

LEGAL AFFAIRS

**Professional Athletes and their
Rights of Privacy**

by Philip R. Hochberg

A monthly magazine stops to examine Pete Rose's relationship with his children; daily newspaper reports highlight his every move, and television cameras follow him from ball park to ball park.

Coming on the heels of Jose Canseco's complaints about constant scrutiny of his life by the news media, the snickers inspired by accounts of Steve Garvey's coast-to-coast amorous escapades, and the continuing references to the Margo Affair in charting Wade Bogg's

career, we might ask, at what point will it, or should it, stop?

To put it another way, have professional athletes given up all their rights of privacy? Can newspapers, magazines, television or anyone reveal every truth about an athlete?

There is a legitimate body of legal opinion that today's ballplayer, willing to accept the adulation and the \$1.5 million salary, has little left of his right of privacy. It's almost as if a Faustian bargain were struck, private riches for public scrutiny. If the player doesn't like it, he can always leave "public" life - or go make his millions, quietly as a Wall Street trader.

It may be unfair. After all, the argument goes that Rose, Canseco, Garvey and Boggs are not Gary Hart; they're not seeking the presidency. Indeed, they're not even Sean Penn or Rob Lowe. They didn't choose to be anyone's heroes; they didn't seek to become role models.

They're merely baseball stars. But the argument has a flaw because they're not "merely" players (or a manager); they are (or were) great players with multimillion-dollar contracts, who appear in nationwide advertising and who perform in baseball- crazy markets.

This is not to say that Rose, Garvey, Canseco, Boggs, et al. have given up all of their rights of privacy, by any means. Certain aspects haven't been given up. For example, even if Commissioner A. Bartlett Giamatti were to find Rose gambled on baseball games, reporters would not be justified in stealing Rose's tax returns to try to analyze them. They'd have to obtain their information in less offensive ways than a physical intrusion into his life.

Nor would a player lose his ability to control endorsements. Newspapers and magazines may be free to write about Canseco, but don't use his name or photo in an advertisement attesting to the great speed of candy-apple

red Jaguars. The right of publicity - or "appropriation" of his likeness - is one area that has been vigorously enforced in the last two decades.

Finally, ballplayers (like other citizens) cannot be pictured in a "false light." True incidents cannot be pictured in a totally false setting. (Along these lines, when the book "Shoeless Joe" became the film "Field of Dreams," the "real" J.D. Salinger in the novel became the fictional Terence Mann in the movie. Dramatic device or lawyer's caution?)

The right of privacy, a theory of law first articulated in a Harvard Law Review article 99 years ago by Samuel Warren and (later Justice) Louis D. Brandeis, traditionally encompasses a number of distinct interests. Only one of them - public discourse of private facts - is touched upon by recent press accounts. And in the case of today's athletes - maybe even college, as well as professional - one seems to rarely reach the standard that

would support a successful suit: There was no legitimate public interest in having the information available.

Ballplayers are no less public figures, the courts have ruled, than actors, entertainers, inventors, war heroes, indeed virtually anyone whose deeds - voluntary or involuntary - have made the public interested in them.

In one of the few cases involving the privacy rights of sports figures, the United States Fifth Circuit Court of Appeals held that an All-American quarterback at Texas Christian University in the late 1930's, Davey O'Brien, could not recover damages when his picture was used in a beer advertisement. The 1942 case, *O'Brien v. Pabst Sales Co.*, recognized that O'Brien had willingly sought and received the publicity, lessening his right to complain.

Because the principal test is one of newsworthiness, it almost becomes a self-fulfilling prophecy: publish - or broadcast - any fact about today's ballplayers and the

insatiable interest of the public will be fed, justifying the next inquiry, and so on. While at least one authority has stated that the test should be "reasonable relevance to the public activities," celebrity attention today seems to have made everything fair game.

Where does it start? Certainly with matters of public record - e.g., Margo's filing of the lawsuit. The tougher question to answer, however, is whether the Boggs- Adams story would have been published if the lawsuit had never been brought: What's the editorial judgment that kept the story out of the Boston papers until then? And if the absence of the public's "right to know" is the answer, then why should the mere filing of the lawsuit alter questions of the "rights" of the public, whatever they may be?

Where does it stop? In the case of today's ballplayers, probably only where the news media senses the public is

tired of the story and won't sell more papers or magazines or won't achieve higher ratings.

Perhaps the real answer is that it won't stop until the athletes, as the Restatement of Torts, a scholarly statement of the law, has said, "have reverted to the lawful and unexciting life led by the great bulk of the community and the public's curiosity no longer must be satisfied."

Philip R. Hochberg is a partner in the law firm of Baraff Koerner Blender & Hochberg, in Washington, D.C. He represents college and professional sports interests, and is a member of the Advisory Editorial Board of the Entertainment Law Reporter. [ELR 11:2:3]

RECENT CASES

NBC's telecast of "Billionaire Boys Club" docudrama did not violate Joe Hunt's right to a fair trial; injunctive relief was properly denied as unconstitutional prior restraint on First Amendment rights of broadcaster and producer

NBC's November 1987 broadcast of the docudrama "Billionaire Boys Club" did not violate Joe Hunt's Sixth Amendment right to a fair trial, a Federal Court of Appeals has ruled. The docudrama, produced by I.T.C Productions, Inc., focused on Hunt's involvement with the "Billionaire Boys Club," an "enterprise and social group," and portrayed Hunt's social and business dealings with entrepreneur Ronald Levin. At the time of the telecast, Hunt had been convicted in Los Angeles for the murder of Levin, and was awaiting trial in San Mateo

County for his alleged role in the murder of Hedayat Eslaminia. The real names of Hunt and Levin were used in the docudrama, but Eslaminia's was not.

Hunt argued that the broadcast, which depicted him planning and committing the Levin and Eslaminia murders, would prejudice his right to a fair trial in the San Mateo proceeding. Hunt also noted that his conviction in Los Angeles County for the Levin murder was on appeal, and argued that NBC's proposed broadcast would prejudice any retrial in the event of a reversal of the conviction.

A Federal District Court denied Hunt's request for a temporary restraining order and a preliminary injunction seeking to prevent NBC, until Hunt's pending criminal cases were final, from broadcasting or distributing the docudrama.

Federal Court of Appeals Judge J. Clifford Wallace, in finding that the District Court did not abuse its

discretion in denying Hunt's application for a preliminary injunction, stated that for purposes of the appeal, the court would assume, without deciding, that the NBC docudrama was speech protected from prior restraint. Hunt did not make the requisite showing that there were a limited number of untainted potential jurors in San Mateo County (or in Los Angeles in the event of a retrial in the Levin case); did not demonstrate that the broadcast would "inflame and prejudice" the entire San Mateo County community, so as to endanger Hunt's right to a fair trial; and did not show why alternative measures such as voir dire, jury instructions, or a change of venue would not sufficiently protect his rights. Hunt also did not establish that the proposed prior restraint would effectively protect his rights, given prior "substantial and unrestrained publicity" concerning his activities.

Judge Wallace concluded by refusing to accept NBC's suggestion that the court adopt the position set forth in Judge Goodwin's concurrence in the case of *Columbia Broadcasting System, Inc. v. United States District Court*, 729 F.2d 1174 (9th Cir. 1983; ELR 6:8:16). Judge Goodwin commented that there was no conflict between the Sixth Amendment right to a fair trial and the First Amendment right to publish information because both constitutional guarantees are limitations upon government, not citizens. On this basis, argued NBC, Hunt failed to state a claim against the broadcaster, a private actor. Judge Wallace declined to determine the precedential value of Judge Goodwin's position in view of the court's conclusion, on other grounds, that the District Court did not abuse its discretion. However, to the extent that Judge Goodwin's concurrence might be binding and correct, it would have constituted, for Judge

Wallace, a separate and adequate reason to uphold the District Court's decision.

Hunt v. National Broadcasting Company, Inc., Case No. 87-6625 (9th Cir., Apr. 3, 1989) [ELR 11:2:5]

Appeals Court affirms summary judgment in favor of producer and distributor of the film "Ginger and Fred" in action brought by Ginger Rogers alleging violations of the Lanham Act and invasion of privacy

A Federal Court of Appeals in New York has upheld a District Court decision granting summary judgment to Alberto Grimaldi and MGM/UA Entertainment Co. in an action brought by Ginger Rogers alleging that the distribution of the film "Ginger and Fred" violated section 43(a) of the Lanham Act. (ELR 10:4:13)

The 1986 film, created and directed by Federico Fellini, presented a fictional account of a reunion between two retired Italian cabaret performers who had imitated Rogers and Fred Astaire and became known in Italy as "Ginger and Fred." (It should be noted that the MGM parties claimed that the title of the film was "Federico Fellini's 'Ginger and Fred'"; but the Court of Appeals, without deciding the issue, accepted Rogers' contention that the title was "Ginger and Fred.")

Federal Court of Appeals Judge Jon O. Newman, in discussing Rogers' claim, noted that the District Court had found that the Lanham Act did not apply to the title of the film because the title was "within the realm of protected expression" and was not "primarily intended to serve a commercial purpose." The District Court's ruling might create a nearly absolute privilege for film titles, "insulating them from Lanham Act claims as long as the film itself is an artistic work, and the title is

relevant to the film's content," stated Judge Newman. Characterizing such an approach as unduly narrow and possibly insufficient to protect the public against deception, the court chose to focus on the question of whether the title of a film or a book has acquired secondary meaning. Thus, if a title is sufficiently well known that consumers associate it with a particular author's work, the holder of rights in the title may prevent the use of the same or confusingly similar titles by other authors.

Judge Newman considered the "hybrid" nature of titles, in that titles often may be an "inextricably intertwined" combination of artistic expression and commercial promotion. The expressive element of titles does require more protection than the labeling of ordinary commercial products, and the Lanham Act must be construed narrowly to avoid a conflict with First Amendment values, agreed the court. Therefore, when confronted with allegedly misleading titles using a celebrity's name, the

Lanham Act will not apply unless the title "has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the title explicitly misleads as to the source or the content of the work."

In the instant case, Rogers claimed that consumers might believe that she produced, endorsed, sponsored, or approved the film, and/or that the film was about Rogers and Astaire. The court observed that the title did not explicitly indicate that Rogers endorsed or produced the film. The risk that some consumers might incorrectly infer that Rogers had some involvement with the film was far outweighed by the public's interest in artistic expression. In all, the sponsorship and endorsement aspects of Rogers' Lanham Act claim did not raise a genuine issue of fact, declared the court.

Also rejected was Rogers' claim that the title gave a false impression of content. The risk of misleading consumers, stated Judge Newman again, was outweighed

by the possibility of an unwarranted restriction of expression. A footnote comment noted that the advertisements for the film included a disclaimer pointing out that the film was fictional and did not depict any real person. Judge Newman stated that it was not necessary for the court to decide whether such a disclaimer "would be sufficient to cure an otherwise deceptive title."

Judge Newman, turning to Rogers' state law claims, stated that Oregon law would govern the case since Rogers was an Oregon domiciliary. However, since there were no reported decisions of any Oregon court on a right of publicity claim, Judge Newman confronted the challenge of predicting what New York courts would predict the Oregon courts would rule as to the scope of a right of publicity under Oregon law. The court reviewed the common law right of publicity and concluded that New York would recognize free expression limits in Oregon law on the right of publicity.

The title "Ginger and Fred" was not a disguised advertisement for the sale of goods or services, and under Oregon law, held the court, Rogers was not entitled to relief on the right of publicity claim.

Summary judgment also was properly entered rejecting Rogers' claim for false-light defamation.

Federal District Court Judge Thomas P. Griesa, sitting by designation, concurred in the result reached in the majority opinion, but disagreed with the opinion otherwise. Judge Griesa noticed that the District Court had considered Rogers' claims as related to the film (including the title and the screenplay), but that on appeal, the only issues raised by Rogers related to the title and to the advertising and promotion of the film. According to Judge Griesa, Judge Sweet's opinion would not have interfered with the protection of the public against "flagrant deception," and his discussion of First Amendment protection for artistic expression was Judge Sweet's

basis for deciding this case (emphasis provided by Judge Griesa). For Judge Griesa, the unusual circumstances of the case before the court did not provide a well- founded basis for announcing a general rule concerning the legal boundary between implicitly misleading titles and explicitly misleading ones. Furthermore, Judge Griesa considered it likely that the distinction between explicitly and implicitly misleading titles "will prove to be unsound and unworkable."

With respect to the state law claims, Judge Griesa pointed out that Judge Sweet recognized that Oregon law, as indicated in a discussion in *Anderson v. Fisher Broadcasting Co.*, 712 P.2d 803 (Or. 1986; ELR 8:8:18), was basically no different from that expressed in the New York, California and federal decisions relied on by Judge Sweet and by the majority, and that Judge Sweet "sensibly avoided a lengthy excursion into the subject of choice of law."

Rogers v. Grimaldi, Case Nos. 600, 601 (2d Cir., May 5, 1989) [ELR 11:2:5]

Broadway musical based on "Amos n' Andy" characters does not infringe CBS' abandoned trademark rights, but writer is barred from using copyrighted portions of post-1948 radio and television programs

Stephen M. Silverman may produce a Broadway musical based on the "Amos'n' Andy" characters created in 1928 by Freeman F. Gosden and Charles J. Correll, a Federal Court of Appeals has ruled.

Gosden and Correll assigned all of the rights in the "Amos 'n' Andy Show" scripts and radio programs to CBS Inc. in 1948. The writers continued to create new scripts for the radio programs until 1955. In 1951, CBS

began broadcasting an "Amos 'n' Andy television series which aired on various stations until 1966.

In the early 1980s, Silverman requested license to use the "Amos 'n' Andy" characters in his musical; when CBS denied the request, the writer sought declaratory relief alleging, among other claims, that the pre-1948 "Amos 'n' Andy" radio programs were in the public domain.

Federal District Court Judge Gerard L. Goettel initially granted in part and denied in part CBS' motion for summary judgment (ELR 8:7:11). Judge Goettel ruled that the scripts for the pre-1948 programs were in the public domain, but that the broadcasts of the programs were entitled to common law copyright protection because the broadcasts did not constitute publication. CBS thus would have the right to prevent copying of the sound recordings of the radio shows. However, Silverman did

not plan to use recordings of the programs in the proposed musical.

(In a footnote, Federal Court of Appeals Judge Jon O. Newman pointed out that the District Court's suggestion that CBS had copyrights in the sound recordings was incorrect since the recordings were made prior to February 15, 1972.)

With respect to the post-1948 radio programs, Judge Goettel ruled that CBS had common law copyrights in the scripts for the programs which became statutory copyrights when CBS registered the scripts with the Copyright Office in early 1985. The court found that Silverman was liable for copyright infringement in connection with the use of substantial portions of dialogue from at least one of the post-1948 radio scripts.

Judge Goettel next rejected Silverman's contention that CBS placed the television programs in the public domain by publishing them without copyright notice - the

distribution of copies, without copyright notice affixed, for synchronized national broadcast was not a general publication.

CBS' counterclaim alleging copyright infringement was dismissed on the ground that the court could not determine substantial similarity until Silverman's play was produced.

On the issue of trademark infringement, the court ruled that the name "Amos 'n' Andy" and the names and appearances of other characters from the program were protectable marks, and ordered a trial on the issue of whether CBS' non-use of the marks constituted abandonment.

After a bench trial, Judge Goettel concluded that CBS had not abandoned its trademarks. The court ordered Silverman to pay damages to CBS of about \$9,400, plus attorney's fees. The court's judgment effectively denied Silverman's claim for a declaration of his right to use

component parts of the pre-1948 radio programs. Again, although Judge Goettel initially determined that the scripts for the pre-1948 radio programs were in the public domain, Silverman obtained no right to use such programs because of the court's ruling that "Amos 'n' Andy" and the programs' characters were protected trademarks.

On appeal, Judge Newman agreed with Silverman that CBS abandoned its trademarks. The District Court had concluded that CBS rebutted the presumption of abandonment arising from 21 years of non-use by citing a social climate adverse to the showing of the series, and stating its intention to resume use in the future. But Judge Newman concluded that the statutory reference to an intent not to resume the use of a mark meant that a mark would be deemed abandoned upon a showing that use "has been discontinued with an intent not to resume within the reasonably foreseeable future." Over twenty

years of non-use, accompanied by a "bare assertion of possible future use" was not sufficient for the court to find that CBS did not abandon the trademarks. Other activities by CBS, such as challenging infringing uses, or engaging in "sporadic licensing" for the use of the mark in documentary and educational programs also did not prevent a finding of abandonment - such uses did not "rekindle the public's identification of the mark with the proprietor ... nor... establish an intent to resume commercial use.

Judge Newman considered it significant that the parties' dispute involved an allegedly infringing use of a trademark in connection with a work of artistic expression. The risk of inhibiting free expression by enforcing trademark rights added "some weight" to Silverman's claims, stated the court. And although CBS also had an expression interest, that interest was markedly

diminished by its decision to withhold dissemination of the works with which its marks are associated."

CBS' interest in avoiding public confusion also was not as weighty as in a case involving a non-artistic product. The holder of a trademark associated with a television series normally would be entitled to secure some protection against an infringing use of the mark in connection with a Broadway musical, noted the court. But in this case it was not likely that theater-goers would attend the proposed musical because of a mistaken belief that the work was produced by CBS.

After concluding that the undisputed facts established CBS' abandonment of the "Amos 'n' Andy" trademarks, Judge Newman stated that the rights of the parties could be determined without resolving the validity of the CBS copyrights in the television programs. The validity of the copyrights appeared to the court to turn on the factual circumstances surrounding the distribution of the

television programs, and those circumstances were not sufficiently developed. However, CBS' copyrights in the post- 1948 radio programs, and any rights the company may be found to have in the television scripts and programs, provided CBS with protection only for those increments of expression beyond the material contained in the pre-1948 radio scripts, which were in the public domain. Thus, as the District Court found, CBS may prevail on the claim that Silverman's script infringed CBS' copyright in at least one of the post-1948 radio scripts because significant dialogue appearing in that script was copied by Silverman. But Silverman was entitled to use the public domain material from the pre-1948 scripts.

The "Amos 'n' Andy" characters were sufficiently delineated in the pre-1948 radio scripts and thus were placed in the public domain when the scripts entered the public domain, stated Judge Newman. Again, Silverman may not use any further delineation of the characters

contained in the post-1948 radio scripts and the television scripts and programs (if it is determined that such works were protected by valid copyrights). Judge Goettel erred, stated Judge Newman, in concluding that the "duplication of the characters as they appeared on television would infringe CBS's copyrights." Only the increments of expression added by the television programs were protectable - the physical features of the characters which were adequately described in the pre-1948 radio scripts may be copied even though those features became visually apparent only in the television series.

The damages awarded to CBS for Silverman's infringement of the post-1948 radio scripts, and the related attorneys fees, were affirmed. Injunctive relief was granted to CBS in accordance with the court's focus on protectable increments of expression. And Silverman obtained a declaration entitling him to use all aspects of the "Amos 'n' Andy" materials, including names, stories,

and characters, to the extent that such aspects were in the public domain. The matter was remanded to the District Court for the entry of a revised judgment in accordance with the Court of Appeals' opinion.

The United States Supreme Court has denied CBS' petition for review.

Silverman v. CBS Inc., 1989 U.S.App. LEXIS 1355 (2d Cir., Feb. 6, 1989) [ELR 11:2:7]

Sylvester Stallone and distributors of "Rocky IV" did not infringe sequel treatment

A Federal District Court in California has rejected a copyright infringement claim brought by Timothy Anderson against Sylvester Stallone and other parties

involved in the production and distribution of the film "Rocky IV."

In 1982, after viewing the film "Rocky III," Anderson wrote a treatment for a film; the treatment, entitled "Rocky IV," incorporated characters created by Stallone in the earlier "Rocky" films and credited Stallone as co-author. In October 1982, Anderson met Freddie Fields, then president of MGM. During the meeting, the parties discussed the possibility that Anderson's treatment might be used for "Rocky IV." Anderson then signed a release that, as described by Judge William D. Keller, "purported to relieve MGM from liability stemming from use of the treatment."

"Rocky IV" was released in November 1985. In January 1987, Anderson sued Stallone and various MGM/UA parties, alleging breach of contract, copyright infringement, unfair competition and unjust enrichment, and breach of confidence.

Judge Keller first rejected the MGM parties' motion for summary judgment, based on California's two year statute of limitations, with respect to Anderson's causes of action for breach of oral contract, breach of implied-in-fact contract, and tortious breach of the implied covenant of good faith and fair dealing. Citing Professor Nimmer (Sec.6.05[F] at 16:43-16:44 (1988)), the court noted that the issue of when the statute of limitations began to run was an issue of fact. The date when Anderson's cause of action accrued would be based on the terms of the agreement reached, if any, between Anderson and Fields. Thus, the dispute as to whether Anderson was to be paid only if Rocky IV was released, or was entitled to payment for any use of his treatment, precluded summary judgment on the issue of whether the contract causes of action were time-barred.

Anderson's breach of confidence claim, however, was ruled time-barred. Stallone, in July 1984, described on a

national television program the proposed story for Rocky IV. If, as alleged by Anderson, Stallone used Anderson's treatment, any breach of confidence would have occurred in July 1984; the applicable two year statute of limitations therefore barred the breach of confidence claim.

The court then determined that Anderson's unjust enrichment and unfair competition claims were preempted by federal copyright law, noting that section 301 of the Copyright Act provides that preemption occurs if the work on which the state claim is based is within the subject matter of copyright, and if the state claim protects rights that are qualitatively equivalent to copyright protection. Judge Keller stated that Anderson could not avoid the preemption of his state law claims by arguing that the purported copying of portions of his work, albeit not an infringement of copyright laws, still amounted to unjust enrichment. Furthermore, the unjust enrichment

claim, in the absence of the "extra element" of a confidential relationship, was not equivalent to the breach of confidence claim.

Judge Keller then granted summary judgment to the MGM parties on Anderson's copyright infringement claims on the ground that Anderson's treatment was an infringing work that was not entitled to copyright protection, and on the ground that Rocky IV was not substantially similar to Anderson's treatment.

The court found that the Rocky characters as developed in the film series constituted expression protected by copyright "independent from the story in which they are contained." Describing the uncertainty involved in deciding when a character may be protected by copyright, Judge Keller referred to the test set forth in Warner Bros. Pictures, Inc. v. Columbia Broadcasting System, Inc., 216 F.2d 945 (9th Cir. 1954), in which the court held that the literary character Sam Spade was not

copyrightable, because copyright protection was available to a character only if the character "constituted the story being told."

Subsequent decisions have implicitly limited the holding of the Sam Spade case, noted the court. *Walt Disney Productions v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978), distinguishing comic book characters from literary characters, held that several Disney cartoon characters were protected by copyright. In Professor Nimmer's view, *Air Pirates* not only limited the Sam Spade "story being told" requirement to "word portraits," but undermined the reasoning which would warrant a separate analysis for the protection of literary as opposed to graphic characters.

Judge Keller commented that *Olson v. National Broadcasting Corporation*, 855 F.2d 1446 (9th Cir. 1988; ELR 10:5:7), a decision involving the television series "The A-Team," did not clarify the uncertainty concerning the

copyrightability of characters. The Olson court cited with approval the Sam Spade "story being told" test, but then cited Air Pirates and other cases allowing copyright protection for characters who are "especially distinctive."

In the instant case, the more restrictive "story being told" test apparently would not have to be applied to the visually depicted characters of the first three Rocky films. However, "out of an abundance of caution," the court reviewed the protectability of the Rocky characters under both tests, and determined that under either standard the Rocky characters would be protected from appropriation.

A lengthy analysis of the Rocky characters revealed them to be "one of the most highly delineated group of characters in modern American cinema." The court found no difficulty in ruling as a matter of law that the Rocky characters were so extensively delineated that

they were protected from "bodily appropriation" when taken as a group and "transposed" into a sequel by another author.

Furthermore, the Rocky characters were so highly developed and central to the three Rocky films, which focused on the development and relationships of the characters, that Rocky, Adrian, Apollo Creed, Clubber Lang and Paulie "constituted the story being told" in the first three Rocky films.

Anderson's treatment lifted the Rocky characters "lock, stock and barrel" from the prior Rocky films, stated the court, obviating any need to determine whether the characters in the treatment were substantially similar to Stallone's characters. The bodily appropriation of the characters in the treatment infringed on Stallone's copyrighted work.

Judge Keller then discussed whether copyright protection is available to portions of a derivative work. Case

law generally has assumed that no part of an infringing derivative work should be granted copyright protection. After considering the application of sections 103(a) and 106(2) of the Copyright Act, the court agreed, and held that the MGM parties were entitled to summary judgment on Anderson's copyright claims - copyright protection was not available for any portion of the treatment and Anderson was precluded from suing Stallone and the MGM parties for copyright infringement.

Summary judgment also was appropriate on Anderson's copyright claims because Rocky IV was not substantially similar to Anderson's treatment, held the court. The finding that Anderson's work was not entitled to copyright protection was sufficient, in itself, to warrant summary judgment on the copyright infringement claims. However, even if the court agreed that Anderson's work was protected by copyright, the MGM

parties would be entitled to summary judgment on the ground that Rocky IV did not copy Anderson's work.

After a thorough discussion of the test for substantial similarity set forth in *Sid & Marty Krofft Television v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977), and subsequent cases in which the test was applied, Judge Keller declared that a finding of non-infringement was appropriate. The following unusual circumstances were noted by the court: the first three Rocky films were made before Anderson wrote his treatment, precluding Anderson from basing any inference of copying by Stallone in Rocky IV from similarities that "flow[ed] naturally" from the fact that both works were sequels to the first three films; Stallone already had developed the idea that Rocky IV would center on a symbolic boxing confrontation between the United States and Russia before Stallone knew that Anderson's treatment existed; and,

again, Stallone, not Anderson, developed the majority of the characters in Anderson's work.

Upon applying the Krofft test, the court observed that the two plots were dissimilar, apart from an East/West boxing confrontation that Stallone, independently, had developed. In all, after extensive review, Judge Keller stated that there was no issue of material fact with respect to the general theme, setting, dialogue, sequence, tone and mood, and characters of the works in issue and that under the extrinsic test, the two works were dissimilar as a matter of law. The court therefore did not need to reach the question of whether there was substantial similarity between the two works under the intrinsic test of Krofft.

Nevertheless, with hallmark thoroughness, Judge Keller proceeded to find that "no reasonable audience would recognize the movie Rocky IV as a dramatization or picturization of Anderson's work." Under the intrinsic

test, as well as under the extrinsic test, a finding of substantial similarity could not be based on unprotectable scenes-a-faire or characters, themes, and plots which Stallone originally created, and the MGM parties accordingly were granted summary judgment on Anderson's copyright infringement claim.

Anderson v. Stallone, Case No. 87-0592 (C.D.Ca., April 25, 1989) [ELR 11:2:8]

"Vampira's" claims against "Elvira" for unauthorized use of "likeness" are dismissed by Federal District Court

In "The Horror Movie Hostess Litigation," Elvira (after obtaining an order dismissing Vampira's breach of contract claim) sought to dismiss Vampira's state law claims

alleging violations of section 3344 of the California Civil Code and the common law rights of privacy and publicity, and common law unfair competition, and to strike Vampira's claim for punitive damages under the Lanham Act.

Maila Nurmi, a former 1950s television movie hostess, performed as a character called Vampira. Vampira, wearing a distinctive dark dress, usually appeared amid a display of horror movie props. Nurmi alleged that in 1981 certain marketing, broadcasting and management firms asked her to re-create the Vampira character; that the negotiations were unsuccessful; and that the companies then created the character called Elvira, portrayed by actress Cassandra Peterson, using certain props, clothes and mannerisms based on the Vampira character.

Section 3344 provides that damages may be recovered from any person who knowingly uses another's name,

voice, signature, photograph or likeness in any manner or for commercial purposes, without permission. Nurmi argued that the Elvira parties improperly used Nurmi's "likeness," albeit not her name, voice, signature or photograph, in creating the Elvira character.

A Federal District Court in California, in dismissing the section 3344 claim, has ruled that the term "likeness," as used in the statute means an "exact copy of another's features and not merely a suggestive resemblance." Judge William Matthew Byrne, Jr. cited *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988; ELR 10:2:7) in which a section 3344 claim was rejected because Bette Midler's actual voice was not used in the commercial in issue, although her singing style was duplicated. Judge Byrne also noted that in *Lugosi v. Universal Pictures*, 160 Cal.Rptr. 323 (1979; ELR 1:18:1), the court referred to Lugosi's likeness "in terms which were synonymous with actual appearance."

Judge Byrne observed that Nurmi's interpretation of the meaning of "likeness" might "freeze" all rights to certain props, clothing, or other qualities surrounding a character with the first person to portray a part. Subsequent actors then might be subject to section 3344 claims, and, in Judge Byrne's view, this result "would greatly inhibit the development of the entertainment arts and the freedom of expression..."

Nurmi did not allege that the Elvira parties created Elvira to look exactly like Vampira. In the absence of any appropriation of Nurmi's name, voice, signature, photograph or likeness, the claim under section 3344 was dismissed.

The court also dismissed Nurmi's claims alleging violations of the common law rights of publicity and privacy because Nurmi did not state that her actual features were used by the Elvira parties for commercial purposes; granted the motion by the Elvira parties to strike

Nurmi's claims for punitive damages under the Lanham Act claim; and denied a motion for sanctions for Nurmi's opposition to the motion to strike.

Nurmi v. Peterson, Case No. CV 88-5436-WMB
(C.D.Ca., Mar. 31, 1989) [ELR 11:2:10]

Arbitrator finds that writer's credit in advertisement for the film "Bird" did not violate Writer's Guild Basic Agreement

In May 1988, Warner Brothers submitted to the Writers Guild a "one sheet" which the company planned to use in an advertising campaign for the film "Bird." The Guild rejected the advertisement on the ground that the presentation credit which read "A Film by Clint Eastwood" allegedly was not in the same style and size of

type as the writing credit "Written by Joel Oliansky." The presentation credit (which was outside the billing block) was in a different color than the writing credit, and the spacing between the letters in the presentation credit was greater than the spacing between the letters of the writing credit, in violation of paragraphs 22 and 28D.1 of Theatrical Schedule A of the 1985 Basic Agreement, argued the Guild.

Warner Brothers contended that the phrase style and size of type" did not refer to the color of the type or to the space between the letters in the credits. The company further claimed that equality between writing credits and presentation credits was required only in billing blocks.

Arbitrator Michael Rappoport, citing the clear language of the Basic Agreement and the relevant bargaining history, determined that the advertisement for "Bird" did not violate the Agreement. Rappoport found that the

language of the Agreement indicated that unless the parties expressly agreed to certain production or presentation credits, such matters were reserved to the production company. It also was noted that the Agreement did not mention the color of the type, and Rapoport concluded that it was not the intention of the parties to include color within the meaning of size and style of type as that phrase related to presentation or production credits outside the billing block. Similarly, the wording of paragraph 28D did not appear to Rapoport to encompass the spacing between letters.

In the Matter of the Arbitration between Writers Guild of America, West, Inc. and Warner Brothers, Inc., No. 88-CR-63 (decision issued: May 12, 1988; opinion issued: Oct. 23, 1988) [ELR 11:2:11]

Eugene Klein's \$2 million judgment in malicious prosecution action against Los Angeles Raiders and Al Davis is reversed

In the course of the litigation involving the relocation of the Raiders football team from Oakland to Los Angeles (see ELR 10:11:21), the Raiders alleged that Eugene Klein, the sole general partner of the San Diego Chargers, was one of three "principal conspirators" who attempted to prevent the move. In May 1981, Klein suffered a heart attack while testifying in a federal anti-trust action brought by the Los Angeles Memorial Coliseum Commission. The Commission, later joined by the Raiders, challenged a National Football League rule restricting the relocation of a member team's franchise.

In June 1981, a Federal District Court granted Klein's motion for a directed verdict on the Raiders' claim for

conspiracy and alleged interference with contractual relationships.

A Federal Court of Appeals eventually affirmed the Federal District Court's judgment (entered on a jury verdict) of antitrust liability on the part of the National Football League parties.

In January 1984, Klein sued the Raiders and Raider owner, Al Davis, for malicious prosecution, alleging that Klein was wrongly singled out as a "ringleader" in the antitrust action and incurred pain and suffering, including the 1981 heart attack.

A San Diego trial court jury awarded Klein about \$5 million in compensatory damages, and an additional \$5 million in punitive damages. The court denied a motion by the Raiders and Davis seeking judgment notwithstanding the verdict, but granted a motion for a new trial unless Klein accepted a remittitur of \$4 million each from the compensatory and punitive damages awards;

Klein accepted the remittitur (ELR 8:12:18; 8:9:14; 8:8:20).

A California appellate court has reversed the judgment on behalf of Klein on the ground that the trial court should have found as a matter of law that the Raiders and Davis had probable cause to bring a federal claim against Klein individually, and therefore were not liable for malicious prosecution; the issue of probable cause should not have been submitted to the jury.

Presiding Judge Daniel Kremer noted that Klein did not suggest that there was a factual dispute concerning the Raiders' knowledge of the allegedly wrongful acts committed by Klein on behalf of the Chargers. Furthermore, stated Judge Kremer, the Raiders' claim against Klein, although ultimately unsuccessful, was "legally tenable and thus supported by probable cause," because reasonable attorneys might have found tenable the theory that Klein, on the basis of acts undertaken for the

Chargers, might be held individually liable for violating the antitrust laws and/or for tortious interference with the Raiders' contractual relationships or prospective advantage.

Judge Kremer directed the trial court to enter judgment favoring the Raiders and Davis.

Klein v. Oakland Raiders, Case No. D006262
(Ca.Ct.App., May 31, 1989) [ELR 11:2:11]

California Supreme Court lets stand ruling that theater admission tax ordinance was unconstitutional

The California Supreme Court, denying the city of Montclair's petition for review, has let stand an appellate court decision holding that the city's Admissions Tax Law was invalid.

Montclair's 1986 ordinance imposed a six percent tax on the price of "an admission ticket for the privilege of admission to any event held." Events subject to the tax included motion pictures, theatrical and musical performances, athletic contests, art exhibits, fairs and carnivals.

United Artists Communications and other owner/operators of entertainment facilities challenged the constitutionality of the tax. United Artists pointed out that about 90 percent of the admissions tax would be borne by the company's two movie theaters and by another company's two adult bookstores. A trial court declared that the tax was constitutional.

California Court of Appeal Judge McDaniel, citing the decisions in *Minneapolis Star v. Minnesota Comm. of Rev.*, 460 U.S. 575 (1983), *City of Alameda v. Premier Communications Networks, Inc.*, 156 Cal.App.3d 148 (1984; ELR 6:12:17) and in *Festival Enterprise, Inc. v.*

City of Pleasant Hill, 182 Cal.App.3d 960 (1986; ELR 8:8:16), stated that in the instant case the burden of the tax in issue would fall "disproportionately" upon businesses engaged in protected speech. The ordinance therefore was unconstitutional as applied to the United Artists parties, concluded the court.

United Artists Communications, Inc. v. City of Montclair, Case No. E005085 (Ca.Ct.App., Mar. 10, 1989; April 3, 1989) [ELR 11:2:12]

California use tax on New Jersey mail order book distributor is upheld

The California State Board of Equalization correctly imposed a use tax on Scholastic Book Clubs' activities in California, a California appellate court has ruled.

Scholastic, a New Jersey corporation, conducts a nationwide mail order book sale business. Student book orders submitted by teachers and librarians are fulfilled from a warehouse in Missouri; the company has no physical facility, bank account or regular employees in California.

The Board assessed a use tax deficiency based on Scholastic's sales for the period of September 1, 1980 to March 31, 1983.

In denying Scholastic's claim for a refund, the court stated that the teachers and librarians, by collecting payments from students and distributing the merchandise ordered, acted as the company's agents or representatives. By accepting the orders and shipping the books, Scholastic "clearly and unequivocally ratified the acts of the teachers..." Scholastic provided a bonus program to encourage teacher participation, and, in all, was "exploiting or enjoying the benefit of California's schools

and employees to obtain sales" so as to provide a sufficient "nexus" for the imposition of use taxes.

Scholastic Book Clubs, Inc. v. State Board of Equalization, Case No. A040915 (Ca.Ct.App., Jan. 30, 1989) [ELR 11:2:12]

Lloyds of London must pay \$500,000 to former college football player whose NFL contract was terminated as a result of his injury

Lloyds of London was obligated to pay former Stanford football player John Barns \$500,000 of coverage pursuant to an insurance policy purchased by Barns, a Federal Court of Appeals has ruled.

Barns purchased the policy, which extended from August 1985 to August 1986, to cover the possibility

that an injury would keep him from playing in the National Football League. The Seattle Seahawks signed Bams, in April 1986, to two contracts covering the 1986-87 and 1987- 88 seasons; the contracts were terminable by the team if Barns did not establish his excellent physical condition. Unfortunately, in June 1986, Barns injured his shoulder and the Seahawks terminated the contracts. When Bams demanded payment from Lloyds, the company refused on the ground that Barns had signed two contracts with the Seahawks and thus did not suffer an injury which prevented him "from ever being able to sign for his intended professional Football Contract."

A Federal District Court jury returned a verdict favorable to Barns and the court entered judgment for \$500,000, plus a 12 percent penalty for delayed payment, prejudgment interest and attorneys fees.

In affirming the judgment, Federal Court of Appeals Judge Patrick E. Higginbotham, noting that Lloyds accepted a premium covering the entire term of the contract, rejected the argument that the insurance contract terminated when Bams first signed with the Seahawks in April. And since the jury could have believed that Barns intended to sign a contract that would not condition his eligibility to play for the Seahawks on a further physical examination, the District Court did not err in entering judgment on the verdict.

Barns v. Underwriting Members of Lloyds, London, 866 F.2d 813 (5th Cir. 1989) [ELR 11:2:13]

Worker injured while loading equipment for Linda Ronstadt concert tour obtains new trial on damages

During a 1982 concert tour, singer Linda Ronstadt was scheduled to perform at the Stanley Theater in Pittsburgh, Pennsylvania. The requirements for the sound and light systems for the show were set forth in a rider attached to Ronstadt's contract with promoter DiCesare-Engler Productions; the rider was written by Showco, Inc., the company responsible for the lighting and sound systems for the singer's tour. DiCesare-Engler asked Recker Transfer Company to provide workers to load and unload the trucks containing the equipment for the Pittsburgh show.

William Martin, an employee of Recker, was injured after the show while reloading equipment onto a tractor trailer. When Martin sued various parties, the jury determined that he was 30 percent negligent, that Showco

was 45 percent negligent, and that Recker was 25 percent negligent.

On appeal, the court first noted that Recker had not obtained insurance to guarantee the payment of workers compensation benefits. Therefore, pursuant to the state Workmen's Compensation Act, Recker was not entitled to claim that Martin had assumed the risk of working on the loading ramp.

With respect to Showco, the court found that Martin was not the company's employee because his services were casual and not in the regular course of Showco's business. However, Showco also was not entitled to claim the defense of assumption of the risk because Martin's conduct did not indicate that he accepted the risk of the potential danger in the placement of a loading ramp. Upon further review, the court ordered a new trial solely on the issue of damages.

Martin v. Recker, 552 A.2d 668 (Pa. Superior Ct. 1988) [ELR 11:2:13]

Actor is limited to workers' compensation for injuries suffered during filming of television commercial

During the filming of a television commercial for IBM, actor Craig Johnson suffered a shoulder injury during a scene depicting a softball game. Johnson brought a personal injury action against Berkofsky-Barret Productions, the producer of the commercial. Subsequently, Johnson filed a claim with the Worker's Compensation Appeals Board against the production company.

The trial court granted Berkofsky-Barret's motion for summary judgment, apparently on the ground that Johnson's act of filing a claim with the Board constituted an admission of employment and barred civil action.

A California appellate court has affirmed, on a different ground, the trial court's ruling. Presiding Judge Klein, after discussing the distinction between employees and independent contractors, found that Johnson was Berkofsky- Barret's employee because, as Johnson conceded, the company "directed and supervised the manner in which the actor performed in the commercial." It was noted, among other factors, that the production company had the right to discharge Johnson at will without cause; that acting in commercials is "universally" done under the direction of another; that Johnson did not supply tools, employ helpers or provide the place where the work was to be performed; that payment was based on the amount of time involved, not on the job; that the filming of the commercial was part of the production company's regular business; and that Johnson did not invest in any equipment or materials.

As a matter of law, Johnson was an employee of Berkofsky-Barret at the time of the accident, and was limited to workers' compensation as his sole and exclusive remedy for any damages resulting from his injuries, concluded the court.

Judge Klein then stated that the same result would be required even though a company called L'Image obtained the acting job for Johnson. Production companies generally paid L'Image for Johnson's acting services and L'Image, in turn, paid Johnson after deducting its percentage fee. Notwithstanding the manner of payment, L'Image provided the production company with short term employees in very much the same way as other temporary employment agencies, stated the court; the case of *Riley v. Southwest Marine Inc.*, 203 Cal.App.3d 1242 (1988) which rejected the argument that a tort remedy should be permitted to temporary employees, also served to limit Johnson's remedy.

In a footnote comment, Judge Klein referred to *Von Beltz v. Stuntman Inc.*, 255 Cal.Rptr. 755 (Ca.Ct.App. 1989; ELR 10:12:12) in which the court held that a stuntperson employed by the film's production company was not a co-employee or special employee of the director's wholly owned loan-out company. The evidence in *Von Beltz* indicated that the stuntperson retained substantial control over the details of the stunt, noted Judge Klein. Another factor distinguishing *Von Beltz* involved the principle that "where the servants of two employers are jointly engaged in a project of mutual interest, each employee ordinarily remains the servant of his own master and does not thereby become the special employee of the other."

Johnson v. Berkofsky-Barret Productions, Case No. B034124 (Ca.Ct.App., June 26, 1989) [ELR 11:2:14]

Briefly Noted:

Libel/Jackie Mason.

Comedian Jackie Mason and his business manager Jyll Rosenfeld did not state a cause of action for libel in their lawsuit against real estate developer Abe Hirschfeld. Hirschfeld's comments on the career of his former friend were published in the New York Post. One of the comments referred to Mason's request for funds to produce a script. According to Hirschfeld: "I read the script and did not think that it was so good. I knew he would be a hit, but I felt that the film would be a bust." Judge Harold Baer Jr. found that Mason did not demonstrate the defamatory character of the statements or show that readers would reasonably understand the statements to be defamatory. "To make things worse," Mason did not provide a basis for concluding that the statements were

not substantially true. In granting Hirschfeld's motion for summary judgment, Judge Baer also noted that Rosenfeld did not demonstrate that one of the comments was written "of and concerning" her.

Mason v. Hirschfeld, New York Law Journal, p. 25, col. 2 (N.Y.Cnty., June 15, 1989) [ELR 11:2:15]

Libel.

In 1982, Jimmy Briggs, now deceased, was an unsuccessful candidate for local public office in Texas. Four days after the election, television station KGBT broadcast a news segment concerning the activities of the Ku Klux Klan and anti-Klan demonstrators. During the broadcast, an image of Briggs standing at the podium appeared for two or three seconds; the audio portion of

the segment, however, did not mention Briggs' name. Apparently, Briggs' likeness accidentally appeared due to the re-use of a tape recorded during the candidate's political campaign which was not entirely erased. Briggs and his wife sued the station for libel, claiming that viewers inferred that Briggs was affiliated with the Ku Klux Klan. The Texas Supreme Court has upheld a trial court ruling granting summary judgment to the KGBT parties on the ground that the station did not act with actual malice - there was an uncontroverted and objective explanation for the mistake in broadcasting the tape in issue. The court also upheld the dismissal of the Briggs' claim for negligent infliction of emotional distress. Judge Gonzalez concurred with the result, but proposed, in order to minimize the self-censorship effect of defamation litigation, that the court adopt a summary judgment procedure (as described by Judge Gonzalez) for defamation

cases involving public officials and public figures when the media party claims a lack of malice.

Channel 4, KGBT v. Briggs, 759 S.W.2d 939 (Tex. 1988) [ELR 11:2:15]

Workers' Compensation/Jockeys.

Jockeys working at the Fair Grounds Racetrack in Louisiana, as a prerequisite for participating in the 1986-1987 race meeting, were required to sign an agreement creating a statutory employer- employee relationship with the corporate owner of the racetrack. The agreement stipulated that the jockeys were entitled to benefits under the state's workers' compensation laws. In response to a request for a declaratory ruling sought by certain jockeys who signed agreements under protest,

the Louisiana State Racing Commission upheld the validity of the agreement and found that the racetrack could require jockeys to sign the agreement in order to participate in racing. A trial court decided that the relationship between the racetrack and the jockeys did not meet various requirements for establishing a statutory employment situation, and found the agreement unenforceable. But a Louisiana appellate court has upheld the Commission's determination that the owners and operators of racetracks, rather than the Commission, have the proprietary right to secure financial protection against potential racetrack tort liability for jockey injuries sustained during racing activities. The agreements at issue were not an unlawful usurpation of the authority of the Commission and therefore were valid and enforceable, concluded the court.

Wolf v. Louisiana State Racing Commission, 532 S.2d 822 (La.App. 1988) [ELR 11:2:15]

Previously Reported:

The following cases, which were reported in previous issues of the Entertainment Law Reporter, have been published: Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc., 866 F.2d 278 (10:9:13); Cream Records, Inc. v. Joseph Schlitz Brewing Co., 864 F.2d 668 (10:11:13); Dumas v. Gommerman, 865 F.2d 1093 (10:9:14); Mellencamp v. Riva Music Ltd., 698 F.Supp. 154 (10:10:15).

The decision in Abend v. MCA, Inc. (10:9:11) has been published at 863 F.2d 1465. In April 1989, a Federal Court of Appeals declined to rehear the matter or to grant a rehearing en banc. [ELR 11:2:15]

IN THE NEWS

**Writer's Guild arbitrator rules that screenwriter
Melissa Mathison is entitled to share in the merchandising
revenues from the film "E.T."**

Screenwriter Melissa Mathison is entitled to receive a share of the merchandising revenues from the film "E.T.: The Extra-Terrestrial," a Writers Guild arbitrator has ruled.

According to news reports of what the WGA asserts should have been a confidential opinion, arbitrator Sol Rosenthal rejected Universal Studios' argument that Steven Spielberg's initial description of the E.T. character was so substantial as to deprive Mathison of the right to receive any merchandising revenues. The arbitrator also

rejected Universal's argument that substantial portions of the character were generic, and found that Mathison set forth extensive detail concerning the character in two working drafts even before designer Carlo Rambaldi completed his model of E.T.

Under the merchandising provision of the Guild contract, Mathison will be entitled to five percent of all of the revenue received by Universal, or its parent company MCA, from the merchandising of the E.T. character. Mathison also will receive about four percent of the gross revenue derived from merchandise on which the E.T. character is joined by other characters from the film; the other characters were not Mathison's "unique and original" creations, found the arbitrator.

In response to a news report concerning the arbitration, Spielberg's attorney Bruce Ramer, without commenting on the merits of the award, emphasized that Steven Spielberg provided Mathison with extensive detail as to

the "shaping of the character and concept" central to the film; cautioned against finding in the arbitrator's opinion any "implied denigration of Steven Spielberg's contributions in the creation of 'E.T.'"; and stated that "no one had any more to do with that creation tha[n] Steven Spielberg, without whom there would have been no 'E.T.'" [July 1989] [ELR 11:2:16]

National Labor Relations Board Administrative Law Judge recommends Board action against Writers Guild

In response to charges filed during the Writers Guild strike in 1988, a National Labor Relations Board Administrative Law Judge has recommended that the Board find the Writers Guild of America West in violation of the National Labor Relations Act.

A number of Writers Guild members challenged the Guild constitution. The constitution prohibits members who resign from the union during a strike from breaking strike rules after their resignation; the members who resign may be subject to Guild discipline if they work for a struck company.

Administrative Law Judge Gerald A. Wacknov also recommended that the Board issue an order directing the Guild to change its constitution. [July 1989] [ELR 11:2:16]

"Platoon": The Settlement/Part 2

In early 1988, Vestron, Inc., Hemdale Film Corp., and Home Box Office settled their dispute over the home video rights to the films "Platoon" and "Hoosiers" (ELR 9:8:20). Subsequently, Arnold Kopelson, the producer

of "Platoon" sued Hemdale, claimed that the company concealed a purported agreement with Orion Pictures, the distributor of the film, to make a \$4.5 million payment. Kopelson also claimed that his share of the profits from the film should not have been reduced by any expenses except a distribution fee.

Kopelson and Hemdale have reached an out-of-court settlement, the terms of which were not disclosed. [July 1989] [ELR 11:2:16]

Paris Court of Appeals overturns order barring French television broadcast of colorized version of "Asphalt Jungle" in moral rights case brought by heirs of director John Huston

According to news reports published shortly before this issue of the Entertainment Law Reporter went to

press, the Court of Appeals in Paris has reversed a lower court order that had barred French television stations from broadcasting colorized versions of the American movie "The Asphalt Jungle." (See ELR 10:10:3)

The case was brought by the heirs of the film's director, John Huston, who sought to protect Huston's "moral rights." It has been closely watched on both sides of the Atlantic, especially in light of the United States recent adherence to the Berne Convention (ELR 10:6:3, 10:9:20) which includes a moral rights provision.

According to reports, the Appeals Court does not appear to have rejected the argument that Huston's heirs are entitled to enforce his moral rights in France. Instead, it appears that the court ruled that colorizing "The Asphalt Jungle" did not violate those rights, because the colorized version was merely an "adaptation" of the original black-and-white version rather than a "desecration" of it.

The Entertainment Law Reporter will report more fully on the decision as soon as a copy of it is obtained. [July 1989] [ELR 11:2:17]

President Bush seeks increased protection for intellectual property from twenty-five countries

President Bush, acting under the 1988 Omnibus Trade Act (see ELR 10:6:3, 10:4:11), has placed eight countries allegedly engaged in unfair trade practices, including the failure to provide protection for intellectual property, on a "priority watch list." The countries cited- Brazil, India, Mexico, China, South Korea, Saudi Arabia, Taiwan and Thailand - will have until November 1, 1989 to improve their anti-piracy activities with respect to United States goods. If the countries do not improve such activities, sanctions might be considered. An

additional seventeen countries were placed on a standard watch list. [July 1989] [ELR 11:2:17]

Sports agents Norby Walters and Lloyd Bloom are sentenced to prison after conviction on charges arising from improper dealings with college athletes

A Federal District Court in Chicago has sentenced sports agent Norby Walters to five years in prison, followed by five years of probation, as a result of Walters' conviction on charges of mail fraud and racketeering. Sports agent Lloyd Bloom was sentenced to three years in prison and three years of probation on his conviction on the same charges, which arose from the signing of college athletes to representation contracts before the athletes' eligibility expired (see ELR 10:5:12). The agents also were charged with threatening some of the

athletes with harm if they attempted to break the contracts.

According to news reports, Judge George Marovich also ordered Bloom to finish paying back \$145,000 to football player Paul Palmer, and ordered Walters to forfeit \$250,000 to the government.

Walters and Bloom plan to appeal the jury's verdict and the sentencing. [July 1989] [ELR 11:2:17]

Rock star Billy Idol must pay about \$23,000 in damages to fan injured at concert

An arbitrator in Portland, Oregon, has ruled that performer Billy Idol must pay about \$23,000 in medical expenses and damages to a woman who was trampled by a crowd that rushed the stage during a May 13, 1987 concert. Idol, according to a news report, had called to the

audience, "I'm lonely. Come on down here." Lucy Hammond, who was sitting in the second row at the Memorial Coliseum, was injured when she was knocked to the floor by the crowd. The arbitrator reportedly concluded that Idol acted in deliberate disregard of the safety of the audience. [July 1989] [ELR 11:2:17]

Paramount must pay damages of \$1,500 and attorney's fees for use of copyrighted song in videocassettes of "Medium Cool"

As reported at ELR 10:6:10, a Federal Court of Appeals in California determined that Paramount Pictures used the song "Merry-Go-Round," without authorization from copyright owner Herbert Cohen, in reproductions of the film "Medium Cool" in videocassettes distributed for home display.

A Federal District Court Judge in California recently ordered Paramount to pay Cohen \$1,500 in damages and attorney's fees in an amount to be determined. However, Judge Harry Hupp declined to rule that Paramount was a willful infringer. [July 1989] [ELR 11:2:18]

Hemdale Film settles court costs dispute involving dismissed "Hoosiers" copyright infringement claim

Hemdale Film Corp. and writer Michael Lilly have settled an action in which Lilly claimed that the Hemdale film "Hoosiers" was based on his copyrighted story.

A Federal District Court in Florida, according to news reports, had dismissed Lilly's claim on the ground that any similarities between the story and the film, other than their successful- small-school-basketball-team theme, were "insubstantial." The court awarded

Hemdale about \$50,000 in attorneys fees and court costs.

Under the settlement, Lilly apparently agreed not to appeal the court's award to Hemdale in return for Hemdale's agreement not to seek payment from Lilly of the attorneys fees and costs it had been awarded. [July 1989] [ELR 11:2:18]

Wife of British mass killer wins \$940,000 libel claim against Private Eye magazine

A British jury has determined that the magazine Private Eye must pay about \$940,000 in damages to the wife of the so-called "Yorkshire Ripper," Peter Sutcliffe. Sutcliffe was jailed for life in 1981 for killing thirteen women and attempting to kill five other women. Sonia Sutcliffe claimed that the magazine falsely alleged that

she sold her story to a tabloid newspaper for close to \$400,000 after, according to a news report, "carousing" with the tabloid's reporters. [July 1989] [ELR 11:2:18]

Capitol Records obtains restraining order barring Mike Curb from distributing Donny Osmond records

In the spring of 1989, a Federal District Court in California granted Capitol Records a temporary restraining order which barred Mike Curb from releasing any recordings made by singer Donny Osmond.

Curb, the former California lieutenant governor and the producer of many of Osmond's hit records during the 1970s, had sued Osmond, his manager and Capitol Records in a Los Angeles trial court, alleging breach of contract and unfair competition. According to news

reports, Curb claimed that he had an oral agreement to participate with Capitol-EMI in releasing material recorded by Osmond.

Capitol claimed that Curb's purported distribution of copies of "Soldier of Love," a single from the Osmond album, infringed the company's copyrights. [July 1989] [ELR 11:2:18]

South Carolina and Alabama increase penalties for piracy of sound recordings

South Carolina and Alabama have enacted laws increasing the penalties for the crimes of piracy, counterfeiting and bootlegging of sound recordings. The legislation, similar to statutes in effect in California and Virginia (ELR 11:1:19; 10:8:16) incorporates a graduated system of penalties which takes into account the

number of recordings involved. Penalties of up to five years in prison and \$250,000 in fines may be imposed for the piracy of pre-1972 sound recordings or bootlegging. [July 1989] [ELR 11:2:18]

Federal Communications Commission limits settlement payments in license renewal proceedings

In the spring of 1989, the Federal Communications Commission voted to ban licensees from making settlement payments to entities withdrawing a competing license application prior to the initial decision stage of a comparative hearing except for payments limited to the "legitimate and prudent expenses" of the withdrawing challenger. Payments to entities withdrawing a petition to deny a license also will be limited to legitimate expenses. And the Commission's approval will be required

for citizens' agreements reached in exchange for withdrawing a petition to deny. [July 1989] [ELR 11:2:18]

DEPARTMENTS

In the Law Reviews:

The Colorization Dispute: Moral Rights Theory as a Means of Judicial and Legislative Reform by Anna S. White, 38 Emory Law Journal 237 (1989)

Free Agency in Sports: Plum or Prune? by Paul D. Staudohar and Jon McAtee, 40 Labor Law Journal 228 (1989)(published by Commerce Clearing House, Inc., 4025 W. Peterson Ave., Chicago, IL 60646)

Labor Relations in Professional Sports - Lessons in Collective Bargaining by Robert A. McCormick, 14 Employee Relations Journal 501 (1989)

The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors by Edward J. Damich, 23 Georgia Law Review 1 (1988)

Entertainment Law: The Emergence of a Law of Credit and Billing by Anne Jacques, 17 Anglo-American Law Review 24 (1988)(published by Barry Rose Law Periodicals Ltd., Chichester, England)

Artists' Rights: The Free Market and State Protection of Personal Interests by Burton M. Leiser and Kathleen Spiessbach, 9 Pace Law Review 1 (1989)

The Unnecessary Complexity of Free Speech Law and the Central Importance of Alternative Speech Channels by R. George Wright, 9 Pace Law Review 57 (1989)

Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations by L. Ray Patterson and Craig Joyce, 36 UCLA Law Review 719 (1989)

Unauthorized Biographies and Other "Books of Revelations": A Celebrity's Legal Recourse to a Truthful Public Discourse by Steven I. Katz, 36 UCLA Law Review 815 (1989)

Note: Baltimore Orioles, Inc. v. Major League Baseball Players Association: The Right of Publicity in Game Performances and Federal Copyright Preemption by Shelley Ross Saxer, 36 UCLA Law Review 861 (1989)

Don't Be Burned by Berne: A Guide to the Changes in the Copyright Laws as a Result of the Berne Convention Implementation Act of 1988 by Stephen J. Strauss, 71 Journal of the Patent and Trademark Office Society 374 (1989)

Electronic Mass Media and Copyright in Canada and the U.S. by Barbara L. Waite, 71 Journal of the Patent and Trademark Office Society 269 (1989)

The Future of Minority Advocacy Before the FCC: Using Marketplace Rhetoric to Urge Policy Change by Kurt A. Wimmer, 41 Federal Communications Law Journal 133 (1989)

The Demise of the Fairness Doctrine: A Blow for Citizen Access by Mark A. Conrad, 41 Federal Communications Law Journal 161 (1989)

Soldiers of Misfortune: Holding Media Defendants Liable for the Effects of Their Commercial Speech by Kimberly Caswell, 41 Federal Communications Law Journal 217 (1989)

Obscenity and the Reasonable Person: Will He "Know It When He Sees It"?, 30 Boston College Law Review 823 (1989)

Distilling the Witches' Brew of Fair Use in Copyright Law by Jay Dratler, Jr., 43 University of Miami Law Review 234 (1988)

In Search of a Stolen Masterpiece: The Causes and Remedies of International Art Theft by Carol L. Morris, 15 Syracuse Journal of International Law and Commerce 59 (1988)

Satellite Piracy in the Great White North: Can U.S. Broadcasters Protect Themselves Against Unauthorized Retransmission of Their Signals by Canadian Cable Systems? by Lynn M. Robinson, 15 Syracuse Journal of International Law and Commerce 103 (1988)

Juror Journalism: Are Profit Motives Replacing Civic Duty? by Brent K. Ashby, 16 Pepperdine Law Review 329 (1989)

Authors' Moral Rights-Reform Proposals in Canada: Charter or Barter of Rights for Creators? by David Vaver, 25 Osgoode Hall Law Journal 749 (1987)

Contributory Copyright Infringement: The Tort and Technological Tensions by A. Samuel Oddi, 64 Notre Dame Law Review 47 (1989)

Eimann v. Soldier of Fortune and "Negligent Advertising" Actions: Commercial Speech in an Era of Reduced First Amendment Protection by Donald B. Allegro and John D. LaDue, 64 Notre Dame Law Review 157 (1989)

EC Green Paper: A View from the Music Industry by Gillian Davies, 5 Computer Law and Practice 59 (1988)

Hasbro, Inc. v. Lanard Toys, Ltd.: G.I. Joe Emerges from Trademark Wars Victorious But Second Circuit Continues Search for Appropriate Scope of Review, 63 St. John's Law Review 97 (1988)

Recovery in Contract for Damage to Reputation: Redgrave v. Boston Symphony Orchestra, Inc., 63 St. John's Law Review 110 (1988)

Film Artists Bushwacked by the Coloroids: One-Hundredth Congress to the Rescue? by Nicholas Swyrydenko, 22 Akron Law Review 359 (1989)

Anticompetitive Practices in the Motion Picture Industry and Judicial Support of Antiblind Bidding Statute by Charles H. Grant, 19 Journal of Arts Management and Law 35 (1989)

Trade Policy Responses to New Technology in the Film and Television Industry by Keith Acheson and Christopher Maule, 23 Journal of World Trade 35 (1989)

The Protection of Commercial Speech and the Regulation of Children's Television: Throwing Out the Baby with the Bathwater by Jeffrey S. Weintraub, 6 New York Law School Journal of Human Rights 63 (1988)

Gray Market Goods: The United States Trademark Owners' View by Vincent N. Palladino, 79 The Trademark Reporter 158 (1989)

Trademark Surveys by Lawrence E. Evans, Jr. and David M. Gunn, 79 The Trademark Reporter 1 (1989)

Trademark Survey Evidence by Lawrence E. Evans, Jr. and David M. Gunn, 20 Texas Tech Law Review 1 (1989)

Catholic University Law Review has published a special issue concerning Competing Public and Private

Interests: Mass Media Regulation and the Constitution with the following articles:

Foreword: The First Amendment Identity Crisis by Erwin G. Krasnow, 38 Catholic University Law Review (1989)

Red Lions, Tigers and Bears: Broadcast Content Regulation and the First Amendment by Charles D. Ferris and Terrence J. Leahy, 38 Catholic University Law Review (1989)

Decency Redux: The Curious History of the New FCC Broadcast Indecency Policy by John Crigler and William J. Byrnes, 38 Catholic University Law Review (1989)

Information as Property: Do Ruckelshaus and Carpenter Signal a Changing Direction in Intellectual Property Law? by Pamela Samuelson, 38 Catholic University Law Review (1989)

The First Amendment Invalidity of FCC Ownership Regulations by Jonathan W. Emord, 38 Catholic University Law Review (1989)

Governmental Use of Copyrighted Property: The Sovereign's Prerogative by Roberta Rosenthal Kwall, 67 Texas Law Review 685 (1989)

Trademark and Copyright: How Intimate Should the Close Association Become? by Lee B. Burgunder, 29 Santa Clara Law Review 89 (1989)

Ethics and the Sports Lawyer: A Comprehensive Approach by Robert E. Fraley and F. Russell Harwell, 13 The Journal of the Legal Profession 9 (1988)

The Right of Publicity and Vocal Larceny: Sounding Off on Sound-Alikes , 57 Fordham Law Review 445 (1988)

Intellectual Property and Trade Law Approaches to Gray Market Importation, and the Restructuring of Transnational Entities to Permit Blockage of Gray Goods in the United States by Raimund Steiner and Robert P. Sabath, 15 William Mitchell Law Review 433 (1989)

Commercial Sound-Alikes: An Argument for a Performer's Cause of Action, 62 St. John's Law Review 667 (1988)

The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors by Edward J. Damich, 23 Georgia Law Review 1 (1988)

Ownership of Interviews: A Theory for Protection of Quotations by Vicki L. Ruhga, 67 Nebraska Law Review 675 (1988)

Labor Relations in Professional Sports- Lessons in Collective Bargaining by Robert A. McCormick, 14 Employee Relations Law Journal 501 (1989)

What Happened to General Commissioned Works Under the Copyright Act of 1976?, 34 The Wayne Law Review 1591 (1988)

Sports, Antitrust, and the Single Entity Theory by Lee Goldman, 63 Tulane Law Review 751 (1989)

International Sports Competition: The America's Cup 1988-The Legal Battle, 30 Harvard International Law Journal 264 (1989)

Student-Athletes, Athlete Agents and Five Year Eligibility: An Environment of Contractual Interference, Trade Restraint and High-Stake Payments by Marianne Jennings & Lynn Zioiko, 66 University of Detroit Law Review 179 (1989)

Digital Audio Tape Machines: New Technology or Further Erosion of Copyright Protection? by Todd Page, 77 Kentucky Law Journal 441 (1988-89)

In the Forest of Copyright Law, Are Son of Sam Laws Barking Up the Wrong Tree? by James P. Broderick, 22 The John Marshall Law Review 111 (1988)

Arts Policy and Older Adults by David B. Pankratz, 18
Journal of Arts Management & Law 13 (1989)

Marketing Small College and University Theatre Programs by Roger L. Miller, 18 Journal of Arts Management & Law 65 (1989)

"Unbundling" the Channels: A Functional Approach to Cable TV Legal Analysis by Don R. LeDuc, 41 Federal Communications Law Journal 1 (1988)

A Solution to Indecency on the Airwaves by Helene T. Schrier, 41 Federal Communications Law Journal 69 (1988)

The Evolving Doctrine of Right of Publicity: Judicial Protection of Celebrity's Pecuniary Interest from Commercial Exploitation of His or Her Identity and

Theatrical Style by Addison E. Dewey, 22 Creighton Law Review 39 (1988-89)

Stopping the End-Run by Public Plaintiffs: Falwell and the Refortification of Defamation Law's Constitutional Aspects by Arlen W. Langvardt, 26 American Business Law Journal 665 (1989)

Arts and Entertainment Law: Fakes, Forgeries and Fees: the Authentication of Fine Art by Shane Simpson, 62 The Australian Law Journal 796 (1988) (published by The Law Book Company Limited, 44-50 Waterloo Road, North Ryde, NSW 2113)

Is the NFL an Illegal Monopoly? by John A. Gray and Stephen J.K. Walters, 66 University of Detroit Law Review 5 (1988)
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