. Judge Pregerson stated that the case presented a "classic example" of an unfair use: "a commercial use of a fictional story that adversely affects the story owner's adaptation rights," and the District Court erred in finding a fair use.

The matter was remanded to the District Court for reconsideration of Abend's motion for summary judgment and the affirmative defenses raised by the MCA parties, including estoppel, unclean hands, waiver, abandonment, laches and copyright misuse.

Judge David Thompson agreed that the District Court erred in granting the MCA parties' motion for summary judgment based upon the fair use defense, but dissented from any suggestion by the court that the copyright in "Rear Window" was in some way limited because the fair use defense did not apply to Abend's claim of infringement. Judge Thompson would have found that the District Court correctly granted summary judgment in favor of the MCA parties on the basis of the decision in Rohauer, stating that the continued exhibition of "Rear Window," a copyrighted derivative work, did not infringe Abend's renewal copyright in the underlying work. For Judge Thompson, the instant case involved "two works of equal dignity in the eyes of copyright law," and presented substantially the same question which was presented in Rohauer, with no reason to depart from the holding of that case. When Woolrich died before the commencement of the renewal term and

assignment of his renewal rights, MCA lost the right to create a new film or any work using Woolrich's story; the company did not lose its right to exploit the film without Abend's consent, or without allowing Abend to share in the proceeds from the exploitation. Abend still may republish the story, or authorize new film, television or theatrical productions so long as he does not infringe upon the new matter contained in "Rear Window." In Judge Thompson's view, the finding that Abend is entitled to a portion of "Rear Window's" profits "just doesn't make sense."

Abend v. MCA, Inc., Case Nos. 87-5780; 87- 5833; 87-5922 (9th Cir., Dec.27, 1988) [ELR 10:9:11]

In-room viewing of rented movie videos by hotel guests does not violate movie studios' copyrights, Court of Appeals holds in long-awaited La Mancha case

A Federal Court of Appeals in California has upheld a District Court decision finding that the operators of a hotel resort in Palm Springs did not violate the Copyright Act by renting videodiscs for viewing on hotel-provided video equipment in guests' rooms.

Guests at the La Mancha Private Club & Villas may rent movie videodiscs from the hotel for a \$5 to \$7.50 daily fee per disc. Guests view the videodisc movies projected on the television screens in their rooms.

When Columbia Pictures and several other motion picture producers sued the resort for copyright infringement, the District Court determined that the movies were not performed "publicly" within the meaning of

section 106(4) of the Copyright Act, and granted summary judgment to La Mancha.

Federal Court of Appeals Judge Diarmuid O'Scannlain first found that hotel guest rooms are not "public" for purposes of the Copyright Act - a hotel may be "open to the public," but a guest's hotel room, once rented, is not. The court observed that the movies were viewed exclusively in guest rooms, "places where individuals enjoy a substantial degree of privacy, not unlike their own homes."

The court next rejected Columbia's argument that La Mancha was engaged in the unauthorized transmission or communication of copyrighted works, holding that LaMancha did not "communicate" the in-room performances at all, and that any transmission and reception occurred entirely within the guests' rooms.

Judge O'Scannlain concluded by commenting that "it is for Congress, not for the courts, to update the Copyright

Act if it wishes to protect viewing of videodisc movies in guest rooms at La Mancha."

Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc., Case Nos. 86-5641; 86-5664; 86-5677 (9th Cir., Jan. 17, 1989) [ELR 10:9:13]

Sale of ceramic tiles featuring pages from art book infringes copyrights in artist's works

Mirage Editions, the exclusive publisher of the works of the late artist Patrick Nagel and the owner of the copyrights to many of his works, along with Nagel's widow, Jennifer Dumas, sued Albuquerque A.R.T. for copyright infringement. According to Mirage, A.R.T. purchased copies of the commemorative book entitled "Nagel: The Art of Patrick Nagel," removed selected

pages from the books, glued them individually onto ceramic tiles, and then offered the tiles-with-artwork for sale.

A Federal Court of Appeals in California has upheld a District Court decision granting summary judgment to the Mirage parties. Judge Brunetti pointed out that the protection of the derivative rights provision of the Copyright Act extends beyond mere protection against unauthorized copying to include the right to make other versions of, perform, or exhibit the work. After citing "Nimmer on Copyright," the court noted that A.R.T., by borrowing and mounting the preexisting, copyrighted individual art images without the consent of the copyright proprietors, recast or transformed the individual images and thus prepared a derivative work infringing the subject copyrights.

A defense based on the first sale doctrine was rejected. A.R.T.'s right to transfer its ownership of copies of the

Nagel art book applied only to the particular copies of the book which the company purchased, and did not involve a transfer by the copyright holder of the exclusive right to prepare derivative works.

Mirage Editions, Inc. v. Albuquerque A.R.T. Co., 856 F.2d 1341 (9th Cir. 1988) [ELR 10:9:13]

Corporate-commissioned lithographs created by artist Patrick Nagel were not works for hire

Jennifer Dumas has obtained the affirmance of a Federal District Court decision granting her motion for a preliminary injunction to restrain a Los Angeles art gallery from reproducing and marketing copyrighted works of art created by Dumas' late husband, Patrick Nagel.

In 1979, Nagel produced four works of art on contract to the advertising agency of D'Arcy, MacManus & Masius for use by the agency's client, ITT Cannon. Cannon planned to give the Nagel works as sets of lithographs to its distributors as part of a promotional campaign. The content of the paintings and some aspects of the design, borders and placement of figures allegedly were determined by D'Arcy; the agency also provided Nagel with sketches to use in preparing his illustrations. However, the purchase order did not specify that the works were works for hire nor did it transfer the copyrights to ITT Cannon.

ITT at some point threw away Nagel's four original paintings. In 1985, the company sold several remaining sets of lithographs to Stefan Gommerman, doing business as Eva & Steve Dorog Gallery. Gommerman claimed that he also purchased from ITT any copyrights

to the works which ITT may have held, and registered each of the four works in his name.

Dumas notified Gommerman and ITT Cannon of her claim of copyright ownership. Gommerman, however, proceeded to reproduce one of the works as a poster. Dumas' action for copyright infringement and for the unauthorized use of a deceased personality's name in violation of California Civil Code section 990 followed.

A Federal District Court in California granted a preliminary injunction barring Gommerman from reproducing or otherwise manufacturing the ITT works, or selling, advertising, or in any way distributing reproductions of the ITT works already in Gommerman's possession.

Federal Court of Appeals Judge Betty B. Fletcher, in upholding the District Court's ruling, first noted that in the case of a work made for hire, section 201(b) of the Copyright Act of 1976 provides that "the employer or

other person for whom the work was prepared is considered the author for purposes of this title, and unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright." Section 101 of the Act defines a "work made for hire" as: (1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire." The Act does not define the terms "employee," "employer," or "scope of employment."

After carefully reviewing the statutory context of the work for hire provisions and the legislative history of the

doctrine, the court concluded that only the works of formal, salaried employees are covered by section 101(1), and that only certain types of specially commissioned works qualify as "works made for hire" under section 101(2). Nagel was not a formal employee of D'Arcy or ITT, and the ITT works did not fall within any of the enumerated categories of section 101(2). The ITT works therefore were not "works for hire," ruled the court.

Judge Fletcher recognized that other federal courts have adopted other approaches to the work for hire issue. The Second and Seventh Circuits look to the employer's degree of control over the artist's work product to determine whether an independent contractor is nevertheless an employee producing a work for hire under section 201(b), an approach "more suited to the era that predated the 1976 Act," in Judge Fletcher's view. In *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548 (2d Cir.; ELR 6:12:10), cert.denied, 469 U.S. 982 (1984),

the court affirmed a jury instruction which provided that the artist need not have "a regular job with the hiring author," so long as the employer "caused the work to be made and exercised the right to direct and supervise the creation." But the Aldon analysis did not acknowledge that the 1976 Act created "a new bargain between publishing and related interests on the one hand, and artists on the other," emphasized Judge Fletcher, and undercut the intent of the drafters of section 101 to increase certainty over whether a work is made for hire.

The Aldon decision has been criticized by the Fifth Circuit in *Easter Seal Society v. Playboy Enterprises*, 815 F.2d 323 (1987; ELR 9:11:12), cert.denied, 108 S.Ct.28 (1988), as allowing the outcome of copyright disputes to vary "even between the same buyer and same seller in a series of works produced together..." In the instant case, the application of the supervision and control test might have resulted in a different result for

each of Nagel's lithographs. Actual control and the right of control may be relevant to analyzing "employee" status, but should not be determinative, stated Judge Fletcher. Rather, if agency law principles are used, as in *Easter Seal*, to resolve the issue of whether an artist is an employee of the purchaser, or if the works fall under any of the enumerated "works for hire" in section 101(2) and the parties have a written agreement, then works may be characterized as "made for hire."

Judge Fletcher cautioned that using agency law principles to distinguish employees from independent contractors should not indirectly include the rejected "supervision and control" test. Thus, even under *Easter Seal*, a work-by-work analysis may be required to determine ownership disputes, and some independent contractors could be deemed "employees" where the purchaser includes provisions in the contract granting it substantial rights of control. But because the work for

hire doctrine as finally agreed upon effects an "implicit transfer of copyright ownership while simultaneously destroying the artist's right to terminate the transfer, the drafters wanted a bright line between employees and independent contractors, so that the parties would not be mistaken in their appraisal of the contracted work's status, and purchasers would have little ability to change the artist's presumed status without the artist being fully aware of the change."

The court therefore concluded that only works produced by formal, salaried employees are covered by section 101(1) of the Copyright Act. Works by independent contractors are works for hire only when the requirements of section 101(2) are met. Nagel, again, was not an employee of D'Arcy or ITT for purposes of section 101(0); and the ITT works did not meet the requirements of section 101(2); and the District Court's

decision granting a preliminary injunction thus was affirmed.

Dumas v. Gommerman, Case No. 87-6542 (9th Cir., Jan. 13, 1989) [ELR 10:9:14]

Ruling that sculpture depicting the homeless is not a work made for hire to be reviewed by Supreme Court

In Dumas (ELR 10:9:14), one of the cases cited by the court was Community for Creative Non-Violence v. Reid. In Reid, which is now before the United States Supreme Court, the Federal Court of Appeals for the District of Columbia reversed a District Court decision (ELR 9:4:16) holding that the Community for Creative Non-Violence, a nonprofit advocacy group for the

homeless, was the owner of the copyright in a sculpture entitled "Third World America."

In October 1985, Mitch Snyder, one of the leaders of the Community, reached an agreement with sculptor James Earl Reid whereby Reid would create a sculpture depicting two adult figures, an infant, and a shopping cart containing the homeless family's belongings. The Community agreed to prepare a steam grate atop a platform; the sculpted figures would be shown huddled around the grate. The parties agreed that Reid's portion of the sculpture would cost no more than \$15,000, not counting the sculptor's services, which Reid donated to the project.

As described by Federal Court of Appeals Judge Ruth Bader Ginsburg, Reid and his associates worked on the figures during late 1985, conferring on occasion with Community members concerning the form and arrangement of the figures. Reid delivered his portion of "Third

World America" to Washington, D.C., where it was joined to the steam grate pedestal and placed on display.

In early 1986, the Community proposed to take the sculpture on a tour of several cities to raise money for the homeless. Reid objected due to the delicate nature of the material used in the project. But the Community would not pay for casting the work in bronze or having a "master mold" made. Subsequently, Reid, who was repairing some damage to the sculpture, refused to return the work to the Community, and filed a certificate of copyright registration. Snyder then filed a certificate of copyright registration in his name (as the Community's trustee, according to the District Court), and the Community sued Reid seeking the return of the sculpture and a determination of copyright ownership.

In reversing the District Court's finding that "Third World America" was a work made for hire whose copyright was owned by the Community, Judge Ginsburg

cited the statutory language, reviewed the conflicting interpretations of the various circuit courts, and held that "a copyrightable work of an independent contractor cannot be a work made for hire under the current Act unless that work falls within one of the specific categories enumerated in section 101(2) and 'the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.'" "Third World America" therefore did not qualify as a work made for hire because Reid was an independent contractor and not an employee of the Community within the rules of agency law. Furthermore, noted the court, sculpture was not a category of commissioned work in section 101(2) and there was no written agreement between the Community and Reid.

Judge Ginsburg next stated that although the Community was not the author of a work made for hire and there was no other basis for a claim that the Community

was the sole owner of the copyright in the sculpture, the record did not support Reid's argument that he was the sole author and exclusive owner of the copyright in the work. It was noted that the Community was responsible for creating the special effects pedestal designed to simulate a grate emitting steam, and, based on the current record, it appeared to the court that the steam grate pedestal was not so insignificant a contribution to the work of art that it failed to reflect the "originality" required for a jointly-authored work. The sculpture was more than the Community's abstract idea - Snyder and other Community members apparently guided Reid's expression and coordinated his work with the Community's construction of the pedestal.

The court observed that "were it not for the prevailing confusion over the work for hire doctrine," the instant case "might qualify as a textbook example of a jointly-authored work in which the joint authors co-own the

copyright." The court declined to reach such a finding in order to give Reid an opportunity, on remand, to rebut the Community's joint ownership claim and to allow the District Court to determine if any other parties might qualify as authors of "Third World America" so as to require the joinder of such parties.

Judge Ginsburg concluded by discussing the fact that the only "copy" of the copyrighted work at issue was exclusively owned by the Community. Co-ownership (or even sole ownership, stated the court) of the copyright might not include a right to stop or limit the Community's proposed tour or to gain possession of the sculpture. However, if the Community reproduces the sculpture in any medium and profits from such reproduction, Reid might be due an accounting. And even independent of Reid's ownership of the copyright, the Community might have to credit the sculptor as the author of the work, noted the court, citing *Smith v.*

Montoro, 648 F.2d 602 (9th Cir. 1981; ELR 3:6:1). Furthermore, Reid, as an author, may have rights against the Community if it issues an excessively "mutilated" or altered version of "Third World America."

Although the Court of Appeals remanded the matter for further proceedings, particularly for "comprehensive consideration" of whether the sculpture at issue was a joint work, and if so, for determination of the owners of copyright, the United States Supreme Court has agreed to hear the Community's appeal.

Community for Creative Non-Violence v. Reid, 846 F.2d 1485 (D.C.Cir. 1988) [ELR 10:9:15]

Louisiana appellate court rejects invasion of privacy and defamation claims involving use of Easter Seal Society Mardi Gras video in adult film

In discussing the work for hire issue, the courts both in *Dumas* and *Reid* mentioned the decision in *Eastern Seal Society for Crippled Children and Adults of Louisiana, Inc. v. Playboy Enterprises*, 815 F.2d 323 (5th Cir.1987), cert. denied, 108 S.Ct. 1280 (ELR 9:11:12). In *Easter Seal*, the United States Supreme Court let stand a Federal Court of Appeals decision rejecting the *Easter Seal Society's* copyright infringement claim against *Playboy Enterprises* for using footage of a staged Mardi Gras parade in an adult film. The Court of Appeals determined that the Society was not the copyright owner of the videotape footage under the work made for hire doctrine.

In August 1988, a Louisiana appellate court considered the false light invasion of privacy and defamation claims brought against the producers of the adult film by the volunteers who participated in the Mardi Gras parade.

The parade was videotaped by a New Orleans public television station, and the master tape was broadcast nationally in March 1982 as part of the Easter Seal Telethon. Subsequently, portions of the tape appeared in a film entitled "Candy, The Stripper."

A trial court awarded damages to the parade participants, but the appellate court found that no claim by any of the volunteers was actionable. The court noted that the parade was conducted publicly on Bourbon Street; that the volunteers were aware that they were being taped for national broadcast; and that there was no indication that any individual placed any restriction on the use of the videotapes which were used after the initial national broadcast in productions broadcast locally and distributed nationally. There appeared to the court to be " nothing at all private about the contents of the video tapes."

The appellate court also found it significant that the Playboy parties did not alter the tape received from the public television station, or cause the parade participants to appear otherwise than as they were when originally captured on video tape. Furthermore, although "Candy" contained nudity and apparent sexual intercourse, the court declined to call the film "pornographic" in the sense that it violated the state's obscenity statute. There was no "suggestion, implication, or innuendo" connecting any parade participant with the subject matter of the film; the parade was "no more than part of the New Orleans backdrop;" and, again, there was no reason to connect any parade participants, individually or collectively, in any significant way with the film's characters or subject matter.

Judge Ciaccio therefore found that there was no falsity or fiction in the portrayal of the parade participants - there was no "false light" portrayal. The fact that the

film was produced and published by Playboy and referred to drugs and sex did not mean, in the court's view, that the film was automatically objectionable and offensive to a reasonable person, or that any ordinary viewer would form an unfavorable opinion about the character of any parade participant or presume that they consented to appear because they approved of the opinions advanced by the film. The film did not portray the parade participants inaccurately and did not present their "involute personalities" in an objectionable false light; thus, there was no unreasonable invasion of privacy.

The defamation claims raised by the parade participants also were dismissed - the film contained no falsity or fiction in its portrayal of the volunteers; the volunteers did not show any malice by the Playboy parties; and the record did not support a finding of injury to any volunteer's reputation amounting to the requisite

showing of hatred, contempt, ridicule which would cause the individual to be shunned or avoided.

The Supreme Court of Louisiana has denied an application by the Society and various individuals for a writ of certiorari and/or review.

Easter Seal Society for Crippled Children and Adults of Louisiana, Inc. v. Playboy Enterprises, Inc., 530 S.2d 643 (La.App.1988); 532 S.2d 1390 (La.1988) [ELR 10:9:16]

Briefly Noted:

Media/Tawana Brawley Matter.

In September 1988, a time of intense media attention on the Tawana Brawley matter, Alfred C. Sharpton and

C. Vernon Mason sought pre- action disclosure of the depositions of CBS Inc, WCBS-TV, National Broadcasting Inc., WNBC-TV, and several individuals, including the inspection of all documents, audio and video recordings and photographs "pertaining in any manner to Tawana Brawley." A New York trial court refused to grant the motion, noting that the applicable statute provided only a narrowly defined form of relief and that disclosure was not supported "by the belief that the chronology of events and reports concerning Tawana Brawley reflects a conspiracy between government and national television networks focusing on discrediting (Mason and Sharpton) and their client." And Judge David B. Saxe found that there was no support for the issuance of a court order for the preservation of almost unlimited materials.

Mason v. CBS Inc., New York Law Journal, p.18, col.4
(N.Y.Cnty., Sept. 13, 1988) [ELR 10:9:17]

Previously Reported:

The following cases, which were reported in previous issues of the Entertainment Law Reporter, have been published: Hauser v. Harcourt Brace Jovanovich, Inc., 530 N.Y.S.2d 431 (9:12:10); Olson v. National Broadcasting Company, Inc., 855 F.2d 1446 (10:5:7); People v. Freeman, 758 P.2d 1128 (10:6:15); Powell v. National Football League, 690 F.Supp. 812 (10:4:15).

The citation for Zola v. Gordon (10:7:15) is 685 F.Supp. 354 (S.D.N.Y. 1988).

An amended opinion in United States v. Minor (10:2:11) has been published at 846 F.2d 1184.

The decision in *City of Oakland v. The Oakland Raiders* (10:5:13) has been published at 249 Cal.Rptr. 606. In October 1988, the City of Oakland agreed to pay the Los Angeles Raiders \$4 million to settle the litigation arising from the Raiders' move to Los Angeles. [ELR 10:9:17]

IN THE NEWS

Dispute between author Tom Clancy and publisher over rights to "Red October" hero is settled

Author Thomas L. Clancy, Jr., and the United States Naval Institute have resolved a dispute concerning the rights to "Jack Ryan," the hero of Clancy's novels "Patriot Games" and "The Hunt for Red October."

The Naval Institute Press, the publisher and copyright owner of the highly successful "Red October," challenged Clancy's right to feature the Jack Ryan character in a novel published by Putnam entitled "The Cardinal of the Kremlin."

The terms of the settlement, which was reached through mediation conducted under the auspices of the American Arbitration Association, were not announced. [Feb. 1989] [ELR 10:9:18]

Columbia Pictures' "The Adventures of Baron Munchausen" features court-ordered disclaimer in West German prints and advertising

Columbia Pictures included a court-ordered disclaimer on all prints and advertising of the film "The Adventures of Baron Munchausen" in order to proceed with the

film's scheduled mid- December premiere in West Germany. A California appellate court, according to news reports, enjoined the foreign distribution of the film unless Columbia changed the title of the film or used the disclaimer stating that the feature was different from an earlier film of the same name produced in Germany in 1942-43 by UFA Transit Murnau. Allan Buckhantz sought the injunction, applicable only to overseas distribution, in connection with a lawsuit alleging that Columbia infringed his sequel and remake rights to the original German version of the film. [Feb. 1989] [ELR 10:9:18]

Pittsburgh Pirates and Dave Parker settle dispute over deferred compensation

The Pittsburgh Pirates and Dave Parker have settled a dispute (see ELR 8:7:16) concerning Parker's 1979

contract. The contract required the Pirates to pay Parker, now with the Oakland Athletics, \$5.3 million in deferred payments through the year 2007. The Pirates had claimed that the 1979 contract was null and void from its inception because prior to its execution, Parker allegedly concealed from the club the facts concerning his use of cocaine from 1976 to 1982.

The terms of the out-of-court settlement were not disclosed. [Feb. 1989] [ELR 10:9:18]

Former pitcher Denny McLain is released on probation after pleading guilty to racketeering and drug charges

In 1987, a Federal Court of Appeals (ELR 9:3:20) overturned former pitching star Denny McLain's conviction on charges that he had engaged in gambling, loan

sharking and drug dealing, finding that McLain did not obtain a fair trial.

In October 1988, McLain, who has maintained his innocence, pleaded guilty to racketeering and drug offenses in order to avoid a retrial on the charges. A Federal District Court judge sentenced McLain to a 12 year prison term, as recommended by the government, but ordered the pitcher released on five years probation because of prison time already served by the two-time Cy Young Award winner.

According to news reports, Judge Kovachevich stipulated that McLain revise his autobiography "Strikeout" to "embody the truth of the matters in the plea agreement." [Feb. 1989] [ELR 10:9:18]

Florida county repeals ordinance banning "The Last Temptation of Christ"

A Florida county ordinance banning the exhibition of the film "The Last Temptation of Christ" has been repealed. According to news reports, a Federal District Court ruled the ban unconstitutional in September 1988, the day after the ban was adopted by the Escambia County Commission. The Commission, in addition to repealing the ban, agreed to pay \$10,000 in legal fees. [Feb. 1989] [ELR 10:9:19]

London court dismisses HandMade Films' contract claim against the Cannon Group

HandMade Films, a small independent film production company owned by former Beatle George Harrison and Denis O'Brien, has been denied relief by a London High Court in an action against the Cannon Group.

HandMade, the producer of "The Lonely Passion of Judith Hearne," "Withnail and I," and other films, sought about \$2.8 million from Cannon for the repayment of advances and guarantees allegedly due under an agreement for home video rights on several films. According to news reports, the court's ruling allows Cannon to seek the repayment of the company's court costs by HandMade. [Feb. 1989] [ELR 10:9:19]

Buffalo Bills win dispute over state sales tax

The Buffalo Bills were not required to pay sales taxes on a 25-cent per capita charge on tickets to the team's games, a New York Tax Appeals Tribunal has ruled.

The state's Department of Taxation and Finance had ordered the team to pay about \$28,000 plus interest as the tax due on the per capita charge. Erie County had

required the Bills to collect the 25-cent fee to help pay off the bonds issued by the county for the construction of Rich Stadium. The Tribunal found that the charge was a tax-exempt fee imposed by Erie County, rather than part of the admission charge to football games. [Feb. 1989] [ELR 10:9:19]

California amends statutory definition of obscenity

California Governor George Deukmejian has signed legislation to change the definition of obscene matter, obscene live conduct and harmful matter. The amendments to sections 311 and 313 of the state Penal Code, effective January 1, 1989, will meet the standards established by the United States Supreme Court decision in *Miller v. California*, 413 U.S. 15. "Obscene matter," as defined in section 311(a) means "matter, taken as a

whole, which to the average person, applying contemporary statewide standards, appeals to the prurient interest, and is matter which, taken as a whole, depicts or describes in a patently offensive way sexual conduct; and which, taken as a whole, lacks serious literary, artistic, political or scientific value."

Prior California law, as set forth in the Legislative Counsel's Digest, defined "obscene matter" to mean "matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary statewide standards, is to prurient interest, as prescribed, and is matter which, taken as a whole, goes substantially beyond the customary limits of candor in description or representation of those matters, and is matter, which, taken as a whole, lacks significant literary, artistic, political, educational, or scientific value."

The legislation includes in the definition of "matter," among other items, "live or recorded telephone

messages when transmitted, disseminated, or distributed as part of a commercial transaction." However, a telephone corporation, as defined in the Public Utilities Code, is not liable for violating the statute when carrying or transmitting messages described in the statute or performing related activities in providing telephone services.

Section 313 also sets forth certain measures to restrict access by persons under 18 years old to harmful matter distributed by the use of telephones; individuals facing prosecution for violating 313 by knowingly distributing any harmful matter to young people by the use of telephones may raise as a defense the compliance with the stated measures. [Feb. 1989] [ELR 10:9:19]

WASHINGTON MONITOR

United States accession to Berne Convention takes effect March 1st

The United States has deposited at the World Intellectual Property Organization headquarters in Geneva, Switzerland, the instrument of accession to the Berne Convention for the Protection of Literary and Artistic Works. The effective date of accession, March 1, 1989, also is the effective date of legislation, described at ELR 10:6:3, amending United States copyright law to be compatible with the Berne Convention. [Feb. 1989] [ELR 10:9:20]

United States Department of Justice reconsiders film licensing procedures under Paramount decrees

The United States Department of Justice has reversed its definition of "customer selection" restraints under the Paramount consent decrees concerning motion picture exhibition. According to news reports, distributors may book films in theaters without submitting the films for competitive bidding, so long as the method of film licensing permits the distributor to select an exhibitor on the merits of the particular theater involved, without discrimination in favor of affiliated theaters, circuit theaters or others. The Justice Department has not changed its position barring circuit dealing or "relationship licensing." [Feb. 1989] [ELR 10:9:20]

FBI revises guidelines for investigating film and video criminal copyright infringement

The Federal Bureau of Investigation, in accordance with newly-revised guidelines, is likely to increase its investigation of criminal copyright infringement in the motion picture and video industries.

Previous guidelines required the criminal activity subject to investigation to involve potential industry losses of more than \$500,000 and to affect three or more states or countries. The monetary loss minimum has been reduced to \$250,000, and the multiple jurisdiction requirement has been eliminated in order to encourage prosecutions. [Feb. 1989] [ELR 10:9:20]

Federal Trade Commission issues discriminatory pricing complaint against six book publishers

In late December 1988, the Federal Trade Commission issued complaints against six of the nation's largest book publishers for allegedly discriminating illegally against independent bookstores by selling books at discounted prices to major bookstore chains.

According to news reports, the complaints were issued against Harper & Row Publishers Inc.; Hearst Corp, and its William Morrow & Co. unit; Macmillan Inc.; Putnam Berkley Group Inc.; Random House Inc.; and Simon & Schuster Inc. The complaints charge the publishers with using pricing schedules that charge a lower price per book on large orders, such as those from the nation's three major bookstore chains: Waldenbooks Inc., B.Dalton Bookseller, and Crown Books Corp. The publishers also allegedly treat orders placed by bookstore

chains as a single order, even if the books are shipped separately to individual chain outlets. A hearing has not been scheduled. [Feb. 1989] [ELR 10:9:20]

DIC studio's freelance animation writers may vote on union representation, rules National Labor Relations Board

In late November 1988, a regional office of the National Labor Relations Board ruled that the freelance animation writers working for the DIC animation studio were "employees" under the National Labor Relations Act. Writers who completed two writing assignments for DIC during a specified time period will be entitled to vote to determine whether they wish to be represented by the Animation Writers of America, a recently-formed union. [Feb. 1989] [ELR 10:9:20]

DEPARTMENTS

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[ELR 10:9:22]