# LEGAL AFFAIRS

## Executive Summary of the Report of the Register of Copyrights: Technological Alterations to Motion Pictures

[Editor's Note: On March 15, 1989, the United States Copyright Office submitted a lengthy report, on colorization and other technological methods of altering motion pictures, to U.S. House of Representatives Subcommittee on Courts, Intellectual Property and the Administration of Justice. This article is the Executive Summary of that report. The full report is, or soon will be, available for purchase from the U.S. Government Printing Office. Its ISBN number is 08444-0642-2. The full report also will be published in late summer or early fall (of 1989) by the Loyola Entertainment Law Journal, Loyola Law School, 1441 West Olympic Blvd., Los Angeles, CA 90015.]

During the recent, successful effort to adhere to the Berne Convention for the Protection of Literary and Artistic Works, Congress extensively debated the issue of "moral rights" in general, and as applied to the motion picture industry. The term "moral rights" does not refer to a judgment about a work's morality (or lack thereof). Instead, it concerns the personal relationship of the author to his or her work apart from economic rights. In particular, it relates to the author's interest in having his or her authorship of the work acknowledged ("the right of attribution"), and to the author's interest in preventing unauthorized alterations in the work that are prejudicial to his or her reputation ("the right of integrity"). n1 In deciding on the form of implementing legislation for Berne adherence, Congress adopted the minimalist approach;" i.e., to make only those changes absolutely required to join the Convention. After two years of hearings and consultations with foreign experts, Congress reached the conclusion that the totality of existing U.S. law - federal, state statutory, and common law - satisfied our obligations under the Convention to accord moral rights.

Accordingly, under the minimalist approach, Congress decided against amending the Copyright Act in the Berne implementing legislation to provide for a single, unified, federal system of moral rights. This decision was not, however, based on hostility to moral rights in general, nor to such rights as applied specifically to the motion picture industry. In fact, both Senate and House subcommittees held hearings on colorization and other alterations to motion pictures during the second session of the 100th Congress. In addition, on February 25, 1988, Chairman Kastenmeier and Ranking Minority Member Carlos Moorhead of the House Subcommittee on Courts, Intellectual Property and the Administration of Justice n2 requested the Copyright Office to inquire into the present and future uses of technologies such as computer color encoding (colorization), panning/scanning, and time compression and expansion ("lexiconning"), and how these technologies affect "consumers, artists, producers, distributors and other affected individuals and industries." We were directed to consult with creators of motion pictures, distributors of motion pictures, broadcasters, consumers, and preservationists. In order to fulfill this mandate, Copyright Office staff visited two companies engaged in computer color encoding of motion pictures as well as a company that modifies theatrical motion pictures for viewing on television. The staff also interviewed representatives of motion picture companies, Turner Entertainment Company, the Directors' Guild of America, and the Screen Actors' Guild of America. In response to a Notice of

Inquiry, we received twenty comments from all industry interests, as well as from educators, preservationists, and scholars. On September 8, 1988, we held a public hearing and received testimony from witnesses from all of the above groups. This report represents the culmination of our interviews and of our review of the congressional hearings, the statements submitted in response to our Notice of Inquiry, and the testimony received at our September 8th hearing. The report is comprised of seven chapters and two appendices. The first appendix reproduces the statements submitted in response to our Notice of Inquiry; the second reproduces the transcript of our September 8, 1988 hearing.

## Chapter 1: Introduction

After noting the genesis of this report, the introduction provides an overview of previous Copyright Office actions in accepting claims to copyright in colorized versions of black and white motion pictures. It then briefly notes the issues to be examined, including how the use of technologies permitting the alteration of theatrical motion pictures has affected the interests of creators, distributor-copyright owners, and the public.

Chapter 2: Copyright in the Motion Picture and Television Industries

The second chapter of the report reviews copyright protection for motion pictures and television programs in the United States and under the Universal Copyright and Berne Conventions. The chapter also examines the various claims for authorship in motion pictures, beginning with a review of the U.S. case law, the treatment of authorship under the 1976 Copyright Act and the Berne Convention, as well as the national legislation of France, the Federal Republic of Germany, and the United Kingdom. This review serves as background for a discussion of the position of U.S. motion picture directors that, for purposes of preventing material alterations to their works, the principal director and principal screenwriter should be considered the "authors" of the motion picture. This position is based on a number of arguments: first, that the principal director is the single individual primarily responsible for the actual composition of the picture; second, that only the principal director and principal screenwriter are involved in "telling the yam;" and, finally, that since a line must be drawn somewhere, the principal director and principal screenwriter represent the logical place to draw that line. We then give the response of academics and motion picture industry representatives to the directors' arguments. Testimony by a law professor that motion picture scholarship has, in recent years, come to recognize the importance of the contributions of several groups of filmmaking professionals (e.g., cinematographers, art directors, and editors) is given. Testimony from motion picture industry representatives challenging the directors' position is recited. These representatives assert that for most of the motion pictures at issue, the old studio movie moguls are more properly regarded as the author of the work. Testimony on the current important role of certain producers is recounted. The chapter concludes by noting the difficulties faced internationally in determining authorship in cinematographic works and notes that, due to the use of work made for hire arrangements in the United States, the issue generally has relevance only with respect to moral rights, a topic addressed in Chapter 5.

Chapter 3: Post Exhibition Alterations to Motion Pictures

This chapter is divided into two parts. The first part reviews the current and projected future technologies used to adapt theatrical motion pictures for viewing on television screens and notes the reason why these adaptations are believed necessary. The second part analyzes the effect of these adaptations on the aesthetics of motion pictures. The chapter begins with an explanation of the predominance of post- theatrical markets (videocassettes, cable television, and broadcast television) for motion pictures, and the reasons theatrical motion pictures are technologically adapted to be distributed to these markets. The principal technologies are:

Computer Color Encoding. This is a process by which black and white film prints are transferred to videotape and the videotape is electronically encoded with color.

Panning and Scanning. This is a process by which theatrical motion pictures, composed for viewing on large screens, are altered to fit on the narrower television screen.

Lexiconning. This technology involves the electronic time compression or expansion of a motion picture in order to fit the picture into broadcast time slots.

Letterboxing. This technique permits the original composition of a theatrical motion picture to be retained on television by reducing the size of the image. This process leaves dark bands at the top and bottom of the screen.

We then analyze the aesthetic effects that each of these technologies have on motion pictures. We conclude that colorization has an adverse effect on the aesthetics of black and white motion pictures, that panning/scanning has had an adverse effect in the past, but that such effects have been somewhat ameliorated through the voluntary decision of directors and cinematographers to film theatrical motion pictures within the parameters of television. This decision has, however, also resulted in fewer motion pictures being shot in a widescreen format due to the predominance of the post- theatrical markets. We conclude that lexiconning can have an adverse aesthetic effect on motion pictures but that no information was presented indicating the extent to which it is employed or the effect to which it is employed in a manner resulting in an adverse aesthetic effect. The chapter concludes with a review of future technologies such as High Definition Television and computer generation of characters.

Chapter 4: The Impact of Collective and Individual Bargaining on the Development and Distribution of Motion Pictures

In this chapter, we discuss the nature of collective and individual bargaining. We note that the Directors Guild of America Basic Agreement contains a detailed set of minimum conditions for the preparation, production, post- production stages of motion pictures, and for post-theatrical release editing. Directors are given an absolute right to a "Director's Cut" - the penultimate form in which the motion picture is released. Directors do not have, and for purposes of legislative reform have disavowed, any desire to obtain the "Final Cut;" i.e., the right to determine the final form of the work as theatrically viewed. Under the Basic Agreement, however, directors have obtained the right of consultation regarding post-theatrical alterations to motion pictures as viewed on videocassettes, and on cable and broadcast television. We recount the directors' unsuccessful efforts to transform, under the Basic Agreement, the provision that grants them right of consultation into an absolute right to permit or prohibit such alterations. We also discuss the position of producers that directors should not have such an absolute right. We note that a only a very few directors have obtained the desired rights in their individual contracts. We then analyze the pros and cons of reliance upon collective and individual bargaining, and question whether the failure of the directors to obtain the rights they seek necessarily indicates a breakdown in labor relations, and one that requires federal legislation to repair it.

## Chapter 5: Moral Rights

This lengthy chapter begins with a review of the nature of moral rights, with special emphasis on the Berne Convention and U.S. case law. We review recent state and federal legislative efforts to grant moral rights to works of fine art, as well as the discussions on moral rights during hearings on U.S. adherence to the Berne Convention. We go into the testimony of directors, producers, and computer color encoding companies in detail, as well as the remarks of various Members of Congress.

We then set forth the directors' claims for moral rights legislation, the producers' response to those claims, and conclude with our analysis of the issue. The directors' claim is based, essentially, on three premises: first, that no artist should have his or her work materially altered without his or her consent; second, that collective and individual bargaining is an inadequate means to obtain the right to prevent material alterations that are injurious to their reputation; and, third, that the public has an interest in viewing motion pictures in their original form. The directors would limit these rights to the principal director and principal screenwriter. All of the other creative collaborators in the motion picture would have to rely on the principal director and principal screenwriter for vindication of their rights. Authors of preexisting works used in motion pictures, such as novelists and composers, are to rely on contractual provisions for prevention of unwanted material alterations to their works in the motion picture. The producers' and colorizers'' response to the directors' claim rests on the assertion that their activities are consistent with both the purposes of the Copyright Act and the rights they have fairly obtained through collective and individual bargaining. Additionally, they argue that imposition of restrictions on existing motion pictures would violate the "takings" clause of the Fifth Amendment to the U.S. Constitution. The producers and colorizers reject the directors' attempt to invoke the public interest, arguing that the directors actually seek a right permitting them to insist that the original version be the only version distributed to the public. They note the public's preference for color television viewing, and they point to their preservation efforts in restoring and making available black and white versions of motion pictures along with the colorized version. They stress the critical economic need and benefit of distributing motion pictures in nontheatrical markets. The producers and colorizers deny that collective and individual bargaining is inadequate and that directors should have the final say over the form in which their works are distributed in post-theatrical markets. We then analyze these various arguments, concluding as follows.Proponents of change in the existing law should bear the burden of showing that a "meritorious public purpose is served by the proposed congressional action." If this threshold is met, Congress is then faced with the "delicate job of bartering between what are often contrary interests." In analyzing the directors' assertion that a meritorious public purpose is served by protecting the integrity of their works, we note that in adhering to the Berne Convention, the United States has declared that its law satisfies the obligations of that

Convention, one part of which is Article 6bis, the moral rights provision. In adhering to the Convention, the United States specifically declared that the totality of existing U.S. law - federal, state statutory and common law - provides a level of moral rights protection that at least rises to the minimum level required by Article 6bis. The question of whether moral rights should be unified in a single federal system under the Copyright Act is the subject of dispute, but, after joining the Berne Union, it cannot be denied that the United States recognizes moral rights. Accordingly, the prevention of material alterations to motion pictures in a manner that injures the reputation of the creative collaborators of the film does represent a "meritorious public purpose," at least on its face. Invocation of the public interest by some of the directors gives rise to a degree of ambiguity since they do not strictly speaking seek to preserve the original version of motion pictures, but instead seek to obtain rights for individual directors to decide whether the theatrical version should be materially altered. n3 Additionally, we conclude that if Congress is persuaded that it should vest directors and screenwriters with increased moral rights, then Congress should also include the other creators in the list of beneficiaries. For example, the authors of the underlying works used in motion pictures get such benefit and should not be forced to rely on contractual protection, which the directors claim is inadequate for vindication of their rights. Finally, we discuss the likelihood that a violation of the takings clause of the Fifth Amendment would result from the grant of a new federal moral right as applied to existing motion pictures. Given this problem, the issue becomes whether legislation is required for future motion pictures since very few motion pictures are now shot in black and white, and many theatrical motion pictures are shot in a form that ameliorates the need for extensive panning/scanning for television viewing. We also discuss the important interest in ensuring that new motion pictures are created, and the interests of broadcasters, cable systems, and video retailers in delivering motion pictures to the public.

Chapter 6: Preservation

In this chapter we discuss issues of preservation: the availability of the original version of motion pictures, and the opportunity to view that version in theatrical exhibition, on videocassettes, and on cable and broadcast television. We review the steps taken by various private and public organizations to preserve motion pictures and the approaches that may be taken to better coordinate these various efforts.

Chapter 7: Conclusions

Chapter 7 contains our conclusions. Based on the testimony before the congressional committees and the Copyright Office, and the various written comments submitted to us in this inquiry, the Copyright Office reached the following conclusions:

(1) The Subcommittee should seriously consider a unified federal system of moral rights;

(2) If a unified federal system of moral rights is adopted, state moral rights protection should be partially preempted. Preemption should apply to rights equivalent to those granted in the amended federal statute but not to nonequivalent rights;

(3) If the Subcommittee prefers an industry- by-industry approach to moral rights, and chooses to zero in on the motion picture industry, the Subcommittee should carefully consider whether the existing web of collective and individual bargaining is adequate to protect directors' legitimate interests;

(4) If the Subcommittee chooses to grant a higher level of moral rights in the motion picture industry than now exists, the Copyright Office could support this effort in principle. This legislation would accord rights only to works created on or after the effective date of the legislation and would be granted to authors of preexisting works used in motion pictures on or after the effective date, as well as to other creative participants in the motion picture (e.g., cinematographers, art directors, editors, and perhaps, actors and actresses).

**NOTES**

1. See Berne Convention Article 6bis.

2. The Subcommittee was formerly known as the Subcommittee on Courts, civil Liberties and the Administration of Justice.

3. The ambiguity of this invocation of public interest does not, of course, apply to directors' attempts to prevent material alterations to the works of other directors created during Hollywood's "Golden Era."
[ELR 10:12:3]

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## RECENT CASES

### California Supreme Court will review decision upholding $10 million jury verdict to actress Raquel Welch in bad faith termination action against MGM involving the film "Cannery Row"

The California Supreme Court has agreed to review an appellate court decision upholding a jury verdict (ELR 8:4:20; 8:3:22) awarding damages of $10 million to actress Raquel Welch in a lawsuit against Metro-

Goldwyn-Mayer Film Co. arising from Welch's termination from the film "Cannery Row."

In October 1980, Welch's loan-out company entered into a contract with MGM to provide the actress' services on the film. As described by appellate court Judge Arleigh Woods, MGM agreed to pay Welch $250,000 for nine weeks of filming; Welch also agreed to be available for rehearsals and wardrobe fittings for two weeks before filming began. A "pay or play" clause in the contract provided that the studio could terminate Welch from the film at any time, but was obligated to pay her the full contract price, unless Welch failed to fulfill her contractual obligations. MGM also agreed to provide Welch with a star type" trailer for makeup purposes, and to allow Welch to select a hairdresser and makeup artist.

Welch participated in various prefilming activities, and arrived at the studio as scheduled for shooting dates in early December. Welch soon realized that she was able to prepare her makeup much faster at home, and asked to continue this arrangement. Although conflicting testimony was presented by the MGM parties at trial concerning the studio's acquiescence in the home-makeup arrangement, there was no question, observed Judge Woods, that Welch was not forbidden to make up at home, received three hours for makeup in the call sheets, was always on the set in time for her set call, and was not the cause of the film's budget problems.

The budget problems and the fact that the film was in the hands of first time director David Ward apparently resulted in a meeting on December 18th attended by David Begelman, then president of MGM, by David Chasman, MGM's head of film production, and by Michael Phillips, the film's producer. It was noted that it was against studio policy for an actress to make up at home because such an arrangement meant that the actress was not available for rehearsal during the makeup period and because there were potential liability and union problems. Begelman ordered Phillips to tell Welch that she would be sent a letter declaring her in breach of contract unless Welch made up at the studio the next morning, and that her makeup time would be limited to two hours.

When Phillips called Welch on the night before the actress' first major scene, the producer's statements concerning the meeting conveyed the message not only that Welch was to report for makeup at the studio on the following morning, but that a breach of contract letter was "going out." Welch became extremely upset, and, according to her testimony at trial, did not understand that she was ordered to make up at the studio on the 19th. However, Welch arrived at the studio one hour earlier than her set call, and performed her work that day.

On December 19th, Chasman and Begelman decided to inform Welch that she was in substantial breach of her contract. Welch's agent spoke with the studio parties that day and assured them that he would make sure that Welch would be at the studio at 6:30 A.M. on the following Monday for two hours of makeup; the agent considered the problem resolved. However, after a series of telephone calls during the weekend by the parties involved, Begelman decided to terminate Welch's contract because the actress had disobeyed the order to make up at the studio on Friday morning and, allegedly, refused to talk with Phillips over the weekend (a meeting between Phillips and Welch was scheduled for 9:00 A.M. on Monday).

The December 22nd termination letter indicated that Welch failed to comply with her contractual obligations. Welch responded with a letter threatening to sue unless MGM paid the balance of $194,444 which remained due under the contract. Welch was replaced by Debra Winger in the film; Winger received $150,000 for the role. Judge Woods observed that it cost almost $200,000 to replace Welch with Winger and to reshoot the scenes in which Welch had appeared. MGM eventually lost almost $16 million on the film.

Judge Woods proceeded to describe the considerable media attention focused on Welch's termination from the film, including a report containing negative comments by Begelman concerning Welch's conduct. Although Welch did not make another film, she moved to New York and appeared in a Broadway show for six months and later signed two $1 million contracts - one for food commercials, and the other for a concert tour.

Judge Woods concluded his discussion of the events surrounding Welch's termination by observing that Welch had presented evidence concerning "secret" meetings between MGM representatives and representatives of Debra Winger prior to Welch's termination. Chasman purportedly spoke with Winger's personal manager on either December 17th or 18th concerning Winger's availability; a contract with the actress was negotiated during the weekend of December 20-21, and the deal closed on Monday, the 22nd. Winger did not notify her agent of the deal until the night of December 21st; Winger's agent worked for the same agency that represented Welch. Begelman, Chasman, Phillips, Ward, and two MGM attorneys denied that there were any discussions regarding Winger or contacts with her or her representatives prior to December 22nd.

In her lawsuit, Welch alleged that MGM, Phillips, and Ward engaged in a conspiracy to induce MGM to breach the employment contract in order to replace Welch with another actress and to make it appear that Welch was responsible for the film's budget problems.

Welch sought $194,444 in actual damages and $5 million in punitive damages.

The jury awarded the actress $194,444 in compensation against MGM and Phillips, $500,000 punitive damages against Phillips, and $3,750,000 punitive damages against MGM. Ward was exonerated.

On appeal, Judge Woods noted that the jury was specially instructed that if Phillips gave MGM "truthful information or honest advice within the scope of a request for the advice, or if [he was] materially motivated by a desire to benefit MGM," then Phillips was not liable for conspiracy to induce breach of contract. The jury's finding against Phillips necessarily meant that it determined that Phillips was not acting in a privileged capacity, and Judge Woods, in view of the jury's resolution of the conflicting evidence, declined to find, as a matter of law that a privilege existed.

The MGM parties argued that Welch lacked standing to sue for either conspiracy to induce breach of contract or bad faith because MGM contracted with a loan-out company, rather than with Welch as an individual. Judge Woods, in rejecting the argument, pointed out that the argument was not raised at trial; that the contract defined Welch, individually, as the "artist," and contained numerous specific obligations owed by MGM to the "artist;" and that Welch signed the contract both as the president of the loan-out company and as an individual.

With respect to the claim of breach of the implied covenant of good faith and fair dealing (alleged solely against MGM), the jury awarded Welch $400,000 in lost contract benefits, $1 million in lost professional income, $700,000 in damages to reputation, nothing for emotional distress, and $3,750,000 in punitive damages. Judge Woods upheld the trial court's decision to permit the claim to be added at the close of Welch's evidence as an amendment to conform to proof, finding no abuse of discretion. It was noted that the MGM parties knew that evidence of emotional damage and lost earnings would be admitted on the conspiracy count, which included a claim for punitive damages.

The MGM parties challenged the damage award on the bad faith claim on the ground that one of the essential elements of bad faith - a "special relationship," such as the relationship between an insurance company and an insured - was lacking. Judge Woods, after pointing out that the California Supreme Court had not directly addressed the issue of bad faith termination of employment contracts, discussed relevant case law dealing with the issue, including Tameny v. Atlantic Richfield Co., 27 Cal.3d 167 (1980), Seaman's Direct Buying Service, Inc. v. Standard Oil Co., 36 Cal 3d 752 (1984), and Wallis v. Superior Court, 160 Cal.App.3d 1109 (1984). Judge Woods declined to apply the Seaman's-Wood criteria to Welch's action because the trial court had followed "well- established law that no special relationship beyond the employer-employee relationship is necessary in a bad faith discharge case."

Judge Woods rejected the contention that there was insufficient evidence to establish either a conspiracy to induce breach of contract or a breach of the implied covenant of good faith and fair dealing. Various parties may have had different underlying motives, but the end result, according to the court, was a conspiracy, supported by considerable evidence, to falsely blame Welch for the film's problems and "to create a pretext for firing her which would provide a basis for not paying her under her contract."

Welch also had sued Begelman for slander based upon an alleged statement to a Rolling Stone reporter in which Begelman commented that "We had a general feeling she had not lived up to her contract ... We had no alternative. It's up to the executives to tell the people in this business we will not stand for that. The producer gave her appropriate directions and she failed to obey."

The jury awarded Welch $300,000 in compensatory damages against MGM on the slander cause of action, and $25,000 against Begelman. Punitive damages of $150,000 and $2,500 were assessed against MGM and Begelman, respectively. Judge Woods upheld the damage award, noting that it was appropriate for the jury to decide whether the statement was one of opinion or fact, and that there was sufficient evidence for the jury to have determined that Begelman knew that Welch had complied with her obligations, had manufactured a pretext to fire her, and therefore must have known that his statement to the Rolling Stone reporter was false.

MGM contended that the successor corporations to MGM could not be held liable for punitive damages because they did not perform the alleged wrongful acts, and MGM ceased to exist five months before the trial. But Judge Woods pointed out that there was no mention of the fact that MGM no longer existed until after the trial, and a successor corporation may not avoid liability for punitive damages when the issue was not raised before the trier of fact.

Judge Woods concluded by finding no error in the instructions as a whole concerning compensatory damages. Also noted was the fact that the lost income award was supported by the amount of money Welch had made from previous film work, the absence of film offers subsequent to "Cannery Row," and the amount of money film stars were making at the time of trial. The damages of $750,000 for loss of reputation on the bad faith count was supported, stated the court, by the difference between Welch's prefilm reputation as a "somewhat difficult but professional actress," and post-"Cannery Row" reputation as a "contract breaker who had been fired for cause."

The MGM parties were barred from raising contentions of duplication within the damages on the bad faith count, stated the court, because there had been no objections to the form of the verdicts and no contention at the trial court level that there were such duplications. A duplication in the $194,000 amount was corrected at the trial court level.

The punitive damages were not excessive or duplicative as a matter of law, concluded Judge Woods, who cited, among other factors, the net worths of the parties and "their complete disregard of the likelihood that the unjustified firing would ruin Welch's film career..."

Six days after Judge Woods decision, the California Supreme Court decided the case of Foley v. Interactive Data Corp., 47 Cal.3d 654, holding that "tort remedies are not available for breach of the implied covenant [of good faith and fair dealing] in an employment contract to employees who allege they have been discharged in violation of the covenant."

In response to the MGM parties' petition for a rehearing, Judge Woods noted that Chief Justice Lucas's majority opinion in Foley expressly left open the question of whether the decision was retroactive or prospective. After receiving supplemental briefing from the parties, Judge Woods concluded that Foley would not apply to cases filed prior to the date on which Foley became final, particularly given the "strong suggestion" in the cases cited above that the similarities between the insurer/insured and employer/employee relationship justified extending the bad faith tort to the employment context, and Foley's "dramatic break from long- standing previous authority, including statements by the Supreme Court itself." Judge Woods therefore declared that Foley was inapplicable to Welch's action and denied the petition for a rehearing.

As noted initially, the California Supreme Court has agreed to review the matter.

Welch v. Metro-Goldwyn-Mayer Film Co., 207 Cal.App.3d 164 (Cal.App.1988); as Modified on Denial of Rehearing (1989) [ELR 10:12:7]

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**Producer may recover losses, on theory of promissory estoppel, arising from Aretha Franklin's failure to appear in proposed musical production**

Aretha Franklin has been found liable to Elvin Associates, on a theory of promissory estoppel, for the producer's losses arising from the singer's failure to appear in the musical production "Sing Mahalia Sing."

In early 1984, as described by Federal District Court Judge Whitman Knapp, Franklin's agent agreed to a proposal by Ashton Springer, the principal of Elvin Associates, to have the singer perform the title role in the Broadway musical about the life of Mahalia Jackson, the late gospel singer. Springer then met with Franklin to discuss, among other matters, rehearsal and performance dates. The producer also began negotiating with investors and reserving theaters for a proposed tour.

While talking with various promoters, Springer heard that Franklin feared flying, and recently had canceled several scheduled performances. The singer's agent told Springer that only those commitments made by prior agents for Franklin without her consent had been canceled; both the agent and Franklin assured Springer that Franklin would fly as necessary. Springer offered to make alternative arrangements for transportation to the various performance sites, and to alter the performance schedule to accommodate slower forms of transportation. However, Franklin told Springer that she would overcome her fear of flying.

In March 1984, the financial terms of the parties' agreement were confirmed as follows: Franklin, in return for a commitment to appear in 12 weeks of performances, would be paid $40,000 per week in salary, as well as an additional weekly amount to cover her expenses; 15 percent of the show's gross weekly revenues exceeding $225,000; and 20 percent of the show's weekly profits.

In the following weeks, as Springer hired designers and cast and crew members, a series of draft agreements were prepared. There were no significant changes in the material financial terms of the agreement, and a final draft of the agreement was ready on June 7th, the date that Franklin was scheduled to arrive in New York to begin rehearsals for the show.

When Franklin did not arrive in New York, Springer was told that the singer would not fly. The producer paid the cast through the end of the first week of rehearsals, and then suspended the production.

Springer made unsuccessful efforts to find another performer to appear in the title role. In July, after meeting with a new financial backer, Springer wrote to Franklin about reviving the show. Rehearsals and opening performances would take place in Detroit if Franklin agreed to cover the excess expense arising from such an arrangement, and to alter the profit-sharing terms of the prior agreement to account for the losses and additional costs caused by the suspended production.

Springer found that due to the suspended production, several theaters sought substantial deposits to reserve particular dates. Springer did not have the necessary capital, and the new financial backer for the production did not appear to close the investment agreement. When he could not obtain any other financing, Springer had to abandon his attempt to revive the production.

Springer sued Franklin for breach of the original agreement to appear in "Mahalia." Franklin counter-claimed for breach of the agreement concerning the proposed Detroit-based production.

Judge Knapp first observed that every draft of the original agreement contained the preamble: "This letter, when countersigned by you, shall constitute our understanding until a more formal agreement is prepared." The court stated that it was constrained to find that such language indicated that Crown Productions, the corporation through which Franklin's services were to be provided, did not intend to be contractually bound to Springer until the draft agreement was executed; the cause of action for breach of contract against Crown Productions and Franklin was dismissed accordingly.

In turning to Springer's claim for promissory estoppel, Judge Knapp declared that "it is difficult to imagine a more fitting case" for applying the doctrine. In "the real world," Springer's agreement was with Franklin, and, found the court, the singer had "unequivocally and intentionally" committed herself to appear in the production well before the date on which the final agreement with Crown was to be signed.

Franklin's conduct provided Springer with a reasonable basis for beginning to make arrangements and incur the expenses necessary to realize the production. Furthermore, Franklin accepted Springer's performance and participated in many of the producer's activities. Franklin's concern about flying did not make her promise to appear in "Mahalia" conditional, stated the court, or serve to alert Springer to abandon the production. It was reasonable for Springer to assume that if Franklin could not overcome her fear, she would travel to New York by other means.

Judge Knapp stated that it would be unconscionable" not to compensate Springer for the losses he incurred through his justified reliance on Franklin's oral promises, albeit not the lost profits sought by the producer on the breach of contract claim; the amount of damages will be determined at a later trial.

Franklin's counter-claim for damages was dismissed because any obligation on Springer's part was conditioned, implicitly, on obtaining adequate financial backing; the producer's inability to satisfy such a condition despite his best efforts released him from any liability under the agreement.

It should be noted that in an earlier ruling in Springer's action, Judge Knapp rejected Franklin's claim that the alleged contract, even if proven, was unenforceable as against public policy.

Franklin proposed to base an affirmative defense on the fact that in September 1982, the Attorney General of the State of New York sued Springer alleging that the producer had engaged in fraudulent activities with respect to funds invested in the musical "Eubie." Springer consented to the entry of a judgment of permanent injunction and agreed to make an offer of full restitution of about $123,000 to his former limited partners in the musical.

According to Franklin, Springer did not show that he could have performed under the alleged contract with the singer without using funds gathered in violation of the terms of the September 1982 injunction; enforcing the contract therefore would involve countenancing unlawful conduct by Springer, contrary to public policy. But Judge Knapp pointed out that the contract in issue did not of itself violate the injunction, and that Springer did not engage in undisputed illegality in performing under the contract. Furthermore, even if it were clear that Springer had violated the injunction in assembling his financing, the proposed affirmative defense was found inappropriate; the Attorney General, not a federal jury trial, provided the correct forum for any remedial action, in the court's view.

Elvin Associates v. Franklin, Case No. 85 Civ. 5723 (S.D.N.Y., Feb. 2, 1989); 680 F.Supp. 121 (S.D.N.Y. 1988) [ELR 10:12:9]

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**Billy Joel must pay ex-wife about $840,000 in royalty dispute, but issue of liability for payment of tax settlement requires further proceedings**

In November 1983, performer Billy Joel and his ex-wife Elizabeth Weber, entered separation and property settlement agreements pursuant to which Joel agreed to purchase from Weber her one-half interest in certain musical works and copyrights. The $3 million purchase price was to be paid in installments over a ten year period. Each party also agreed to pay half of the amount of any pre-1984 tax deficiency which might be assessed. Subsequently, a tax deficiency arising, according to news reports, from the disallowance of some tax-shelter investments, was assessed; a settlement was reached setting the tax liability at about $5.5 million.

In early 1987, Joel notified Weber of his election to prepay the balance due under the copyright purchase agreement - about $2.3 million. The prepayment apparently was effected by offsetting this amount against the amount Joel claimed Weber owed him for her share of the tax deficiency settlement. Joel then further reduced the $468,000 supposedly remaining due him from Weber for his payment of the tax liability by offsetting a consulting fee due Weber, and by collecting from CBS Records Weber's share of certain royalties. Joel sent Weber a check for about $130,000 representing the money he received from CBS Records in excess of his claim, and demanded that Weber provide notices of the termination of her security interest in the subject copyrights.

When Weber refused to release her security interest, Joel sought to withdraw his prepayment of the debt owed to Weber and thereby revive Weber's tax liability. Joel then informed Weber that in order to satisfy the "revived" liability, Joel would be offsetting amounts payable by CBS Records Group to Weber. Joel directed CBS to pay him directly the amounts due Weber for royalties, her share in the settlement of a royalty claim, and an annual consulting fee.

Weber sought to recover the royalties and payments allegedly due under the separation and property settlement agreements, claiming that she had not accepted any liability or responsibility for the tax settlement payment.

New York State Supreme Court Acting Justice Edward H. Lehner has ruled that the relevant language of the separation agreement provided an exclusion from liability for tax deficiencies resulting from investments not authorized by Weber. It will remain for a trier of fact to determine whether Weber provided the requisite authorization.

Justice Lehner next agreed with Weber that Joel's attempt to withdraw the copyright purchase prepayment was ineffective because it constituted an attempt to rescind a completely executed act. Weber, stated the court, was entitled to rely on the prepayment of the debt and on a continued cash flow from her share of the record royalties - it was "improper" for Joel to attempt to satisfy the "revived" debt by collecting Weber's royalties, her share of the royalty claim settlement and the consulting fee, and Weber's motion for judgment of about $840,000 was granted.

Weber was entitled to maintain her security interest in the copyrights pending the resolution of the tax liability issue, concluded the court, for if Weber is found not liable for half of the tax settlement liability, then Joel would not possess any debt against which he could set off the payment due for Weber's copyright interest.

Weber v. Joel, New York Law Journal, p.23, col.3 (N.Y.Cnty., Feb. 2, 1989) [ELR 10:12:11]

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**Musician Stan Getz's "celebrity status" is not a marital asset subject to equitable distribution in divorce proceeding**

The "celebrity status" of jazz saxophone player Stan Getz was not a marital asset subject to distribution by the court in a divorce proceeding, a Westchester County trial court has ruled.

Stan and Monica Getz were married in November 1956; they separated in 1980 and obtained a divorce in October 1987. Stan Getz is terminally ill.

Judge Nicholas Colabella, in reviewing various items of marital property subject to equitable distribution, noted that Monica Getz did not show that she was entitled to any appreciation in the value of the recordings made by Stan Getz by proving either that such property appreciated during the marriage, the value of the appreciation or that such appreciation was due, in part, to her contributions or efforts. Thus, with respect only to recordings made after November 1956 and before February 1981, the court divided equally between the parties any royalties due.

Judge Colabella then rejected the claim, based on Golub v. Golub, 139 Misc.2d 440 (ELR 9:12:5), that Getz's celebrity status was additional marital property to be equitably distributed. In view of Getz's deteriorating health, the musician no longer possesses the capacity for generating exceptional earnings; to the extent Getz's celebrity status might have measurable value, such value would be reflected in the royalties to be distributed, stated the court.

Monica Getz's claim for a greater distribution due to the alleged dissipation of marital assets by Stan Getz through drug and alcohol use also was rejected.

Getz v. Getz, New York Law Journal, p. 28, col. 6 (Westchester Cnty., Mar. 2, 1989) [ELR 10:12:11]

## California appellate court affirms liability of director Hal Needham and his loan-out corporation for injuries incurred by stunt performer in "Cannonball Run"; in separate case, court rules that insurer was obligated to indemnify loan-out under excess liability policy

During the filming of "Cannonball Run" in June 1980, stunt performer Heidi Von Beltz suffered serious injuries when an automobile in which she was riding collided with a van.

A trial court jury awarded Von Beltz damages of $7 million with respect to her claim against the film's director Hal Needham and Needham's "loan-out" company, Stuntman, Inc.; however, the jury reduced the award to $4.5 million upon finding the stunt performer 35 percent responsible for her injuries. Los Angeles Superior Court Judge Philip E. Jones then voided the award because

Von Beltz already had received about $5.8 million in settlement payments from other parties in the matter and from a workers' compensation award; under California law, these payments were subtracted from the amount of the jury award (ELR 8:2:22; 8:1:21). The trial court's judgment has been affirmed.

California Court of Appeal Judge Roger W. Boren first described the circumstances surrounding the accident. The court noted that the 1962 Aston-Martin sports car used in the stunt lacked seat belts, that Needham directed the stunt drivers to "pick ... up" the pace on a second take of the stunt sequence, and that Von Beltz, who was riding in the Aston-Martin as a "passenger," was not told that the second take would be different from the first stunt maneuver. During the second take, the sports car traveled at about 50 miles per hour in its staged encounter with several oncoming cars; the driver of the Aston-Martin was unable either to take a planned escape route or to avoid the collision with the van. The driver and Von Beltz were hospitalized; Von Beltz was permanently and totally paralyzed from the neck down.

Judge Boren cited testimony that seat belts or harnesses could have been installed in the sports car within twenty minutes. If Von Beltz had been wearing a lap-shoulder belt at the time of the collision, her injuries would have been no more than fractured ribs, according to the stunt performer's expert witness.

Needham's argument that he was not liable to Von Beltz because the stunt performer assumed the risk of being injured was rejected. The court observed that movie stunts are to some extent planned or choreographed, and that a professional stunt performer might be presumed to have "expertise or physical agility" which minimizes the hazards of a stunt, but that stunt performers usually are aware that danger has not been entirely eliminated. For Judge Boren, "where a stuntperson has full awareness of the hazards he faces, it may be possible to conclude that under the circumstances, he has assumed the risk of injury. However, where a movie director or producer changes the nature of the stunt without the stuntperson's knowledge and thereby increases or otherwise alters the risk without the stuntperson's acquiescence, the director or producer may be held liable for any resulting injuries. When in such circumstances a stunt goes awry, the apportionment of negligence will normally be a question for the trier of fact in any ensuing litigation."

In the instant case, there was evidence showing that Needham did not inform Von Beltz that he was changing the stunt, that the second take would be "materially different" from the first staging, and that the driver of the sports car had been instructed to drive head-on into opposing traffic, weave through it in serpentine fashion, and double the speed used in the first take. Von Beltz did not have an opportunity to decline to participate in the stunt, and was not barred from recovery by the defense of assumption of risk, held the court.

Judge Boren next found that there was sufficient evidence to support the jury's conclusion that Von Beltz, by failing to request a seat belt, was thirty-five percent negligent. The court adverted to the movie industry custom whereby stunt performers are responsible for individual safety equipment, and stated that "it appears obvious to us that a stuntperson has responsibility to use whatever appropriate safety equipment is available."

In turning to Needham's claim that his status as Von Beltz' co-employee barred the stunt performer's civil action and limited recovery to workers' compensation, the court noted that Needham worked as the director of "Cannonball Run" pursuant to a contract between Stuntman and North Shore Investments. Needham signed the contract on behalf of Stuntman, and Stuntman paid his compensation. Cannonball paid Stuntman for Needham's services via checks made payable to Stuntman. Although Cannonball had final control of the film, there was sufficient evidence to sustain the jury's finding that Needham was not an employee of Cannonball, found Judge Boren.

The court concluded by stating that whether or not Stuntman, as a corporate entity, was capable in and of itself of controlling Needham, was irrelevant - Needham was Stuntman's employee, and under the doctrine of respondeat superior, Stuntman was properly found liable. Needham's reliance on the case of Home Box Office v. Directors Guild of America , 531 F.Supp. 578 (S.D.N.Y. 1982; ELR 3:19:1) was misplaced, stated the court. Home Box Office involved union restrictions on the employment of directors, not the issue of tort liability. Needham's employment relationships did not insulate him or Stuntman from liability to Von Beltz.

In a separate but related proceeding, a Federal Court of Appeals has upheld a District Court ruling granting summary judgment to Stuntman in an action brought by Interstate Fire & Casualty Co.

Interstate had issued an excess insurance policy to Stuntman; the policy provided coverage in the event that Stuntman's liabilities exceeded certain primary insurance coverage or benefits. After the jury awarded damages to Von Beltz, as described above, the insurer sought a declaratory judgment that even if Von Beltz' recovery exceeded the primary insurance or benefits, the insurer had no duty to indemnify or to defend Stuntman under the policy. Interstate claimed that the policy issued to Stuntman excluded bodily injury to performers.

The District Court ruled that the term personal injury" as used in the coverage portion of the policy included bodily injury, shock, sickness, and disease. But the policy endorsement excluded only "bodily injury" coverage for performers, leaving Interstate, according to the District Court, with a duty to indemnify Stuntman for claims arising as a result of shock, sickness or disease.

In its per curiam decision, the Court of Appeals rejected Interstate's contention that bodily injuries and mental suffering are interrelated as a matter of law, stating that "emotional or mental injuries are not inextricably linked to bodily injury under California law.

Furthermore, if Interstate intended to exclude coverage for all forms of personal injury set out in the coverage section, the exclusionary clause should have been written more precisely, in the court's view, or the insurer should have used the same term in the policy's coverage and exclusionary provisions.

The court found that Interstate was not required to cover the entire amount of Von Beltz' damages in excess of Stuntman's primary coverage, but ordered the insurer to indemnify Stuntman for the portion of the award, as determined by the District Court, compensating the stunt performer for mental injuries or anguish resulting from shock, sickness or disease.

In conclusion, the court found that the District Court did not err in ruling that Interstate had a duty to defend under the policy once Stuntman Is primary insurance policies were exhausted. Judge Canby, in dissent would have found that the policy's exclusion for "bodily injuries" encompassed all of the injuries sustained by Von Beltz. Von Beltz and Stuntman had conceded that the exclusion precluded recovery for the bodily injury itself, as well as for mental and emotional distress resulting from bodily injury. In Judge Canby's view, that included all of the injuries sustained by the stunt performer. The intent of the policy was to cover liability for injuries to the public and to exclude liability for injuries to participants, and Judge Canby would have ruled that there was no excess coverage for Von Beltz' injuries.

Von Beltz v. Stuntman, Inc., Case No.BO22306 (Ca.Ct.App., Feb.23, 1989); Interstate Fire & Casualty Co. v. Stuntman, Inc., 861 F.2d 203 (9th Cir. 1988) [ELR 10:12:12]

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**New Line Cinema, copyright owner of "A Nightmare on Elm Street" series of films, obtains preliminary injunction barring distribution of D.J. Jazzy Jeff and the Fresh Prince's music video entitled "A Nightmare on My Street"**

A Federal District Court in New York, in a decision issued in August 1988 but not published until late in the year, granted New Line Cinema Corporation's motion for a preliminary injunction barring Bertlesman Music

Group and other parties from distributing a music video entitled "A Nightmare on My Street."

Beginning in 1984, New Line produced and distributed a series of films entitled " A Nightmare on Elm Street;" the fourth film in the series, "A Nightmare on Elm Street Part 4 - Dream Master," was released on August 19, 1988. The principal element of the films is the character Freddy Krueger, portrayed by actor Robert Englund. Judge Robert J. Ward described Freddy's distinctive physical appearance, striking wardrobe, terrifying voice, and the knife- equipped leather glove with which Freddy slashes to death other characters in the films. As a result of New Line's efforts, noted the court, Freddy is "a well-recognized character who is readily identifiable with the Nightmare series."

Prior to the release of Nightmare IV, New Line began developing a music video based on the Nightmare series. In December 1987, the company talked with the rap group known as the "Fat Boys" about appearing in the video.

In January 1988, New Line received a proposal concerning a Nightmare video which would feature the rap group D.J. Jazzy Jeff and the Fresh Prince. D.J. Jazzy Jeff had written and recorded a song entitled "A Nightmare on My Street," and planned to use the music in the proposed video. In early April, Zomba Records released the D.J. Jazzy Jeff album "He's the DJ, I'm the Rapper;" the album contained the song "A Nightmare on My Street."

Subsequently, New Line entered a contract with the Fat Boys authorizing the use of the Nightmare themes and characters in a music video entitled "Are You Ready for Freddy?"

In July 1988, New Line sued the Zomba parties on various grounds, including copyright infringement. Without admitting liability, Zomba stated that it would add stickers to the packaging of the company's compact disks, cassettes, albums and singles disclaiming any affiliation with the Nightmare films. New Line rejected the disclaimer proposal.

New Line then learned that Zomba had produced a rap music video of "A Nightmare on My Street," and sought injunctive relief. Judge Ward first found both that a presumption of irreparable injury existed and that New Line presented credible evidence that it would suffer irreparable injury if the D.J.Jazzy Jeff video were released. New Line, as the copyright owner of the Nightmare series, had the exclusive rights to prepare derivative works based on the copyrighted films. The "imagery, setting, and plot" of the D.J. Jazzy Jeff video were substantially similar to Nightmare 1, stated the court, as were many other aspects of the video, including the appearance and behavior of the Freddy character. Thus, New Line established a prima facie case of copyright infringement and irreparable injury would be presumed.

The court, although stating that it was unnecessary to do so, also found that irreparable injury was supported by the facts. There was testimony that the songs promoted by the two videos were in direct competition in the rap music market, and would compete for promotional time on MTV. Furthermore, the planned release of the D.J. Jazzy Jeff video would occur within a week of the release of Nightmare IV, and Zomba would be unjustly enriched, in the court's view, if the company were permitted to benefit at New Line's expense, from the "massive" promotional campaign for the Nightmare IV film.

Judge Ward also cited testimony that the D.J. Jazzy Jeff video appeared less professionally done than the Fat Boys video. However, because of the similarities between the D.J. Jazzy Jeff video and the Nightmare I film, the public might believe that the video was related to the Nightmare series. "The lower quality of the music video, in combination with the changed Freddy, would dissuade potential viewers from going to see the movie," resulting, according to the court, in irreparable harm because there would be no way of calculating how many people would decide not to see the film based on watching the music video.

In response to Zomba's claim that its Nightmare song and video constituted a parody, Judge Ward adverted to the definition of parody set forth in Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Cooperative Productions, Inc., 479 F.Supp. 351 (N.D.Ga. 1979; ELR 1:19:1), in which the court stated that in order to constitute the type of parody eligible for fair use protection, "parody must do more than merely achieve comic effect. It must also make some critical comment or statement about the original work which reflects the original perspective of the parodist - thereby giving the parody social value beyond its entertainment function. Otherwise, any comic use of an existing work would be protected, removing the 'fair' aspect of the 'fair use' doctrine and negating the underlying purpose of copyright law of protecting original works from unfair exploitation by others."

Judge Ward expressed "serious doubts" about whether the D.J. Jazzy Jeff video would constitute a parody under the above definition. The video did not appear to the court to make a critical comment or statement about the Nightmare I film, or to make fun of the films themselves, but rather served an entertainment and promotional function for Zomba's song.

Notwithstanding the aforementioned "doubts," the court assumed, for purposes of New Line's motion, that the D.J. Jazzy Jeff video was a parody. Even as a parody, the video did not constitute fair use, concluded

Judge Ward. In addressing the statutory fair use factors, the court found that the purpose of the D.J. Jazzy Jeff music video was purely commercial, and that Zomba had avoided the usual licensing arrangements, such as those made by the Fat Boys; that the Nightmare series and the character of Freddy Krueger were creative, imaginative and original; that Zomba excessively "traded on the imagination and originality" of the creators of the Nightmare series by using many different elements of the series; and that Zomba's video, if released, would likely harm the value of the derivative use of Nightmare I in the rap video market. Unlike Elsmere Music, Inc. v. National Broadcasting Company, Inc., 482 F.Supp. 741 (S.D.N.Y. 1980; ELR 2:1:4)), aff'd., 623 F.2d 252 (2d Cir. 1980) in which the court upheld as parody the use of the advertising jingle "I Love New York" in a comedy sketch on the television show "Saturday Night Live," Zomba's video and song directly competed with a derivative work produced by New Line. The parody defense was inapplicable, declared Judge Ward.

The court also noted that the testimony indicated that Zomba did not demonstrate good faith in using the copyrighted material, particularly since Zomba was "well aware" that New Line had entered into a deal with the Fat Boys to do a music video.

In granting the requested preliminary injunction pending further proceedings, the court also found that the balance of hardships in the case was decidedly in favor of New Line. Zomba would not be significantly harmed in waiting several months before releasing the D.J. Jazzy Jeff music video, stated Judge Ward, in enjoining Zomba from manufacturing, advertising, distributing, selling or releasing for public broadcast the music video "A Nightmare on My Street."

New Line Cinema Corporation v. Bertlesman Music Group, Inc., 693 F.Supp. 1517 (S.D.N.Y. 1988) [ELR 10:12:14]

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**Shirley MacLaine wins summary judgment in copyright action alleging "Out on a Limb" copies another book**

A Federal District Court in Michigan, in an opinion issued in July 1988 but only recently published, has granted summary judgment to Shirley MacLaine in a copyright infringement action brought by Charles Silva, the author of the book "Date With the Gods." Silva alleged that MacLaine's book, "Out on a Limb," and the televised version of the book, were substantially similar to Silva's 1977 account of his experiences in Peru in the 1970's.

In his book, Silva described certain encounters with an extraterrestrial woman high in the Andes. The book, according to Judge Gilmore, was "mainly a running account of the dialogue between Silva and this extraterrestrial, whose name is Rama."

MacLaine's book was a personal story of "her voyage of self-discovery during her forties and her quest for spiritual understanding," and included accounts of MacLaine's affair with a prominent British politician, her travels to various parts of the world, and her consultations with trance mediums. A strong focus of the work was the theory of reincarnation, and, as did Silva in his book, MacLaine described her experiences with astral projection.

During her years of research, MacLaine discussed with Silva the book "Date With the Gods," and traveled in the Andes of Peru with Silva. A portion of MacLaine's book discussed her travels and her conversations with

Silva. Although MacLaine did not use Silva's name in her book, she did refer to a character named David as a spiritual guide and as the person with whom she traveled in Peru.

In 1981, MacLaine sent Silva a draft of the manuscript of "Out on a Limb" for his comments. After the 1983 publication of "Out on a Limb," MacLaine kept Silva informed of the progress of the work. Silva apparently did not present any objections to MacLaine until filing his lawsuit in December 1987.

Judge Gilmore, upon reviewing the five allegedly similar portions of the works at issue, found that the challenged passages were not substantially similar. Furthermore, although both books may have discussed similar ideas, MacLaine was engaged in "sort of a research project aimed at giving her peace of mind and explaining where she fits in in this world and how she can come to terms with her personal relationships." "Out on a Limb" did not capture the total concept and feel of Silva's work.

Judge Gilmore next reflected that in view of Silva's relationship with MacLaine, including his work on the manuscript, and in view of the fact that Silva waited about six and a half years to file a complaint, the court considered it likely that Silva granted MacLaine a non-exclusive oral license to use part of "Date With the Gods." And it seemed to Judge Gilmore that laches would provide an additional basis for granting summary judgment.

MacLaine also was entitled to summary judgment on Silva's unfair competition claim; the claim was based on a letter in which MacLaine purportedly threatened to sue Silva as a result of his claiming that he was a character in "Out on a Limb," and because Silva was using MacLaine's name and picture to promote lectures. The unfair competition claim was preempted, stated Judge

Gilmore, and, in any event, Silva failed to state a cause of action for unfair competition.

Silva v. MacLaine, 697 F.Supp. 1423 (E.D.Mich. 1988) [ELR 10:12:15]

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**Federal District Court's opinion is published in now-settled action brought by Rev. Jesse Jackson against distributor of unauthorized videotape copies of Democratic National Convention speech; recent action in California against distributors of speech videotapes results in entry of permanent injunction**

The settlement between Rev. Jesse Jackson and MPI Home Video involving MPI's unauthorized sale of videotapes featuring Rev. Jackson's speech, "A Call to Common Ground," at the 1988 Democratic National

Convention was reported at ELR 10:5:19. The terms of the settlement were not disclosed.

In late 1988, the Federal District Court's decision in Jackson v. MPI Home Video was published.

Rev. Jackson addressed the convention on July 19, 1988. On July 25, 1988, Maljack Productions, Inc., doing business as MPI Home Video, purchased from Sherman Grinberg Film Libraries, for about $6,000, a license to use ABC news archive tape of Rev. Jackson's convention speech. MPI then began marketing tapes for home video use containing the complete ABC news coverage of the speech.

The packaging of the MPI videotapes displayed a photograph of Rev. Jackson, two quotations from the speech, and a statement that the tapes contained "the entire stirring Democratic National Convention speech, uncut and unedited."

An application for copyright in the speech was filed with the Register of Copyrights of July 28, 1988. Rev. Jackson obtained a temporary restraining order barring MPI's continued distribution of the videotapes.

In response to Rev. Jackson's motion for a preliminary injunction, Federal District Court Judge Zagel first determined that Rev. Jackson established irreparable injury, in part, by the effect of the allegedly infringing tapes on the potential market for his own product, and that an injunction would be consistent with the public interest.

The court then rejected MPI's claims that the videotapes were protected by the First Amendment, or were within the fair use provision of the Copyright Act. It also was unlikely, stated Judge Zagel, that MPI would prevail on its claim that Rev. Jackson abandoned his copyright, or forfeited any copyright interest through publication without copyright notice. Rev. Jackson's "less than perfect" efforts to add the required notice to copies of the speech most likely would be found reasonable, and the failure to attempt to recover and mark prior copies in the hands of others was found consistent with the statute. And Rev. Jackson would have "a greater than negligible chance" of gaining injunctive relief rather than receiving a compulsory royalty from MPI as an innocent infringer, in Judge Zagel's view.

Rev. Jackson's claim that MPI violated section 43(a) of the Lanham Act by the false implied representation that he authorized or approved the videotapes provided a "better theory" on which to base recovery, stated the court. The appearance of the videotape packages was found more than sufficient to create the likelihood that confusion might occur. However, an appropriate disclaimer might be an adequate remedy, noted the court.

Judge Zagel concluded by issuing the requested preliminary injunction.

In January 1989, according to news reports, a Federal District Court in California issued a temporary restraining order, ex parte, to Rev. Jackson in an action against two individuals and a video distributor known as Cable Via Satellite; the order directed the video parties to cease distributing videotape copies of the July 19th speech. Apparently, the video distributor subsequently agreed to a stipulation for the entry of a permanent injunction barring further distribution of the tapes.

Jackson v. MPI Home Video, 694 F.Supp. 483 (N.D.Ill. 1988) [ELR 10:12:16]

## Art publishers are granted summary judgment in infringement action brought by alleged owner of copyrights to Salvador Dali illustrations, because publishers' use was authorized by joint owner, but contract claim for a share of their proceeds remains

Robert Leshufy and other art publishers have been granted summary judgment in a copyright infringement action involving the reproduction of Salvador Dali illustrations for Lewis Carroll's "Alice's Adventures in Wonderland."

Werbungs und Commerz Union Austalt commissioned Dali to do twelve paintings in 1968; the company produced woodblock prints based on the paintings. WUCUA claimed a copyright in the original Dali watercolors, but its complaint did not allege the registration of any copyrights in the works. Even if the copyrights were registered, the company could not establish infringement, stated Federal District Court Judge Pierre N. Leval, because the publication of the Dali prints by Collectors Guild, Ltd. was "a lawful exercise of the copyright interest in the book illustrations from which the prints were made." Maecenas Press had acquired at least a joint copyright ownership interest in the book illustrations from WUCUA, and, as a joint owner, was entitled to assign its interest to Collectors Guild. The court rejected WUCUA's argument that Maecenas' rights were limited to the publication of the book with its illustrations and did not include the right to publish the illustrations separately. It was further found that Maecenas intended to convey its copyright ownership to Collectors Guild.

Judge Leval expressed the concern that the distribution of the prints, sold, according to a news report, through American Express Co. to its cardholders as "original lithographs by Salvador Dali" for $975 apiece, might involve "deceptive merchandise marketed in a misleading fashion." The images reproduced from the illustrations apparently were printed on paper bearing Dali's signature. Thus, the prints, as described by the court, appeared to have been signed by Dali whereas the late artist never saw them or even knew they were printed. Judge Leval questioned whether such merchandise would be inherently deceptive and should be sold at all bearing the Dali signature. The description of the prints in Collectors Guild's offering circulars also may have conveyed the false impression that Dali signed the paper with the intention of authenticating the particular images.

Although granting summary judgment to the art publishers with respect to the copyright infringement claims, the court denied summary judgment on WUCUA's claim of a contractual right to share in the proceeds of any marketing of the Dali illustrations. And Judge Leval, wondering whether the court might have "an obligation in the public interest to bring to the attention of the responsible Government official the question whether this marketing involves deceptive practices," ordered the parties to confer with him on this subject.

Werbungs und Commerz Union Austalt v. LeShufy, U.S.P.Q.2d 1153 (S.D.N.Y. 1987) [ELR 10:12:17]

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**Federal District Court refuses to enjoin publication of critical biography of the late founder of the Church of Scientology despite finding "some small degree of infringement" of unpublished letters and journals of L. Ron Hubbard**

A Federal District Court in New York has refused to issue a permanent injunction barring the distribution of

"Bare-Faced Messiah: The True Story of L. Ron Hubbard," a critical biography of the deceased founder of the Church of Scientology. New Era Publications International, a Danish corporation related to the Church of Scientology, claimed that Henry Holt & Co., the publisher of "Bare-Faced Messiah," infringed Hubbard's writings. New Era, an entity which was founded to hold and exploit Hubbard's copyrights, did not sue Russell Miller, the author of the biography.

Judge Pierre N. Leval, in an 86 page opinion, first described New Era's unsuccessful attempts to prevent the publication of the Miller work in England and Canada; an action to enjoin the publication of the book in Australia was withdrawn. In May 1988, Judge Leval initially denied New Era's application for a temporary restraining order to prevent Holt's second printing of the book. However, when New Era agreed to indemnify the publisher in the event of production losses, the court granted a temporary restraining order barring the distribution of the second printing pending the submission of proof by the parties.

Holt argued that although the biography quoted extensively both from Hubbard's previously published works and from unpublished letters and journals, Miller was justified in using the material in order to demonstrate his thesis that Hubbard was "dishonest, pretentious, boastful, paranoid, cowardly, cruel, disloyal, aggressive, bizarre and finally even insane in his pseudoscientific fantasies and his obsessions."

After reviewing the nature and purpose of the fair use doctrine, the court focused on the issue of the application of fair use to unpublished work. A copyright owner's interests may be affected by choices concerning the circumstances of first publication, including whether an unpublished work should be published at all. However, noted Judge Leval, the cases of Harper & Row

Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985) and Salinger v. Random House, 811 F.2d 90 (2d Cir)., cert. denied, 108 S.Ct. 213 (1987) established that although the unpublished nature of the copyrighted work is a substantial factor weighing against a finding of fair use, it is not necessarily a determinative factor. Often, "it is the words used (emphasis by the court) by the public figure (or the particular manner of expression) that are the facts calling for comment." The fair use doctrine, which was designed to protect an artist's commercial rights, should not be used to suppress important critical or historical works, declared the court.

Judge Leval cautioned that a portion of the Salinger decision might be misunderstood to imply that a biographer or critic may never quote unpublished protected expression contained in an unpublished copyrighted work. Again, emphasized the court, when the protected expression itself is the fact calling for or supporting critical comment, the fair use doctrine may be applied, although there will be a "diminished likelihood" that fair use will be found, notwithstanding the quotation from unpublished, copyrighted sources. Thus, "the use of the protected expression must be reasonably necessary to the communication and demonstration of significant points being made about the subject and must have not significant adverse effect on the market for the copyrighted work."

New Era further argued that the private nature of some of the Hubbard documents warranted a finding of infringement. But Judge Leval, citing Hoehling v. Universal City Studios, Inc., 618 F.2d 972 (2d Cir.), cert. denied, 449 U.S. 841 (1980; ELR 1:11:2; 1:24:4) stated that "factual information derived from a copyrighted work may be freely republished without infringement."

After considering the historic basis of the doctrine of common law copyright, the court found it clear that current copyright law "protects only the artistic expression and not the factual content, regardless whether considered private or secret." It also was noted that Hubbard's death terminated his privacy interest; that the diaries in issue, written about sixty years ago, were "more in the nature of a travelogue;" and that there was legitimate public interest in access to the documents of such an influential individual. If New Era had sued to enforce Hubbard's right of privacy, the action would have failed on many grounds, in the court's opinion.

In turning to the statutory fair use factors, Judge Leval first adverted to published reviews crediting Miller's biography as a "serious work of investigation and criticism." Without evaluating the accuracy of Miller's reports or the author's conclusions, the court stated that the work would be eligible for fair use consideration as a work of "criticism, comment, news reporting." Holt's profit-making objective did not deprive the publisher of a fair use claim for the biography.

Judge Leval then compared each passage cited by New Era with the source material, and concluded that Miller's use of the Hubbard material primarily displayed "a powerful and compelling fair use purpose." Miller did not appropriate Hubbard's literary talent to improve the biography or to "usurp" the creative talent of his subject, but rather sought to establish critical points or to illustrate Hubbard's character, stated the court. The quotations in issue served the fair use purposes of research, history, criticism, comment and news reporting. Furthermore, by using Hubbard's own writings, Miller allowed his readers to reach conclusions about Hubbard's life, character and ideas based on the original material, rather than having to accept Miller's characterizations.

The court also found that although Miller apparently used a relatively insubstantial portion of the total amount of Hubbard's work, there was a sufficient taking of protected material to raise a "serious problem" of copyright infringement if the takings were not protected by fair use. Judge Leval, describing his conclusion on the fair use claim as "complex," stated that with respect to Hubbard's published materials, the fair use factors favored the publisher. A similar finding applied to most of the items cited from Hubbard's unpublished material, stated Judge Leval, and were it not for the ruling of the Court of Appeals in Salinger, a finding of fair use would apply to the book overall. However, in view of Salinger, the court reluctantly concluded that Miller's work "to some degree infringes Hubbard's copyrights in some of his previously unpublished works."

After careful consideration of the issue of injunctive relief, Judge Leval stated that "when the interests protected by the copyright are in acute conflict with those represented by the First Amendment, courts should weigh cautiously whether a prior restraint in the form of an injunction is the appropriate remedy." The instant case involved "special circumstances" in which the interests of free speech "overwhelmingly" exceeded New Era's interest in an injunction. The book already was in print, and considerable expense and waste would be incurred in republishing after deleting any infringing material. The court, also adverting to the public interest in a valuable historical study, concluded that notwithstanding some small degree of infringement, a permanent injunction was not available to New Era.

Judge Leval's decision has been upheld by the Second Circuit Court of Appeals in an opinion which will be reported by the Entertainment Law Reporter as soon as possible.

New Era Publications International v. Henry Holt and Company, Inc., 695 F.Supp. 1483 (S.D.N.Y. 1988) [ELR 10:12:17]

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**Shana Alexander and Doubleday win summary judgment on appeal in suit by psychologist who alleged he was defamed in "Nutcracker"**

A New York appellate court, reversing a trial court ruling (ELR 9:9:9), has granted Shana Alexander and Doubleday & Company, Inc., the author and publisher of the 1985 book "Nutcracker: Money, Madness, Murder: A Family Album," summary judgment in a libel action brought by Dr. Herman Weiner.

"Nutcracker" was a non-fiction account of the 1978 slaying of multimillionaire Franklin Bradshaw.

Bradshaw's daughter and grandson, Frances and Marc Schreuder, were convicted of Bradshaw's murder.

Alexander, in two paragraphs of the book, referred to Dr. Weiner, a psychologist who had treated Frances Schreuder as a patient. The references reported unflattering descriptions by Ms. Schreuder's estranged relatives of Dr. Weiner's physical appearance, and their suspicions about the nature of Ms. Schreuder's relationships with her "shrinks."

The trial court, in granting summary judgment to Dr. Weiner, found that the statements referring to the psychologist's alleged sexual intimacy with Ms. Schreuder constituted libel per se, and that Dr. Weiner met his burden of showing by a preponderance of the evidence that the author and publisher conducted their substantiation investigation in a "grossly irresponsible" manner. On appeal, Judge David Ross stated that although the court disapproved of a derogatory comment by Bradshaw's widow in which she referred to Dr. Weiner as a "big fat, ugly Jew," the comment was an opinion, expressed in the form of an epithet and did not provide a basis for a libel action. Two other comments about Dr. Weiner's attire and his billing practices also were expressions of pure opinion, and therefore not actionable.

With respect to the references implying that Dr. Weiner slept with Ms. Schreuder, Judge Ross noted that Alexander relied on four separate sources in reporting the possibility of a relationship between the psychologist and Ms. Schreuder. Alexander and Doubleday, in order to avoid liability in a defamation action, must not have acted "in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties..." In this case, Doubleday did not have substantial reasons to question the accuracy of the material contained in the subject paragraphs or Alexander's reportorial skills. Furthermore, there was convincing evidence, stated the court, that Doubleday carefully reviewed the book before its publication, and thus was not obligated to re-research the work.

The court also found that Alexander and Doubleday were not required to include a denial from Dr. Weiner in the book, noting that in view of the psychologist-patient privilege, there was no reason to believe that Dr. Weiner would discuss the details of his relationship with Ms. Schreuder. And Judge Ross observed that the challenged paragraphs appeared in a section of the book which was introduced by Alexander's statement cautioning readers that the descriptions of Ms. Schreuder's household were based on information from individuals who may not have been "the best of sources in any circumstances..." Similar warnings concerning the opinions of family members appeared throughout the book.

In all, concluded the court, the comments in the two paragraphs were "unequivocally opinions and not facts" and were absolutely protected by the First Amendment. Summary judgment was granted to the "Nutcracker" parties accordingly.

Weiner v. Doubleday & Company, Inc., 535 N.Y.S.2d 597 (N.Y.App. 1988) [ELR 10:12:19]

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**Author of New Yorker Magazine article wins summary judgment in libel action brought by psychoanalyst**

In a decision issued in August 1987, but not published until recently, a Federal District Court in California granted summary judgment to writer Janet Malcolm, The New Yorker Magazine, and Alfred A. Knopf, Inc., in an action for defamation and invasion of privacy brought by psychoanalyst Jeffrey Masson.

Malcolm, in a lengthy article published in The New Yorker in December 1983, described Masson's career and theories. Masson, who at one time was the Projects Director of the Freud Archives, eventually became a critic of Freudian psychoanalysis. He was fired from his position and, according to the article, was rejected by his colleagues. Malcolm's article was reprinted by Knopf in a book entitled In the Freud Archives.

Masson claimed that the article and book falsely portrayed him as "egotistical, vain, and lacking in personal honesty and moral integrity."

Federal District Court Judge Eugene F. Lynch analyzed each disputed passage separately, comparing the alleged defamatory material with relevant portions of Malcolm's tape-recorded interviews. It was observed that there was no direct evidence of actual malice, and that Malcolm's phrasing in the disputed passages provided rational interpretations of Masson's tape-recorded statements.

In all, each of the alleged defamatory statements was either nondefamatory, substantially true, or a rational interpretation of ambiguous conversations. No clear and convincing evidence existed to support a finding that Malcolm or the publishers seriously doubted the accuracy of the article or book, and summary judgment therefore was entered against Masson.

Masson v. New Yorker Magazine, Inc., 686 F.Supp. 1396 (N.D.Ca. 1987) [ELR 10:12:20]

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**Briefly Noted:**

**Securities.**

Casablanca Productions' interest in a video production venture did not fall within the definition of an investment contract, a Federal District Court in Oregon has ruled, in granting summary judgment to Pace International Research, doing business as Cameo Productions Group, with respect to Casablanca's state and federal securities claims. It was noted that although Casablanca may have been a passive partner, the company nevertheless was a partner with significant managerial powers. Casablanca also alleged that Cameo's "repeated acts" of securities fraud, mail fraud and wire fraud in connection with the sale of the investment contract amounted to a pattern of racketeering activity. The court concluded that Casablanca failed to establish that there existed a genuine issue of fact as to whether Cameo's alleged conduct constituted a pattern of racketeering activity, noting that the predicate acts cited by Casablanca involved a single alleged fraud on a single victim.

Casablanca Productions, Inc. v. Pace International Research, Inc., 697 F.Supp. 1563 (D.Ore. 1988) [ELR 10:12:20]

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**Libel.**

A Federal District Court in Florida has granted summary judgment to American Broadcasting Companies in an action concerning an allegedly defamatory report broadcast during a March 1987 "20/20" program. Arthur Jones, described by the court as "the millionaire inventor of the Nautilus exercise machines," sought $4 billion in damages, claiming that the program segment, entitled "Save the Elephants," implied, in part, that he was a liar, a cheat, dishonest, and animal abuser. The court found that the broadcast, neither as a whole or by individual statement, implied that Jones had ulterior motives for rescuing a herd of elephants from destruction, or for later dispersing a portion of the herd (if indeed he did so). Furthermore, the segment was not reasonably capable of the defamatory interpretation that Jones was a "cheat" or that he was inhumane, and other complained-of statements were non-actionable opinions, concluded the court.

Jones v. American Broadcasting Companies, Inc., 694 F.Supp. 1542 (M.D.Fla. 1988) [ELR 10:12:20]

## IN THE NEWS

### James Garner and Universal City Studios settle dispute over net profits from "The Rockford Files"

Actor James Gamer has agreed to settle his lawsuit against Universal City Studios over the distribution of profits from the NBC television series "The Rockford Files."

Garner, claiming that he was contractually entitled to 37.5 percent of certain net profits from the series, sued Universal for fraud, deceit and breach of contract and sought about $16.5 million in damages. The studio claimed that although gross revenues from syndication, foreign and other sales of "The Rockford Files" totalled about $125 million, the series had earned less than $1 million in profits. Gamer, according to news reports, had received about $250,000 from Universal as his profit share.

Prior to the settlement, the terms of which were not disclosed, Gamer had turned down a $6 million settlement offer from Universal. [May 1989] [ELR 10:12:21]

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### Walt Disney Company agrees to end lawsuit arising from unauthorized use of Snow White character during Academy Awards telecast

Upon receiving an apology from the Academy of Motion Picture Arts and Sciences, the Walt Disney Company has agreed to the dismissal of its copyright infringement lawsuit arising from the unauthorized appearance of a Snow White "look-alike" during the March 29th Academy Awards telecast.

Academy President Richard Kahn expressed sincere apologies to Disney "for the unauthorized use of Disney's copyrighted Snow White character and for unintentionally creating the impression that Disney had participated in or sanctioned the opening production number on the Academy Awards telecast." The Academy also stipulated that it would not again present the segment of the show during which the Snow White character appeared and would not use any Disney characters in future events without obtaining prior approval. [May 1989] [ELR 10:12:21]

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## Timothy Dalton and Vanessa Redgrave agree to settle their libel action against London newspaper

Timothy Dalton and Vanessa Redgrave will receive an undisclosed amount of damages to settle a libel action against the Mirror Groups Newspapers Ltd. In an October 1988 article, the Sunday Mirror stated that Dalton behaved unprofessionally toward producer Cubby Broccoli during the filming of "License to Kill." The newspaper apparently also claimed that Redgrave "was in the habit of making life impossible whenever she appeared on a film set." According to news reports, the Sunday Mirror withdrew the "wholly untrue" allegation and apologized to the performers. [May 1989] [ELR 10:12:21]

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**Government removes controversial "Tilted Arc" sculpture from lower Manhattan plaza**

The United States General Services Administration has removed Richard Serra's controversial "Tilted Arc" sculpture from Federal Plaza in lower Manhattan.

The government purchased the 12-foot tall, 120-foot, 73 ton sculpture for about $175,000, and installed the work in the Federal Plaza in 1981. Employees in adjacent buildings claimed that the sculpture obstructed the plaza, and the government decided to relocate the work.

Sera filed a lawsuit in which he challenged the government's decision and sought, unsuccessfully, to obtain an injunction preventing the relocation of the sculpture (ELR 9:8:13).

When Serra, according to news reports, recently decided not to pursue his lawsuit, the General Services Administration began removing the steel structure; the sculpture will remain in storage pending its sale or relocation. [May 1989] [ELR 10:12:21]

## DEPARTMENTS

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Rock 'N' Roll Divorce by Christian L. Castle and James L. Swanson, 12/2 Los Angeles Lawyer 34 (1989)

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[ELR 10:12:23]